COA-24-CV-0185

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, R.S.O. 1990, c. C.34, by Order-in-Council 210/2024 respecting permitting international play in an online provincial lottery scheme

AND IN THE MATTER OF AN APPLICATION by Flutter Entertainment plc to intervene in the said Reference

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BOOK OF AUTHORITIES OF THE PROPOSED INTERVENER, FLUTTER ENTERTAINMENT PLC

April 8, 2024

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INDEX

Jurisprudence

11. *Reference re Earth Future Lottery (P.E.I.)* 2002 PESCAD 8

12. *Reference re Earth Future Lottery,* 2003 SCC 10

13. *Bélanger v. the Queen*, [1970] S.C.R. 567

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17. *R. v. 974649 Ontario Inc.*, 2001 SCC 81

18. *R. v. Andriopoulos*, 1994 CanLII 147 (Ont. C.A.)

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20. *Woods (Re)*, 2021 ONCA 190

21. *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34

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COURT OF APPEAL FOR ONTARIO

CITATION: Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 29
DATE: 20190118
DOCKET: C65807 (M49919, M49949, M49950, M49955, M49957, M49961, M49963, M49965, M49966, M49968, M49970, M49971, M49972 & M49974)

MacPherson J.A. (Motion Judge)

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, No. 1*, SC 2018, c. 12

Gareth Morley, for the moving party Attorney General of British Columbia

Amir Attaran and Matt Hulse, for the moving party Athabasca Chipewyan First Nation

Stewart Elgie, for the moving party Canada's Ecofiscal Commission

Joseph Castrilli, for the moving party Canadian Environmental Law Association, Environmental Defence, and Sisters of Providence of St. Vincent de Paul

Jennifer L. King and Michael Finley, for the moving party Canadian Public Health Association

R. Bruce E. Hallsor, for the moving party Canadian Taxpayers Federation

Marc Bishai, for the moving party Centre québécois du droit de l'environnement and Équiterre

Nathan Hume, for the moving party Intergenerational Climate Coalition

Lisa DeMarco and Jonathan McGillivray, for the moving party International Emissions Trading Association

Cynthia Westaway and Nathalie Chalifour, for the moving party United Chiefs and Councils of Mnidoo Mnising

Ryan Martin, for the moving party United Conservative Association

Greg Vezina, acting in person

Sharlene Telles-Langdon, Brooke Sittler, Mary Matthews and Ned Djordjevic, for the Attorney General of Canada

Josh Hunter and Thomas Lipton, for the Attorney General of Ontario

Heard: January 15, 2019

A. OVERVIEW

[1] By order-in-council, the Lieutenant Governor in Council referred a reference to this court concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186. On August 30, 2018, I issued an order providing a timeline for hearing the reference and setting out the procedures for parties wishing to intervene in the matter. On January 15, 2019, I heard motions from various parties seeking leave to intervene and/or file a record. These reasons address those motions and other procedural matters.

B. THE INTERVENTIONS

[2] Pursuant to my order of August 30, 2018, any Attorney General could intervene as of right in this reference by serving notice of his or her intention to intervene on the Attorney General of Ontario and the Attorney General of Canada and filing the notice with this court. Three Attorneys General have served and filed notices: (1) the Attorney General of New Brunswick; (2) the Attorney General of British Columbia; and (3) the Attorney General of Saskatchewan. I grant them leave to intervene.

[3] Beyond the Attorneys General, any party seeking leave to intervene could do so by serving a motion for leave to intervene on the Attorney General of Ontario and the Attorney General of Canada and filing it with the court. Thirteen parties have done so. Many of these parties have already been granted leave to intervene in a parallel reference challenging the constitutionality of the *Greenhouse Gas Pollution Pricing Act* in the Court of Appeal for Saskatchewan (Docket: CACV3239). In the reference in Saskatchewan, the court granted leave to all parties seeking to intervene, notwithstanding some opposition.

[4] In this case, the Attorney General of Ontario and the Attorney General of Canada consent to or do not oppose the motions for leave to intervene of six of the thirteen parties seeking leave. These six parties are:

1) Assembly of First Nations;
2) Canadian Environmental Law Association, Environmental Defence, and Sisters of Providence of St. Vincent de Paul;
3) Canadian Taxpayers Federation;
4) David Suzuki Foundation;
5) United Chiefs and Councils of Mnidoo Mnising; and
6) United Conservative Association.

[5] I agree that these six parties should be granted leave to intervene and order accordingly.

[6] The Attorney General of Canada also consents to the motions for leave to intervene of six of the seven other parties seeking leave. The Attorney General of Ontario opposes these motions. These six parties are:

1) Athabasca Chipewyan First Nation;

2) Canada's Ecofiscal Commission;

3) Canadian Public Health Association;

4) Centre québécois du droit de l'environnement and Équiterre;

5) Intergenerational Climate Coalition; and

6) International Emissions Trading Association.

[7] I grant leave to intervene to these six parties. In my view, they have satisfied the test for intervener status.

[8] In determining motions for leave to intervene, the court will generally consider "the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties": *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (in Chambers), at p. 167; see also *Bedford v. Canada (Attorney General)*, 2009

ONCA 669, 98 O.R. (3d) 792, at para. 2. In constitutional cases, the rules governing motions for leave to intervene are relaxed: *Peel*, at p. 167. Nevertheless, an applicant seeking to intervene in constitutional litigation must usually meet at least one of the following criteria: (1) the applicant has a real, substantial and identifiable interest in the subject matter of the proceedings; (2) the applicant has an important perspective distinct from the immediate parties; or (3) the applicant is a well-recognized group with a special expertise and a broadly identifiable membership base: *Bedford*, at para. 2; see also *P.S. v. Ontario*, 2014 ONCA 160, 317 O.A.C. 219 (in Chambers), at para. 6.

[9] Applying the applicable principles in this case, I grant leave to intervene to Athabasca Chipewyan First Nation, Canada's Ecofiscal Commission, Canadian Public Health Association, Centre québécois du droit de l'environnement and Équiterre, Intergenerational Climate Coalition, and International Emissions Trading Association. This reference raises important issues about the constitutionality of legislation. These proposed interveners have each established that they have a real interest in the proceeding and will make useful submissions distinct from the Attorney General of Ontario and the Attorney General of Canada without causing them prejudice. As a result, I grant them leave to intervene.

[10] I decline, however, to grant leave to the one remaining party seeking leave to intervene, Mr. Greg Vezina. Both the Attorney General of Ontario and the Attorney General of Canada oppose his intervention in this matter.

[11] According to his affidavit evidence, Mr. Vezina is the founder and chairman of two energy technology companies with interests relating to clean fuel standards and the use of ammonia as an alternative fuel. Mr. Vezina's submissions reflect a keen interest in scientific and policy issues relating to greenhouse gas emissions. In my view, however, they do not assist the court in determining the legal issue of whether the *Greenhouse Gas Pollution and Pricing Act* is constitutional. I therefore dismiss his motion for leave to intervene.

C. FACTUMS

[12] My order of August 30, 2018 set out the length of intervener and reply factums. Having heard submissions from the parties on that issue, I would vary the order as follows:

- The Attorney General of New Brunswick, Attorney General of British Columbia, and Attorney General of Saskatchewan may each file a factum not to exceed 25 pages;
- The other interveners may each file a factum not to exceed 15 pages; and
- The Attorney General of Ontario may file a reply factum not to exceed 30 pages.

D. ORAL ARGUMENT

[13] Pursuant to my order of August 30, 2018, the reference will be heard from April 15 to April 18, 2019. I have canvassed the parties' and interveners' submissions and order that the time be divided as follows:

- Attorney General of Ontario: 4.5 hours (including reply);
- Attorney General of Canada: 4 hours (including reply);
- Attorney General of New Brunswick, Attorney General of British Columbia, and Attorney General of Saskatchewan: 30 minutes each; and
- Other interveners: 10 minutes each.

[14] The schedule for submissions will be as follows:

- April 15, 2019: Submissions of the Attorney General of Ontario;
- April 16, 2019: Submissions of the Attorney General of Canada;
- April 17, 2019: Submissions of the intervening Attorneys General and other interveners; and
- April 18, 2019: Reply submissions of the Attorney General of Canada and the Attorney General of Ontario.

E. RECORDS

[15] The Attorney General of British Columbia, Athabasca Chipewyan First Nation, Canada's Ecofiscal Commission, Canadian Public Health Association, Intergenerational Climate Coalition, International Emissions Trading Association, and United Chiefs and Councils of Mnidoo Mnising further seek leave to file a record.[1] The Attorney General of Canada consents to these seven parties being granted leave to file a record, while the Attorney General of Ontario opposes. In the parallel reference in Saskatchewan, the Court of Appeal for Saskatchewan granted leave to the interveners seeking to supplement the record.

[16] I have reviewed the proposed records of these seven interveners in this case and grant them leave to file their records. I am cognizant of the court's common practice to require interveners in an appeal to accept the existing record and not to seek to supplement it: see *R. v. Kokopenace*, 2011 ONCA 498 (in Chambers), at para. 4; *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A., in Chambers), at para. 26. In my view, however, the usual prohibition on supplementing the record in an appeal should be relaxed when this court is sitting as a court of first instance in a constitutional reference.

[17] Constitutional challenges should not be determined in a factual vacuum: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361; *Danson v. Ontario (Attorney*

[1] Mr. Vezina also sought leave to file a record. Given my decision not to grant him intervener status, this motion is now moot.

General), [1990] 2 S.C.R. 1086, at p. 1099. In a constitutional reference, an intervener may be permitted to file material subject to reserve by the court as to its relevancy and weight: *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 387; see also *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.), at p. 10. As Dickson J. observed in *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, at p. 723:

> A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution, viewed as a "living tree", in the expressive words of Lord Sankey in *Edwards and Others v. Attorney-General for Canada and Others*. Material relevant to the issues before the court, and not inherently unreliable or offending against public policy should be admissible, subject to the proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction. [Footnote and citations omitted.]

[18] In this case, I am satisfied that the proposed records of these seven interveners may assist the court in determining the constitutional validity of the *Greenhouse Gas Pollution Pricing Act* and should therefore be admitted.

F. CONCLUSION

[19] For the reasons above, with the exception of the motion of Mr. Vezina, the motions to intervene and file records are granted. "J.C. MacPherson J.A."

Bedford et al. v. Attorney General of Canada; Attorney General of Ontario, Intervenor

[Indexed as: Bedford v. Canada (Attorney General)]

98 O.R. (3d) 792

Court of Appeal for Ontario,
Goudge, Cronk and Epstein JJ.A.
September 22, 2009

Civil procedure -- Parties -- Intervenors -- Moving parties seeking leave to intervene in application attacking constitutionality of certain prostitution provisions of Criminal Code -- Moving parties intending to argue that constitutionality of challenged laws can be supported by moral values of Canadian society -- Motion judge erring in dismissing motion -- Moving parties having interest in subject matter of application and important perspective different from that of parties -- Moving parties seeking only to make legal argument so their participation would not unduly lengthen proceedings.

The appellants were organizations active in promoting traditional conceptions of family, society and morality. They sought leave to intervene as a friend of the [page793] court in an application for a declaration that some of the prostitution provisions of the Criminal Code, R.S.C. 1985, c. C-46 are unconstitutional. Their motion was dismissed. They appealed.

Held, the appeal should be allowed.

The appellants had a real substantial and identifiable interest in the subject matter of the application and an important perspective different from that of the parties. The motion judge erred in concluding that their proposed argument

was not clearly described. Their position was that the constitutionality of the challenged laws can be supported by the moral values of Canadian society. The issue of morality would be put in play by the applicants. As the appellants did not seek to file any affidavit material, and sought only to make legal argument, their participation would not unduly lengthen the hearing. They might be able to make a useful contribution to the application without causing injustice to the immediate parties.

Cases referred to

GEA Group AG v. Ventra Group Co. (2009), 96 O.R. (3d) 481, [2009] O.J. No. 3457, 2009 ONCA 619; Ontario (Attorney General) v. Dieleman (1993), 16 O.R. (3d) 32, [1993] O.J. No. 2587, 108 D.L.R. (4th) 458, 43 A.C.W.S. (3d) 527 (Gen. Div.); Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada (1990), 74 O.R. (2d) 164, [1990] O.J. No. 1378, 46 Admin. L.R. 1, 45 C.P.C. (2d) 1, 2 C.R.R. (2d) 327, 22 A.C.W.S. (3d) 292 (C.A.)

Statutes referred to

Canadian Charter of Rights and Freedoms

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

Rules and regulation referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 13.02

APPEAL from the order of Matlow J., [2009] O.J. No. 2739 (S.C.J.) dismissing a motion for leave to intervene as a friend of court in an application attacking the constitutionality of certain provisions of the Criminal Code.

Derek J. Bell, Ranjan K. Agarwal and Alexie S. Landry, for appellants Christian Legal Fellowship, REAL Women of Canada and Catholic Civil Rights League.

Ron Marzel, for respondents Terri Jean Bedford, Amy Lebovitch and Valerie Scott.

Roy Lee and Michael H. Morris, for respondent Attorney General of Canada.

Christine Bartlett-Hughes, for respondent Attorney General of Ontario.

[1] BY THE COURT: -- Pursuant to rule 13.02 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194], the appellants unsuccessfully sought leave to intervene as a friend of the court in the application brought by the respondents Terri Jean Bedford, [page794] Amy Lebovitch and Valerie Scott. That application seeks a declaration that certain sections of the Criminal Code, R.S.C. 1985, c. C-46 criminalizing activities related to prostitution violate the Canadian Charter of Rights and Freedoms.

[2] The relevant jurisprudence provides considerable guidance to a court hearing such a motion. Where the intervention is in a Charter case, usually at least one of three criteria is met by the intervenor: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with a special expertise and a broadly identifiable membership base: see Ontario (Attorney General) v. Dieleman (1993), 16 O.R. (3d) 32, [1993] O.J. No. 2587 (Gen. Div.). Most importantly, the overarching principle is that laid down by Dubin C.J.O. in Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada (1990), 74 O.R. (2d) 164, [1990] O.J. No. 1378 (C.A.), at p. 167 O.R.:

> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

[3] Finally, while rule 13.02 accords considerable deference to the court hearing the motion, that discretion is not immune

from appellate scrutiny: see GEA Group AG v. Ventra Group Co. (2009), 96 O.R. (3d) 481, [2009] O.J. No. 3457, 2009 ONCA 619. That discretion cannot be exercised for reasons that clearly misapprehend the record before the court.

[4] In this case, the record leaves no doubt that the appellants meet several of the Dieleman criteria. They have a real substantial and identifiable interest in the subject matter of the application and, as acknowledged by the Attorney General of Canada, an important perspective different from the parties. The respondents do not oppose the motion on this basis.

[5] The respondents' argument at first instance was that the appellants did not show that they would be in a position to make a useful contribution to the resolution of any issue that needed to be determined. In the end, the motion judge essentially agreed with this submission. However, he did so for reasons that, in our view, are clearly erroneous.

[6] The motion judge concluded that the appellants' proposed argument was not described clearly, making it impossible to apply the test for intervention. We disagree. The record below and counsel's submissions clearly described the appellants' [page795] position, namely, that the constitutionality of the challenged laws can be supported by the moral values of Canadian society. Indeed, before us, counsel for the respondents not only understood that this was their position, but argued vigorously that it was irrelevant.

[7] The motion judge also determined that, in any event, he could not reasonably determine whether any issues of morality would properly arise in the argument of the application. That too misunderstands the material before him. The respondents were clear both below and in this court that in the application they will argue that morality cannot serve to support the constitutionality of the impugned legislation. In other words, the respondents will be putting that issue in play. The Attorney General of Canada indicated it would not be relying on Canadian moral values as a cornerstone of its defence of the legislation but made clear that there was considerable

affidavit evidence in the record relating to such an argument. Whether the appellants' position ultimately prevails or not, it will provide a counterpoint to the respondents' argument that will not otherwise be made and may be useful to the court.

[8] In addition, the motion judge's view that the appellants have not shown any special knowledge entitling them to advance their arguments overlooks that the appellants do not seek to file any affidavit material. They seek only to make legal argument, not to supply the court with specialized knowledge, something that also provides a complete answer to the concern that their participation could disrupt the hearing. Also, the time limited argument means that their participation would not unduly lengthen the hearing.

[9] In summary, the basis for the motion judge's decision is clearly flawed and his conclusion therefore cannot stand. Rather, as we have indicated, given the issues at stake and the position the appellants propose to take, we conclude that the appellants may be able to make a useful contribution to the application without causing injustice to the immediate parties.

[10] We would allow the appeal and grant the motion as asked, with the addition set out in para. 19 of the factum of the Attorney General of Canada.

[11] No costs here or below.

Appeal allowed.

Regional Municipality of Peel and Attorney General of Ontario
v. Great Atlantic & Pacific Co. of Canada Ltd.,
Loblaws Supermarkets Ltd., Steinberg Inc.
(c.o.b. Miracle Food Mart) and Oshawa Group Ltd.

Indexed as: Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.
(C.A.)

74 O.R. (2d) 164
[1990] O.J. No. 1378
Action No. 455/90

ONTARIO
Court of Appeal
Dubin C.J.O., in Chambers
August 3, 1990.

Civil procedure -- Parties -- Intervention -- Applicant seeking to be added as party or as friend of court in appeal of judgment that held statute unconstitutional and contrary to Canadian Charter of Rights and Freedoms -- Considerations -- Rules of Civil Procedure, O. Reg. 560/84, rules 13.01, 13.02.

The applicant was a non-profit corporation whose objects included preserving Sunday as a day of rest, monitoring all legislation bearing on Sunday labour or business and pressing for new legislation or amendment of existing law to minimize activity on Sunday. While, historically, members of the applicant were drawn from religious groups, the majority of its members now were representatives of trade unions, small retail businesses and trade associations. The applicant applied for leave to intervene as an added party or as a friend of the court in pending appeals of a judgment that held the Retail Business Holidays Act, as amended in February 1989, unconstitutional and in contravention of the Canadian Charter of Rights and Freedoms.

Held, subject to certain conditions, leave should be granted to the applicant to intervene as a friend of the court.

In determining whether an application for intervention should be granted the matters to be considered were the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties. In constitutional cases, including cases under the Charter, there has been a relaxation of the rules governing applications for leave to intervene and an increase in the desirability of permitting intervention because the judgments in these cases have a great impact on others who are not immediate parties. In this case, although the applicant's argument may overlap with the argument of the Attorney General in support of the legislation the applicant represented a very large number of individuals who had a direct interest in the outcome, had special knowledge and expertise of the subject-matter and was in a position to place the issues in a slightly different perspective from that of the Attorney General. Since the Retail Business Holidays Act does not affect the applicant corporation as such or its employees, it was not appropriate to grant leave as an added party under rule 13.01 of the Rules of Civil Procedure. Subject to certain conditions, it was appropriate to grant leave to intervene under rule 13.02 as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Canadian Charter of Rights and Freedoms
Retail Business Holidays Act, R.S.O. 1980, c. 453

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 13.01 [am. O. Reg. 221/86, s. 1], 13.02, 13.03(2) [am. O. Reg. 221/86, s. 1]

APPLICATION for leave to intervene as added party or friend of the court.

David A. McKee, for People for Sunday Association of Canada, applicant for leave to intervene.

Elizabeth C. Goldberg and Hart Schwartz, for Attorney General of Ontario.

Robert S. Russell and Freya J. Kristjanson, for Loblaws Supermarkets Ltd.

Julian N. Falconer, for Great Atlantic & Pacific Co. of Canada Ltd.

John B. Laskin and Kent E. Thomson, for Oshawa Group Ltd.

Robert J. Arcand and Sharon M. Addison, for Steinberg Inc. (c.o.b. Miracle Food Mart).

Angus T. McKinnon, for Hudson's Bay Co.

DUBIN C.J.O.:-- This is an application by the People for Sunday Association of Canada for leave to intervene as an added party or as a friend of the court in the appeals now pending from the judgment [in the High Court of Justice on June 22, 1990] of Mr. Justice Southey [reported 73 O.R. (2d) 289, 90 C.L.L.C. Paragraph14,023], who held that the Retail Business Holidays Act, R.S.O. 1980, c. 453 (the Act), as amended in February 1989, is in contravention of the Canadian Charter of Rights and Freedoms and is thereby unconstitutional.

This is the first time that the constitutionality of the Retail Business Holidays Act, as amended, has come before this court, although it has twice before considered the constitutionality of its predecessor.

The applicant is a non-profit organization incorporated under

the Canada Business Corporations Act, R.S.C. 1985, c. C-44. The current objects of the corporation include:

(a) To affirm Sunday as a unique weekly opportunity, for as many people as possible, to enjoy spiritual, physical, moral and cultural renewal;

(b) To cultivate the conviction of Canadian people that the preservation of Sunday as the national, weekly day of rest is necessary for the well-being of the individual, the family and the community;

(c) To monitor carefully the drafting and enactment of all legislation bearing on Sunday labour or business and to press for new legislation or amendment of existing law where deemed necessary to minimize activity on Sunday;

(d) To encourage active enforcement of laws protecting the special status of Sunday.

Historically, the membership of the Association was drawn from religious groups. While certain of such groups are still members of the Association, the majority of its members are representatives of trade unions, small retail businesses and trade associations. Included in its membership is a trade union, the majority of whose members work in the retail food sector. The membership also includes retail associations which represent small retail businesses, often owned and operated by single families.

Over the years the Association has taken an active role on issues arising under the present statute, as well as its predecessor, and, in particular, has addressed the role that municipalities play in the present Act, a core factor in the reasons for judgment of Mr. Justice Southey.

In constitutional cases, including cases under the Canadian Charter of Rights and Freedoms, which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition

of applications for leave to intervene and has increased the desirability of permitting some such interventions.

The Attorney General for Ontario supports this application for intervention, but it is opposed by all the other respondents. The principal submission made by those who submit that leave to intervene should not be granted is that the interests of those whom the applicant represents are now fully protected by the position being taken on the appeals by the Attorney General for Ontario and, indeed, much of the evidence relied upon by the Attorney General in the proceedings before Mr. Justice Southey was drawn from sources that the applicant represents.

However, in my opinion, that is not a sufficient reason in this case to deny leave to intervene. The role of counsel for the Attorney General for Ontario is to support the constitutionality of the province's legislation. Although the argument may overlap, the applicant represents a very large number of individuals who have a direct interest in the outcome, has a special knowledge and expertise of the subject-matter and is in a position to place the issues in a slightly different perspective than that of the Attorney General.

It was also submitted that the applicant had considered seeking the right to intervene in the proceedings before Mr. Justice Southey and declined to do so and, therefore, should not be permitted to intervene now. However, I do not think that the failure to apply for intervention before Mr. Justice Southey should foreclose the applicant's opportunity for seeking intervention at this stage.

Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

The relevant provisions of our rules of practice relating to intervention [Rules of Civil Procedure, O. Reg. 560/84, rules 13.01 [am. O. Reg. 221/86, s. 1], 13.02, 13.03(2) [am. O. Reg. 221/86, s. 1]] are as follows:

13.01(1) Where a person who is not a party to a proceeding claims,

(a) an interest in the subject matter of the proceeding;

(b) that he or she may be adversely affected by a judgment in the proceeding; or

(c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding,

the person may move for leave to intervene as an added party.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

. . . . .

13.03(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

It is apparent that the Retail Business Holidays Act does not affect the applicant corporation as such or its employees, and

I do not think that leave to intervene as an added party pursuant to rule 13.01 would be appropriate.

However, in my opinion, it is appropriate to grant leave to intervene under rule 13.02, as a friend of the court, for the purpose of rendering assistance to the court by way of argument.

In the result, I would grant leave to the applicant to intervene on such a basis subject to the following conditions:

(1) that the applicant takes the record as it is and will not be permitted to adduce further evidence;

(2) that it will not seek costs on the appeals, but that costs may be awarded against it;

(3) that it file its factums within seven days of having been served with the factums of the Attorney General for Ontario;

(4) that the costs of this application will be costs in the appeal.

Order accordingly.

DATE: 20011214
DOCKET: M27810/C36567

COURT OF APPEAL FOR ONTARIO

RE: **KIM NATHAN LOUIE and TODD SHELDON LOUIE (Plaintiffs/Appellants) – and – MELVIN DOUGLAS LASTMAN (Defendant/Respondent in Appeal)**

BEFORE: **MORDEN J.A.** *

COUNSEL: **Martha Mackinnon for the moving party, Canadian Foundation for Children, Youth and the Law**

Sheila Block and Alexandra Clark for the responding party, defendant in appeal, Melvin Douglas Lastman

HEARD: **Written submissions filed by the moving and responding parties**

E N D O R S E M E N T

[1] The Canadian Foundation for Children, Youth and the Law moves for an order under rule 13.03(2) granting it leave to intervene as a friend of the court in this appeal by the plaintiffs from a judgment of Benotto J., the reasons for which are reported at 54 O.R. (3d) 286 (S.C.J.). The motion has been argued in writing by the moving party and the respondent in the appeal. The appellants have not filed a factum but have notified the court that they support the motion.

[2] I am satisfied that sufficient has been shown to grant the order sought subject to the conditions set forth at the conclusion of this endorsement.

[3] The basic matters to be considered on a motion such as this are set forth in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 at 167 (C.A.), particularly "the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties".

[4] As far as the issues in this appeal are concerned, it may be noted from the appellants' factum that the number of matters now in issue is reduced from the number argued before, and decided by, the motions judge. They now all relate to the submitted fiduciary obligations of the defendant to the plaintiffs and no longer include claims based on unjust enrichment or tort.

[5] The moving party has been granted intervenor status in many previous cases at all levels of tribunal and court. In family law matters it has represented youth who seek access to their siblings and it has significant experience representing youth in support applications against their parents. I refer now to some of the basic submissions it would make on the appeal.

[6] The moving party submits that the *Family Law Act* and the *Divorce Act* are not "complete codes" with respect to support owed by parents to their children. In making these submissions, it would refer to rights contained in the United Nations *Convention on the Rights of the Child* as they inform and complement the concept of "best interests" and to the effect of the ratification of the *Convention* on domestic law.

[7] Article 4 of the *Convention* requires state parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the *Convention*. Article 3 provides that in all actions concerning children, public and private institutions, courts and administrative bodies and legislative bodies shall make the best interest of the child a primary consideration. Articles 5 and 12 outline the responsibilities of parents with respect to their children and the right of the child to be heard in proceedings affecting him or her. Article 9 provides that children have a right of access to their parents.

[8] The affidavit of Paul Wollaston, Chair of the moving party, concludes: "If granted leave to intervene, the proposed intervenors will rely on relevant domestic and international human rights obligations and will make reference to relevant statutes and common law principles relating to fiduciary duties, the best interests of children and the standing of children in processes which affect them."

[9] The moving party intends to submit that biological parents, as such, without it being necessary to show they have assumed power (as held by the motions judge), have the power or discretion of a fiduciary. It intends to rely on international documents to inform its argument on the nature and scope of the relevant fiduciary obligations. On the same basis, it will submit that children have the right to know the identity of their biological parents unless it can be shown that it is not in their best interests that the identify be disclosed. In addition, once the identity of the parent is known, the child should be allowed to seek support in a timely way. Support entitlement should be retroactive to at least the date on which the parent knows that he or she is a parent, or reasonably ought to have known.

[10] The moving party submits that the resolution of the issues in this case, or, at least some of them, will have far-reaching consequences to a number of children in Ontario. In particular, all children are affected by a decision as to whether parents owe a fiduciary obligation to their children that exists independently of,

and in addition to, any statutory duties with respect to child support. All children whose parents have separated are affected by a custodial parent's decision to waive child support. Many children will be deeply affected by any decision with respect to a parent's obligation to disclose his or her status as biological parent, if known. Children cannot (or can only with extreme difficulty) exercise their rights to support and access to their parents if their parents do not disclose their status as parent to the children.

[11] The general position of the responding party is that the moving party's proposed submissions would be of no assistance in resolving the issues on the appeal. With respect, it appears to me that the thrust of the responding party's submissions in this regard is that the proposed submissions of the moving party are not valid or are of little weight. I wish to make it clear that in granting intervenor status I do not express any view on the ultimate merit of the moving party's position. I merely recognize that the moving party has considerable experience in the subject matter of the appeal, or certain aspects of it, which enable it "to place the issues in a slightly different perspective" (*Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd., supra* at 167) from that of the appellants.

[12] While it may be that the actual decision of the court in this appeal will have impact only on persons in exactly the same position as the plaintiffs, I do not exclude the possibility that aspects of, or steps in, the court's reasoning could bear on the rights of other children and claims they may have against their biological parents. At the end of the day, the court may not consider the moving party's submissions to be of assistance. As I have just said, I express no opinion on the merits of its position. What is important is that the court, before making its decision on the correct result and on the appropriate reasons that support this result, should have all of the relevant possibilities brought to its attention, including submissions on the impact on its judgment, not only on the parties, but on those not before the court whose positions may be similar to but not the same as the parties.

[13] I am satisfied that the intervention order can be made without causing any injustice to the responding party. It is true that the intervention will expand the number of submissions to which the responding party will be obliged to reply but this, which is for the potential benefit of the court, is not an injustice. Further, having regard to the conditions I attach to the intervention order, the responding party may be compensated for any increased costs resulting from the intervention but will not be liable for costs in connection with it.

[14] The conditions I impose are substantially those in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd., supra.*

[15] I grant leave to the moving party to intervene as a friend of the court on the following conditions:

> 1) that it takes the record as it is and will not be permitted to adduce further material;
>
> 2) that it will not seek costs on the appeal, but that costs may be awarded against it;
>
> 3) that it deliver its factum on or before January 15, 2002;
>
> 4) that the time for delivery of the respondent's factum both in the appeal and in response to the moving party's factum, is extended to February 22, 2002; and
>
> 5) that the time allocated for its oral submissions be fixed by the court hearing the appeal.

[16] The costs of this motion will be costs in the appeal.

"Morden J.A."

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[*] Designated by the Chief Justice of Ontario under s. 5(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 to hear this motion.

COURT OF APPEAL FOR ONTARIO

CITATION: 40 Days for Life v. Dietrich, 2023 ONCA 379
DATE: 20230524
DOCKET: M54191 (COA-22-CV-0306)

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

40 Days for Life

Plaintiff (Respondent)

and

Brooke Dietrich, John Doe, Jane Doe and Persons Unknown

Defendants (Appellants)

Andrew Bernstein, Sarah Whitmore, Julie Lowenstein, and Anna Matas, for the appellant Brooke Dietrich

Philip H. Horgan and Raphael T.R. Fernandes, for the respondent 40 Days for Life

Zohar R. Levy and Rachel Laurion, for the proposed intervener Canadian Civil Liberties Association

Heard: in writing

REASONS FOR DECISION

Overview

[1] This is a motion for leave to intervene as a friend of the court, pursuant to r. 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in an appeal from an order dismissing the appellant's anti-SLAPP motion pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*").

[2] The respondent, 40 Days for Life ("40 Days"), is a Texas-based group. One of 40 Days' activities is conducting vigils outside of abortion clinics. The appellant, Ms. Dietrich, often engages online with social justice issues, including pro-choice rights and reproductive freedom.

[3] Ms. Dietrich posted a series of videos online relating to 40 Days and their protest activities. In some of the videos, she encouraged false sign-ups to the vigils (i.e. encouraging individuals to sign up for the vigils, but not attend). In other videos, she makes statements about 40 Days that they allege are false and defamatory.

[4] 40 Days commenced an action for damages for libel, internet harassment, breach of contract, inducement of breach of contract, fraud, and/or conspiracy. In response, Ms. Dietrich brought an anti-SLAPP motion under s. 137.1 of the *CJA*. The motion was dismissed.

[5] Prior to Ms. Dietrich bringing her s. 137.1 motion, 40 Days obtained two interim injunctions against Ms. Dietrich and the other defendants (other

unidentified individuals alleged to have engaged in tortious conduct on social media). The defendants have appealed, with leave, those injunctions to the Divisional Court. The CCLA has been granted leave to intervene in the Divisional Court.

[6] In this court, Ms. Dietrich appeals the dismissal of her s. 137.1 motion.

[7] The CCLA seeks leave to intervene in this appeal. The appellant consents to the CCLA's intervention. The respondent opposes the motion. All agree that this motion can be heard in writing.

[8] In determining this motion, I must consider the nature of the case, the issues that arise in the case, and the contribution that the CCLA can make in resolving the issues before the court, without doing an injustice to the parties: *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.), at para. 22; *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167. Typically, in an appeal involving private actors, the proposed intervener must meet a stringent standard, one that can bend somewhat where issues of public policy arise: *Tsige*, at para. 23.

Nature of the Case and Issues on Appeal

[9] The appellant seeks an order allowing their appeal and dismissing the respondent's action in its entirety pursuant to s. 137.1(3) of the *CJA*. The appellant also seeks $50,000 in damages pursuant to s. 137.1(9) of the *CJA*.

[10] First, the appellant argues that the motion judge erred in finding that 40 Days had established substantial merit for its claims of internet harassment and conspiracy without finding grounds to believe that 40 Days had suffered the requisite harms. She also argues that the motion judge failed to adequately consider the context of the counter-protests and their connection with the public debate over abortion access in Canada, and thus failed to appreciate that the appellant's counter-protests were expressive activities worthy of protection.

[11] Second, the appellant argues that the motion judge erred in conducting the balancing exercise under s. 137.1(4)(b) of the *CJA* by determining that the public interest in permitting the claims to continue outweighed the public interest in protecting the appellant's expression.

[12] Though this case involves a private dispute, the issues involve broader public policy considerations that extend beyond the parties. This court will be called upon to decide issues that engage with public policy dimensions, including the public interest in protecting freedom of expression in a virtual environment. The case will necessarily engage with whether and to what extent online protests should be considered analogous to in-person protests and how online activity intersects with the freedom of expression. Therefore, while this is a private dispute, the resolution of that dispute will, to some extent, engage with a public policy dimension.

Will the CCLA Make a Useful Contribution Without Doing an Injustice to the Parties?

[13] The CCLA seeks to intervene to make submissions on two issues:

1. The application of the current jurisprudence regarding location of protest to expressive activity that occurs online or in a virtual environment; and
2. How the tort of internet harassment should develop in light of the freedom of expression jurisprudence.

[14] On the first issue, the CCLA proposes to provide a roadmap for applying the existing traditional jurisprudence on the location of expressive activity (i.e. the principle that whether the speech takes place in a private as opposed to a public forum is important to assessing whether to restrain the speech) to the virtual environment. While protests have traditionally occurred “in the streets”, protest activity is increasingly moving online. The CCLA wishes to provide insight about whether, and to what extent, freedom of expression ought to be protected within the online world and the appropriate way to consider the location of expression when courts are dealing with motions to restrain expression, as with s. 137.1 motions.

[15] On the second issue, the CCLA proposes to make submissions about how the new tort of internet harassment should develop in light of freedom of expression. Though the *Charter of Rights and Freedoms* does not apply to private

disputes, the Supreme Court has indicated that the development of the common law should be consistent with Constitutional values: *RWDSU Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, at para. 19. For example, the tort of defamation developed with regard to freedom of expression and s. 2(b) of the *Charter*: see *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 43-57. The CCLA proposes to situate the new tort of internet harassment in the context of the existing freedom of expression jurisprudence.

[16] 40 Days opposes the intervention on the basis that:

1. This is a private tort claim unsuitable to intervention. The appeal is largely fact-specific and the appellant is entirely able to advance the submissions that the CCLA wishes to make.
2. The CCLA will end up repeating the appellant's submissions as Ms. Dietrich already addresses the impact of the applicability of freedom of expression jurisprudence to online activity such as took place in this case.
3. The CCLA's intervention will cause prejudice because the appeal is already perfected. Quite simply, they should have brought their motion earlier.
4. The CCLA is really attempting to intervene to support a "pro-choice cause". Their submissions will not be helpful on appeal.
5. The CCLA overstepped their appropriate role as an intervener in the Divisional Court and it is likely they will do the same here. The alleged overstepping

relates to the fact that the CCLA is said to have improperly taken a position on the facts of the appeal in the Divisional Court.

Discussion

[17] The CCLA is a well-recognized group with strong expertise in the area of freedom of expression. There is no question they have made useful contributions on many cases in this court (and others) in the past.

[18] If the CCLA, or any intervener for that matter, were to step beyond the bounds of a proper intervener, then there are remedies for that, ones that can be pursued at the point where any overstepping occurs. What the respondent asks is that this court anticipate that, if the CCLA is granted intervener status, that it will breach the order allowing for the intervention by exceeding the boundaries of that order. I do not operate on that assumption. To the contrary, I operate on the assumption that the CCLA knows well the appropriate role of an intervener and that the CCLA will comply with any order made.

[19] I make no comment on what has or has not transpired in the Divisional Court. Any grievance on the part of the respondent for the work done by the CCLA in the Divisional Court should be raised in that court. The remedy is not to ask this court to, in essence, adjudicate on the matter and then grant a remedy which is to exclude the CCLA from intervention in this court.

[20] In addition, I see no basis for the allegation that the CCLA has the motivation alleged by the respondent. There is simply no evidence to support this claim. And, in any event, interveners do not need to be entirely disinterested in the outcome of a legal issue. To the contrary, interveners are frequently aligned with a party in terms of the outcome of a legal issue. It is the outcome of the case that they must remain distanced from.

[21] Therefore, this motion really comes down to whether the CCLA has something useful to contribute to the appeal beyond what the appellant has already set out in her materials and whether prejudice will arise from an intervention at this stage.

[22] In my view, the CCLA has something useful to contribute. Having reviewed the appellant's factum, it barely touches upon the arguments that the CCLA wishes to advance. Even if Ms. Dietrich were to expand on these issues during the oral hearing of this matter, there is nothing wrong with the CCLA building upon the existing issues and offering fresh perspectives on how to approach them: *R. v. Doering*, 2021 ONCA 924, at para. 25. Any risk of overlap here can be mitigated by narrowing the terms of the intervention.

[23] This leaves the issue of prejudice for resolution. This motion has been brought at a fairly late stage. The appeal is listed to be heard eight weeks from now. Even so, with a tight timeline for filing, I am satisfied that there is enough time

for the CCLA to file a factum and for the parties to file reply factums should they wish to do so.

Disposition

[24] The motion for leave to intervene is granted on the following terms:

1. The CCLA is granted leave to intervene as a friend of the court.
2. The CCLA will not raise new issues or lead new evidence and will make reasonable efforts to avoid duplicating the submissions of the parties.
3. The CCLA shall file a factum of up to 15 pages in length by June 6, 2023.
4. Each party may file a supplementary factum of up to 8 pages in length responding to the intervener by June 27, 2023.
5. The CCLA may make oral submissions not exceeding 15 minutes at the hearing of the appeal.
6. No costs shall be awarded in favour of or against the CCLA.

"Fairburn A.C.J.O."

DATE: 20060407
DOCKET: M33625 (C43898)

COURT OF APPEAL FOR ONTARIO

RE: **OAKWELL ENGINEERING LIMITED (Applicant/Respondent in Appeal) and ENERNORTH INDUSTRIES INC. (Formerly known as Energy Power Systems Limited, Engineering Power Systems Group Inc. and Engineering Power Systems Limited respectively (Respondent/Appellant)**

BEFORE: **McMURTRY C.J.O.**

COUNSEL: **Richard Gibbs, Q.C.**
for the Moving Party/Intervenor, Lawyers Rights Watch Canada

David R. Wingfield
for the Respondent/Appellant in Appeal, Enernorth Industries Inc.

Matthew Milne Smith
For the Respondent/Respondents in Appeal, Oakwell Engineering Limited

HEARD: **March 28, 2006**

ENDORSEMENT

[1] Lawyers Rights Watch Canada ("LRWC") brought a motion on March 28, 2006 seeking to intervene in this matter as a friend of the court. The appeal is scheduled for a full-day hearing on April 10, 2006 and therefore this application was brought extremely late in the proceedings. The proposed intervenor sought to file a factum of 30 pages and requested one hour for oral argument. That "time" request and the nature of the arguments to be made could well have necessitated an adjournment of the proceedings. The appellant, Enernorth Industries Inc. ("Enernorth"), supported the intervention request and an adjournment, if necessary. The respondent, Oakwell Engineering Ltd. ("Oakwell"), opposed the intervention and any adjournment, although it reserved the right to request an adjournment and file fresh evidence should leave to intervene be granted to LRWC. On March 28, counsel were advised that I had dismissed the motion, with reasons to follow. These are those reasons.

[2] LRWC is a committee of Canadian lawyers who promote human rights and the rule of law by providing support internationally to human rights defenders in danger. Its

primary focus is protecting lawyers whose freedoms and independence are threatened as result of their human rights advocacy.

[3] This appeal is not related to the defence of human rights lawyers as it is a commercial case. The issue in this appeal is whether a Canadian court should recognize a civil judgment rendered by the Superior Court of Singapore (and confirmed on appeal there). LRWC has taken up the cause of several human rights advocates in Singapore and submits that the legal system of Singapore is generally corrupt. The proposed intervenor has demonstrated no particular expertise in the law of Singapore but does not seek to assist the court in relation to that law. Rather it wishes to argue that the courts of Canada are bound by a constitutional imperative to refuse to enforce judgments emanating from any corrupt legal system.

[4] Enernorth, a Canadian company entered into an agreement with Oakwell, a Singapore company to build mobile power stations in India. In order for the project to be completed, certain steps had to be taken by the government of India and the particular state in which the power stations were to be built. After the project was commenced, the parties ran into difficulties, including the obtaining of required approvals and commitments from the two levels of Indian government. Ultimately, the parties decided to part ways. Litigation was commenced and later was settled. Pursuant to the settlement Enernorth purchased the interests of Oakwell in the project with an agreement for future payment of royalties to Oakwell on the completion of the project. The parties further agreed that the law and courts of Singapore would govern any disputes that might arise under the settlement. Thereafter, Enernorth carried the project forward but the Indian governments dramatically altered their requirements and Enernorth sold its interests in the project to an Indian company. Oakwell sued in Singapore for payment of royalties or sums in lieu of royalties. Enernorth defended on the basis that there were no monies owing by it to Oakwell as the acts of the Indian governments had the effect of frustrating the settlement agreement. After a trial that lasted some thirteen days, the court issued a lengthy judgment in favour of Oakwell. An appeal to the Singapore Court of Appeal was dismissed.

[5] Oakwell brought an application before Justice Day in the Superior Court of Ontario seeking to enforce its judgment. Enernorth defended on the basis that Ontario courts should not enforce judgments of Singapore because those courts are systemically corrupt. It led evidence that commercial disputes were inevitably determined in favour of those who were "connected to" the ruling oligarchy. Oakwell argued before Day J. that the Singaporean justice system did not respect the rule of law and accordingly its judgments should not be recognized by our courts.

[6] Oakwell responded that the government and courts of Singapore were institutionally patterned after those of Great Britain and similar to those of Canada. It further responded that there was no evidence of any impropriety in the particular case before the court involving Oakwell and Enernorth. It submitted that both parties were given a fair hearing and furthermore that, Enernorth adopted the Singaporean legal system by counter suing for some $175 million. It also argued that Enernorth had raised

no issue of impropriety or bias at trial or on appeal in Singapore. It did so for the first time in defending the application before Justice Day.

[7] Justice Day found that the evidence before him did not support any inference of corruption or bias (actual or apprehended) on the part of the trial judge.

[8] The proceedings before Justice Day consumed some four days. I was advised that the record comprised of at least 15 volumes of material. The factums filed on the application are extensive and comprehensive. The appellant's factum, which deals with the evidence and issues raised on the application and on the appeal, amounts to a "full frontal attack" on the legal system of Singapore. It is clear to me, on the basis of the material filed on this motion, that the attack on the alleged systemic deficiencies of the Singaporean legal system forms a significant element of the appellant's argument before this court. Leave to intervene as a friend of the court may be granted when, on consideration of the nature of the case and the issues that arise, the court is satisfied that the proposed intervenor is able to make a useful contribution to the resolution of the appeal without causing any injustice to the immediate parties. See *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164, 45 C.P.C. (2d) 1 (C.A.).

[9] A friend of the court need not be "impartial", "objective" or "disinterested" in the outcome of the case and this court has recognized the valid contributions to be in made in appropriate cases by classes of intervenors who may advocate a particular interpretation of the law. Such contributions may assist the court in its analysis of the issues for determination by placing them under scrutiny through a different lens or from a different perspective. The fact that the position of a proposed intervenor is generally aligned with the position of one of the parties is not a bar to intervention if the intervenor can make a useful contribution to the analysis to of the issues before the court. See *Childs v. Desormeaux* (2003), 67 O.R. (3d) 385 (C.A.); *Halpern v. Toronto (City) Clerk* (2000), 51 O.R.(3d) 742.

[10] Ontario courts, however, are more reluctant to permit intervention when the underlying litigation is essentially private in nature. In *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2001), 147 O.A.C. 355, 9 C.P.C. (5th) 218 (C.A.), at paragraphs 8 and 9, I pointed out:

Intervention of third parties into essentially private disputes should be carefully considered as any intervention can add to the costs and complexity of the litigation, regardless of an agreement to restrict submissions.

Many appeals will fall somewhere in between the constitutional and strictly private litigation continuum, depending on the nature of the case and the issues to be adjudicated. In my view, the burden on the moving party should be a heavier one in cases that are closer to the "private dispute" end of the spectrum.

[11] In *Stadium Corp. of Ontario Ltd. v. Toronto (City)* (1992), 10 O.R. (3d) 203 (Div. Ct.), Archie Campbell J. stated at page 208:

Proposed intervenors must be able to offer something more than the repetition of another party's evidence and argument or a slightly different emphasis on arguments squarely [made] by the parties. The fact that the intervenors are prepared to make a somewhat more sweeping constitutional argument does not mean they will be able to add or contribute to the resolution of the legal issues between the parties.

[12] I am not satisfied that the proposed submissions of LRWC will bring anything new to the resolution of the issues under appeal. In my view it would provide largely a repetition of the submissions of Enernorth. The fact that it may bring a "somewhat more sweeping constitutional argument" than that made by Enernorth on the point will not particularly assist the resolution of the essential issue before our court.

[13] I should like to comment further upon two other matters. As stated earlier, this appeal is scheduled for hearing on April 10, 2006 and the motion brought by the proposed intervenor was filed only on March 20, 2006 and came on for hearing on March 28, barely two weeks before the scheduled hearing. The proposed intervenor did not seek to intervene on the application before Justice Day, which came on for hearing in late 2004. The decision, delivered in August 2005, was published on the Internet and in legal reports. The appeal has been in this court since the summer of 2005 and has been scheduled for hearing for several months. The only explanation given by the moving party for not seeking to intervene at an earlier date is that the appeal had not come to its attention until recently. In my view, any application for intervention should be made in a much more timely way. Only in exceptional circumstances would an intervention, bringing more extensive arguments, be permitted so close to the hearing date of an appeal when the parties have already delivered their factums and would have little time to properly prepare for and respond to any new arguments.

[14] There is a further issue that is also of considerable concern to me. The proposed intervenor filed an affidavit of a director of LRWC, in support of its application. The affidavit sets out the "rule of law" emphasis placed on the matter by the proposed intervenor, suggests that such issues were not fully addressed by the parties themselves and comments negatively on the decision of Justice Day. When Oakwell advised that it wished to cross-examine the director on his affidavit pursuant to the provisions of the Rules of Civil Procedure, counsel for LRWC responded that the request "to cross-examine Mr. Rubin is an affront to him and to LRWC". Nevertheless, Oakwell took out an appointment for the cross-examination of the director who failed to attend. Oakwell submitted that the director's affidavit should be struck for his failure to adhere to the Rules of Civil Procedure and that this would be a sufficient ground to dismiss the intervention motion.

[15] A party that refuses, contrary to the *Rules of Civil Procedure*, to produce the deponent of an affidavit for cross-examination does so at considerable risk. In this case, the moving party acted improperly in taking the position that the proposed cross-

examination was an “affront” to the deponent and to the proposed intervenor. I would think that it would be a most exceptional case where a motion would be granted where the deponent of the sole affidavit in support of the motion refused to present him or herself for cross-examination pursuant to a reasonable and lawful request from opposing counsel.

[16] In conclusion, I am not satisfied that the Lawyers Rights Watch Canada has met the test for intervention as a friend of the court in this case and the application is therefore dismissed.

“R. Roy McMurtry C.J.O.”

Childs et al. v. Desormeaux et al.

[Indexed as: Childs v. Desormeaux]

67 O.R. (3d) 385
[2003] O.J. No. 3800
Docket Nos. M30222 and C38836

Court of Appeal for Ontario
McMurtry C.J.O. (in chambers)
October 1, 2003

Civil procedure -- Parties -- Friend of court -- Applicant seeking to be added as friend of court in appeal -- Appellants appealing judgment dismissing their negligence action -- Appellants alleging that social host was negligent in allowing guest to leave to drive while drunk -- Applicant being public advocate against drunk driving -- Intervention allowed -- Rules of Civil Procedure, O. Reg. 560/84, rule 13.

The defendant DD was a guest at a New Year's Eve party hosted by the defendants JZ and DC. After he left the party, DD was involved in a traffic accident with a vehicle in which the plaintiff ZC was a passenger. ZC suffered serious injuries, and she sued JZ and DC for negligence, alleging that they had a duty of care to her. The trial judge, Chadwick J., held that the alleged duty of care was novel and did not fall within an established category. Chadwick J. applied the legal test for whether there was a duty of care, and he concluded that while there was a duty, there were good policy reasons not to expand tort law to make the defendant social [page386] hosts liable. ZC and the other plaintiffs appealed. Mothers Against Drunk Driving in Canada ("MADD Canada"), an advocate in the struggle against drunk driving, applied for leave to intervene in the appeal as a friend of the court.

Held, the motion should be granted.

Although the litigation involved private parties, the reality was that the issues involved broad public considerations. Whether to recognize that social hosts owe an actionable duty of care to members of the public was an issue that transcended the dispute between the immediate parties to the litigation. That MADD Canada was aligned with the position of the plaintiffs did not preclude it being granted status as a friend of the court. Today, most intervenors who intervene as a friend of the court articulate a position that may be generally aligned with one side of the argument. In this case, MADD Canada could make a useful contribution to the argument of the issues before the court, and its intervention would not cause injustice to the respondents. That the Executive Director of MADD Canada testified at the trial was also not a bar to its participation.

Cases referred to

Anns v. London Borough of Merton, [1978] A.C. 728, [1977] 2 All E.R. 492, [1977] 2 W.L.R. 1024, 121 Sol. Jo. 377, 141 J.P. 526, 75 L.G.R. 555 (H.L.) (sub nom. Anns v. Merton London B.C.); Authorson (Litigation Guardian of) v. Canada (Attorney General) (2001), 9 C.P.C. (5th) 218, 147 O.A.C. 355, [2001] O.J. No. 2768 (QL) (C.A.); Childs v. Desormeaux (2002), 217 D.L.R. (4th) 217, 13 C.C.L.T. (3d) 259, [2002] O.T.C. 628, [2002] O.J. No. 3289 (QL) (S.C.J.); Cooper v. Hobart, [2001] 3 S.C.R. 537, 96 B.C.L.R. (3d) 36, 206 D.L.R. (4th) 193, 277 N.R. 113, [2001] 11 W.W.R. 221, 2001 SCC 79, 8 C.C.L.T. (3d) 26 (sub nom. Cooper v. Registrar of Mortgage Brokers (B.C.) et al.); Louie v. Lastman (2001), 208 D.L.R. (4th) 380, 152 O.A.C. 341, [2001] O.J. No. 4941 (QL) (C.A.); Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 74 O.R. (2d) 164, 2 C.R.R. (2d) 327, 45 C.P.C. (2d) 1 (C.A.)

Authorities referred to

Krislov, S., "The Amicus Brief: From Friendship to Advocacy"

(1963) 72 Yale L. J. 694

Scriven, D., and P. Muldoon, "Intervention as a Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure" (1986) 6 Adv. Q. 448

MOTION for leave to intervene as a friend of the court in an appeal.

Barry D. Laushway, for appellant.

Eric R. Williams, for respondents Zimmerman and Courrier.

Earl A. Cherniak, Q.C., and Kirk F. Stevens, for proposed intervenors Mothers Against Drunk Driving Canada.

[1] MCMURTRY C.J.O.: -- This is a motion brought by Mothers Against Drunk Driving Canada ("MADD Canada") for leave to intervene as a friend of the court in the appeal brought by the Plaintiffs from the decision of Justice Chadwick rendered on August 30, 2002: Childs v. Desormeaux, [2002] O.J. No. 3289 (QL), 217 D.L.R. (4th) 217, 13 C.C.L.T. (3d) 259, [2002] O.T.C. 628 (S.C.J.). [page387]

[2] The appellants support the application while the respondents oppose the intervention of MADD Canada. I am satisfied that MADD Canada should be permitted to intervene as a friend of the court.

[3] As I stated in Authorson (Litigation Guardian of) v. Canada (Attorney General) (2001), 147 O.A.C. 355, 9 C.P.C. (5th) 218 (C.A.), at paras. 8 and 9:

> Intervention of third parties into essentially private disputes should be carefully considered as any intervention can add to the costs and complexity of the litigation, regardless of an agreement to restrict submissions.

> Many appeals will fall somewhere in between the constitutional and strictly private litigation continuum, depending on the nature of the case and the issues to be adjudicated. In my view, the burden on the moving party should be a heavier one in cases that are closer to the "private dispute" end of the spectrum.

While this litigation might, at first blush, appear to be one that is private in nature, a review of the decision reveals that the issues to be decided as described briefly below, engage a consideration of public policy.

[4] On December 31, 1998, the defendant Desormeaux was an invited guest at a New Year's Eve party hosted by his friends, the defendants Zimmerman and Courrier. According to the factual findings of the trial judge, Desormeaux became intoxicated during the evening to a level that was apparent to his hosts. As happens all [too] often, Desormeaux left the party in his motor vehicle and, tragically, was involved in a traffic accident with a vehicle in which the plaintiff, Zoe Childs, was a passenger. As a result of this accident, 17-year-old Zoe Childs was grievously and permanently injured. On the basis of the evidence adduced at trial, the trial judge found, at para. 104 of his decision, that the defendants "had a duty not to turn Desmond Desormeaux loose on the highway where he could cause injury or death to others". The defendants/respondents on appeal may well challenge both the factual and legal underpinnings of this conclusion.

[5] The plaintiffs argued that the case fell within those categories of cases where a duty of care resulting in tort liability had been previously recognized. Alternatively, the plaintiffs argued that if not within the scope of other recognized duties of care, then a new duty of care ought to be established.

[6] The trial judge held that the proposed duty of care did not fall within an established category of cases in which a duty of care had been previously recognized. Rather, the trial judge found that liability based on a finding of a duty of care imposed on "social hosts" in favour of third parties such as

the plaintiff would be new and novel. [page388]

[7] As a result he was obliged to consider whether a new duty of care should be imposed in accordance with the decision of the House of Lords in Anns v. London Borough of Merton, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) as explained by the Supreme Court of Canada in Cooper v. Hobart, [2001] 3 S.C.R. 537, 206 D.L.R. (4th) 193. At p. 551 S.C.R., p. 203 D.L.R. of the Cooper decision, McLachlin C.J.C. and Major J. on behalf of the court stated:

> The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If forseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Counsel suggests in Yuen Kun Yeu, that such considerations will not often prevail. However we think it useful expressly to ask, before imposing a new duty of care, whether despite forseeability and proximity of a relationship there are other policy reasons why the duty should not be imposed.

[Emphasis in original omitted]

[8] Ultimately, however, while the trial judge held that the plaintiffs had satisfied the first branch of the Anns test, he found "there is good policy reason not to expand tort law to include the social host. In my view it should be left to the legislature to determine a social host liability and also to properly compensate the innocent victims. As such the action is dismissed."

[9] Included in the evidentiary record was the evidence of Andrew Murie, the National Executive director of MADD Canada given in support of the analysis of the policy issues to be considered at the second stage of the Anns test. That this

evidence was admitted and considered by the trial judge reflects the reality that the issues in this case involve broad policy considerations.

[10] As a result, while this is a dispute between individuals and in that regard private nature, the issue of whether, on the facts, a duty of care arose and if so whether such duty is or should be recognized in tort law, is one that differentiates this case from one that is solely of interest to the affected parties. Whether to recognize that social hosts owe an actionable duty of care to members of the public is an issue that transcends the dispute between the immediate parties to this litigation.

[11] MADD Canada is well known as a leading advocate in the struggle to end the carnage arising from drunk driving. One of its public policy activities relates to alcohol related civil liability. MADD Canada proposes to make submissions as to the issue of whether liability of social hosts in a case such as this falls within [page389] an existing head of liability or whether such liability is new and novel. If a new head of liability, MADD Canada also proposes to make submissions as to the relevant policy considerations that should inform the decision of whether to recognize such a new tort.

[12] It is not disputed that the position of MADD Canada is generally aligned with the position of the plaintiffs. It has an obvious and well known viewpoint from which it approaches the issue of civil liability arising out of alcohol related activities. Indeed, it is its very interest in the subject matter that has caused it to acquire experience and expertise in the area.

[13] Today most intervenors who intervene as a friend of the court articulate a position that may generally be aligned with one or another side of the argument. The submission of the respondents that a "friend of the court" must be neutral, abstract and objective refers to a restricted notion of the amicus curiae that has long been rejected. In the United States, the author Samuel Krislov, in "The Amicus Brief: From Friendship to Advocacy" (1963) 72 Yale L. J. 694 at p. 704,

stated:

> The Supreme Court of the United States makes no pretense of such disinterestedness on the part of "its friends". The amicus is treated as a potential litigant in future cases, as an ally of one of the parties, or as the representative of an interest not otherwise represented . . . thus the institution of the amicus curiae brief has moved from neutrality to partisanship, from friendship to advocacy.

[14] While the law of Ontario has not, perhaps, expanded the role of the friend of the court this far, David Scriven and Paul Muldoon, wrote as long ago as 1985, in their article "Intervention as a Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure" (1986) 6 Advocates' Q. 448, at pp. 456-57:

> While the old case law implicitly assumes that a friend of the court cannot provide "assistance" when it intends to advocate its point of view, the language of Rule 13.02 appears to deny this traditional argument. The rule states that any person may intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. The term "argument" literally means to "persuade by giving reasons" and thus directly imports the notion of advocacy in such applications.

[15] Since the publication of this article the law of this province has developed to recognize the valid and important contribution that can be made in appropriate cases by friends of the court who may be advocates for a particular interpretation of the law. As Dubin C.J.O. succinctly stated in Peel (Regional Municipality) v. Great Atlantic & Pacific Company of Canada Ltd. (1990), 74 O.R. (2d) 164, 45 C.P.C. (2d) 1 (C.A.), at p. 167 O.R.:

> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in [page390] the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the

> applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

[16] As articulated by Dubin C.J.O., this is the test for intervention by public interest groups. I am satisfied that although the position of MADD Canada is generally aligned with the position of the plaintiffs, it can "make a useful contribution" to the argument of the issues before the court. Further, I am satisfied that intervention by MADD Canada will not cause injustice to the respondents. As stated by Morden J.A. in Louie v. Lastman (2001), 208 D.L.R. (4th) 380, 152 O.A.C. 341 (C.A.), at p. 343 O.A.C.:

> It is true that the intervention will expand the number of submissions to which the responding party will be obliged to reply but this, which is for the potential benefit of the court, is not an injustice. Further, having regard to the conditions I attach to the intervention order, the responding party may be compensated for any increased costs resulting from the intervention but will not be liable for costs in connection with it.

[17] While the Executive Director MADD Canada testified at trial, his testimony was restricted to the policy issues in support of recognizing a new tort, and not in relation to the underlying facts of the case. MADD Canada did not otherwise participate in the trial. Counsel for MADD Canada has stated that it will neither challenge the factual findings of the judge nor take any position as to the merits of the case as between the parties. Its participation will be limited, essentially, to whether tortious liability of social hosts does or should exist in Canadian law. In this context, I am satisfied that the fact that the Executive Director of MADD Canada was called to testify at trial is not a bar to its participation as a friend of the court on the appeal.

[18] Accordingly, I grant leave to MADD Canada to intervene as a friend of the court on the following conditions:

(a) that it take the record as is and will not be permitted to

adduce further material;

(b) that it will not seek costs on the appeal, but that costs may be awarded against it;

(c) that it deliver its factum, not to exceed 20 pages in length, on or before October 10, 2003;

(d) that the respondents may deliver a supplementary factum, if necessary, to respond to matters raised by the intervenor no later than October 20, 2003; [page391]

(e) that the time allocated for its oral submissions be fixed at 20 minutes.

There will be no costs of this motion.

Order accordingly.

CITATION: Angelica Choc; German Chub Choc; Caal et al. v. Hudbay Minerals Inc. et al., 2013 ONSC 998
COURT FILE NO.: CV-10-411159, CV-11-435841 & CV-11-423077
DATE: 20130214

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Angelica Choc, individually and as personal representative of the estate of Adolfo Ich Chamàn, deceased, Plaintiffs

AND:

Hudbay Minerals Inc., HMI Nickel Inc. and Compañía Guatemalteca de Níquel S.A., Defendants

German Chub Choc, Plaintiff

AND:

Hudbay Minerals Inc., and Compañía Guatemalteca de Níquel S.A., Defendants

Margarita Caal Caal, Rosa Elbira Coc Ich, Olivia Asig Xol, Amalia Cac Tiul, Lucia Caal Chun, Luisa Caal Chun, Carmelina Caal Ical, Irma Yolanda Choc Cac, Elvira Choc Chub, Elena Choc Quib and Irma Yolanda Choc Quib, Plaintiffs

AND:

Hudbay Minerals Inc. and HMI Nickel Inc., Defendants

BEFORE: Carole J. Brown J.

COUNSEL: *Cory Wanless*, for the Plaintiff

Robert S. Harrison and Christopher Rae, for the Defendants

Paul Champ and Anna Shea (articling student), for the Moving Party

HEARD: February 13, 2013

ENDORSEMENT

[1] The moving party, Amnesty International ("Amnesty"), brings this motion for an Order granting it leave to intervene in three related actions brought by the individual plaintiffs, Mayan Q'eqchi' individuals from Guatemala, who claim alleged human rights abuses committed against them by the subsidiaries of Canadian mining companies. Amnesty seeks to intervene with respect to identical motions brought by the defendants in each of these cases, in which the

defendants seek to dismiss the claims against them as disclosing no reasonable cause of action or, alternatively, to stay the claims on the basis of *forum non conveniens*. I was advised, at the hearing of the motion for leave to intervene, that the second Order sought, namely a stay of the claims on the basis of *forum non conveniens* is no longer being pursued by the defendants. Pursuant to the Order of Justice Archibald, the three motions are to be heard together on March 4 and 5, 2013 and, accordingly, there is urgency to this motion to intervene.

[2] Amnesty submits that it only wishes to intervene to provide the court with a perspective largely drawn from its international experience in the field of international human rights and its involvement in the development of international legal standards, norms and principles in the context of transnational corporate responsibility, and wishes to speak to the issues of the existence and/or extension of a duty of care in the circumstances of this case, which involves a Canadian parent corporation and human rights abuses allegedly perpetrated by its subsidiary as against Guatemalan individuals in a foreign conflict-affected area, namely Guatemala.

[3] Amnesty does not seek to intervene or make any submissions with respect to the evidence to be adduced nor with respect to the factual matrix with respect to the motions.

[4] Amnesty states that it has been involved with and will be able to assist the court with international human rights law and norms which may be of assistance to the court in considering the issues involved in this litigation and these motions. It submits that it has significant experience in and has previously intervened on international human rights issues in numerous cases, and can provide a unique perspective regarding the issue of duty of care in this action. It submits that it can provide a perspective different from the perspective of the parties to the action, given its particular experience and expertise regarding the development of international standards and norms as related to international businesses, related human rights abuses, and accountability of transnational businesses, as well as access to justice for victims of business-related human rights abuses in conflict-affected areas.

Amnesty indicates that these issues have been addressed in several international fora including the UN, through the specially appointed UN Special Representative on the Issue of Human Rights and Transnational Corporations and through the International Court of Justice, in cooperation with international corporations, and that it will be able to assist the Court with respect to these international developments, standards and norms, as well as with respect to international jurisprudence which may be of assistance to the court's considerations and deliberations regarding the duty of care and policy considerations. The evidence indicates that Amnesty was consulted by the United Nations Special Representative on the Issues of Human Rights and Transnational Corporations with respect to the development of the said standards, norms and principles.

Law and analysis

[5] Pursuant to Rule 13.02 of the *Rules of Civil Procedure*, any person may, with leave of the judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

[6] While Rules 13.01 and 13.02 refer to intervention in "a preceding", which is defined in the *Rules* as an action or application, where a motion could result in a judgment disposing of an action, as is the case here, it may be considered to be more in the nature of a "proceeding within a preceding" than a mere interlocutory motion, and may be an appropriate case to grant intervenor status: *Trempe v Reybroek*, [2002] O. J. No. 369, 50 7O. R. (3d) 76. The onus is on the party requesting leave for intervention to establish that its presence in the proceedings can assist the court in determining the issues at bar: *M v H*, [1994] O. J. No. 2000 (Ont. Ct. (Gen. Div.)), paragraph 48. As established in the case law, the overarching principle for any proposed intervention, in any case, including constitutional, Charter and other cases, is that the court should consider the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to issues in the motion or proceeding without causing interference to the immediate parties: *Bedford v Canada (Atty. Gen.)*, [2009] O.J. No. 3881, 2009 ONCA 669 (Ont. C.A.).

[7] Where litigation in which the intervention is sought is a private dispute, rather than a public prosecution pitting an individual against the state, the standard to be met by the proposed intervenor is more onerous or more stringently applied. This more onerous threshold may be softened somewhat where issues of public policy arise: see *Authorson (Litigation guardian of) v Canada (Atty. Gen.)*, [2001] O. J. No. 2768, 9 C P.C. (5th) 218 (Ont. C.A.); *Jones v Tsige*, [2011] O. J. No 4276, 106 O. R. (3d) 721 (Ont. C.A).

[8] Amnesty submits that because of its long international experience and involvement in protection of international human rights, it will be able to provide a useful contribution with respect to the issues involved in the motions. It argues that given the transnational aspects of these actions, it should be permitted to intervene despite the fact that these actions involve private individuals, albeit regarding alleged international human rights abuses. It argues that it will not involve itself in the evidence and factual matters particular to the cases, and therefore will not unduly interfere in or delay the matters.

[9] Counsel for the plaintiffs made brief submissions. He argued that in his submissions on the motions to be heard March 4 and 5, 2013, he will, on behalf of the plaintiffs, focus on common law principles and not international human rights law and norms. Accordingly, he submitted that Amnesty would be able to bring a unique perspective on the issues, which would be of benefit to the Court.

[10] Counsel for the defendants argues that these are not appropriate matters for intervention, as they relate to purely private disputes. He further argues that intervention in these cases will be an imposition on his clients, the defendants.

[11] Counsel for the defendants argues that Amnesty cannot provide a unique perspective. He further argues that Amnesty is not impartial as regards the lawsuits. I note that the role of *amicus curiae* has evolved from that of a neutral, objective person making submissions to the court. A friend of the court need not be "impartial", "objective" or "disinterested" in the outcome of the case. The courts have recognized a valid contribution may be made in appropriate cases by intervenors who advocate a particular interpretation of the law, or bring a certain perspective, albeit not neutral. The fact that the position of a proposed intervenor is generally aligned with the

position of one of the parties is not a bar to the intervention if the intervenor can make a useful contribution to the analysis of the issues before the court: *Oakwell Engineering Ltd v Enernorth Industries Inc.,* [2006] O. J. No. 1942 (Ont C.A). Further, the defendants submit that Amnesty has a corporate accountability agenda regarding alleged human rights abuses involving transnational corporations and should not be permitted to intervene and use this litigation as a platform. Finally, the defendants argue, in the alternative, that if intervention is granted, the intervenor should be limited with respect to the length of factum and oral submissions.

[12] I am satisfied that Amnesty has discharged its onus to establish that its presence can assist the court in determining certain of the issues in the motions, and in bringing to the attention of the court considerations of an international nature regarding the issues in play in these cases. I am satisfied that it can bring a perspective different from that of the parties, particularly given its expertise in the areas of international human rights abuse, international and transnational business accountability, and as a result of its involvement in and consultation with the UN Special Representative on the Issue of Human Rights and Transnational Corporations. Given that Amnesty International will not be involved in any of the evidentiary or factual aspects of the cases, I do not find that intervention by Amnesty will cause undue disruption or delay in the motions. Given that Amnesty will only be involved in providing a different view with respect to the legal considerations to be had in determining the issues in the motions, there will be no opportunity for it to use these motions as a "political platform" as argued by the defendants. While the actions involve private disputes, namely actions involving individuals and an international Corporation, with operations in the plaintiffs' home state, the issues involved have international, transnational and public policy overlays which make them appropriate for intervention by Amnesty, which, I find, can make a useful legal contribution.

[13] Considering the issues raised in the pleadings, the nature of the three cases, and the nature of the interventions sought to be made by Amnesty, I grant leave to Amnesty to intervene. The intervention will be limited strictly to making submissions with respect to the issues of law, and particularly international law, standards and norms concerning the existence or scope of the duty of care.

[14] Amnesty shall have the right to serve and file a factum limited to 15 pages by February 20, 2013 and to make oral submissions in the defendant's motion to dismiss or stay the within actions limited to 30 minutes.

[15] I make no order for costs. Each party is to bear its own cost of this motion to intervene.

Carole J. Brown J.

Date: February 14, 2013

CITATION: Working Families Ontario v. Ontario, 2021 ONSC 3652
COURT FILE NO.: CV-18-590584
DATE: 20210519

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WORKING FAMILIES ONTARIO, PATRICK DILLON, PETER MACDONALD, THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO, FELIPE PAREJA, THE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION AND ON BEHALF OF THE MEMBERS OF THE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION, THE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION AND LESLIE WOLFE, Applicants

– and –

THE ATTORNEY GENERAL OF ONTARIO and THE CHIEF ELECTORAL OFFICER OF ONTARIO**,** Respondents

– and –

THE CANADIAN CIVIL LIBERTIES ASSOCIATION**,** Moving Party (Proposed Intervenor)

BEFORE: E.M. Morgan, J.

COUNSEL: *Colin Feasby, Lindsay Rauccio, Graham Buitenhuis, Stephen Armstrong*, for the Moving party

Yashoda Rangangathan and David Tortell, for the Respondents

HEARD: Motion in writing

LEAVE TO INTERVENE

[1] The Canadian Civil Liberties Association ("CCLA") brings this motion under Rule 13.02 of the *Rules of Civil Procedure* to intervene in this Application as a friend of the Court. The Respondents oppose the intervention on the grounds that it will not provide a perspective on the issues that is sufficiently distinct from that of the Applicants in the now consolidated Application.

[2] The underlying Application seeks to have certain provisions of the *Election Finances Act*, RSO 1990, c. F.7, as amended by Bill 254 (the "EFA"), declared unconstitutional as being contrary to ss. 2(b) and (d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 12 (the "Charter"). The Application

contends that the EFA offends freedom of expression and association by expanding the regulation of third-party political advertising in a number of ways. These include, among other things, a new restriction of political expression for up to a year preceding a provincial election and a limitation on collaboration between parties in respect of political advocacy.

[3] It is well established that the factors to examine on a request to intervene include: (a) the nature of the case and issues involved; (b) the likelihood that the proposed intervener can make a useful and distinct contribution to the case; and (c) whether the intervention will cause any injustice to the parties: *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 OR (2d) 164, 167 (CA); *Bedford v. Canada (Attorney General)*, 2011 ONCA 209, at para 8.

[4] I will delve only briefly into the extensive history of the CCLA in respect of the issues at stake in the present Application. This Court has previously observed that "[t]he [CCLA], a national organization created in 1964, actively promotes respect for and the observance of fundamental human rights and civil liberties": *Corporation of the Canadian Civil Liberties Association v. Ontario (Minister of Education)* (1988), 64 OR (2d) 577. For present purposes, suffice it to say as the Court of Appeal has that the CCLA "has substantial experience in promoting and defending the civil liberties of Canadians": *Tadros v. Peel Regional Police Service*, 2008 ONCA 775, at para. 3. The defense of civil liberties and constitutional rights is not just one of the CCLA's various interests; it is its very mission: *Canadian Civil Liberties Association v. Ontario (Attorney General)*, 2020 ONSC 4838, at para. 27.

[5] The CCLA has frequently been granted intervenor status in this Court and others to make submissions on matters touching on those within its expertise. In cases ranging from *Nova Scotia Board of Censors v. McNeil*, [1976] 2 SCR 265 to *R. v. Keegstra*, [1990] 3 SCR 697 to *Lavigne v. Ontario Public Service Union*, [1991] 2 SCR 211 to *Little Sisters Book & Art Emporium v. Canada (Attorney General)*, [2000] 2 SCR 1120 to *Groia v. Law Society of Ontario*, [2018] 1 SCR 772, to name only a few out of literally hundreds of cases, it has contributed through its interventions to the development of Canadian law on civil liberties generally and on freedom of expression and association in particular. Even more specifically, it has been an intervenor in a number of prominent cases dealing with the interface between electoral regulation and political expression: *Ramsden v. Peterborough (City)*, [1993] 2 SCR 1084; *BC Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, [2017] 1 SCR 93.

[6] I have no hesitation in concluding that the nature of the present Application and the issues involved are well within the CCLA's area of interest and expertise. Given its history of interventions, there is little doubt that it will be able to make cogent submissions on the issues of political expression, association, and electoral regulation that this Application will raise. It is a public interest advocacy group whose participation as friend of the Court is unlikely to cause any particular prejudice to the Respondents whose position it opposes. The only question is the one raised by counsel for the Respondents – i.e. whether its submissions will be sufficiently distinct from those of the other parties to the Application.

[7] Courts have noted in previous cases that some degree of overlap between the parties and a public interest intervenor is to be expected. This is particularly the case in constitutional cases where, like in the present Application, there are few underlying factual issues to be resolved by the Court: *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541, at para. 41.

[8] The fact that the CCLA and the parties will predictably cover some of the same topics or rely on the same authorities relevant to those topics, does not alone determine whether the proposed intervenor can offer a fresh perspective. As was recently held in *Dorsey, Newton, and Salah v. Attorney General of Canada,* 2021 ONSC 2464, at para. 25, "Notwithstanding their reliance on the same evidence to support the same result, I accept the submission of the [proposed intervenor] that the correct resolution of this set of test cases will be assisted by submissions that provide a broader understanding of the historical, legal, policy and practical contexts that surround [the challenged government action].

[9] Counsel for the CCLA submit that in Charter cases, it is especially important for the Court "to receive a diversity of representations reflecting the wide-ranging impact of its decision": *Ontario (Attorney General) v. Dieleman* (1993), 16 OR (3d) 32, 37 (Gen. Div.). In its materials filed in support of this motion, the CCLA's affiant points out that the CCLA has on two separate occasions made submissions to committees of the Ontario legislature respecting the changes to the EFA with respect to third-party advertising, the very changes at issue in this Application. While those submission may not have been required by the legislature, there is nothing to indicate that they were not useful to the committee's deliberations. The same can be said about the CCLA's proposed submissions here.

[10] The CCLA can be expected to bring a useful and different perspective to this Application by addressing the issues from the viewpoint of a national civil liberties organization concerned about the larger development of the law as it affects political expression. It is not, like the Applicants, a trade union (or group associated with a trade union) that wants to express itself in the politics of an upcoming election; its interest is discernably broader than that. Counsel for the CCLA explains that it seeks to place the present Application within an overall policy context that considers the appropriate balance between free speech and fair elections.

[11] The CCLA is presently the only proposed intervenor in the Application. This is not a case where there is a 'pile-on' of public interest groups intervening on one side of the issues. Likewise, it is not a case where the proposed intervention will jeopardize the timetable set out for the case. The hearing is set to proceed on June 2-3, 2021, and nothing in the CCLA's motion indicates that its participation will impact on those dates. Moreover, the CCLA's involvement will be limited to legal submissions and will not include the submission of any new evidence, and thus will not greatly expand the task before the Court.

[12] I see a potential for enriching the legal argument, and see no potential for prejudice, in granting the CCLA the status that it requests in this Application. In my view, to do so will serve to enhance the public interest in resolving the Charter issues at stake.

[13] The CCLA is granted leave to intervene in this Application and to file a factum not exceeding 20 pages. It will have the opportunity to make oral submissions not to exceed 20 minutes at the hearing of the Application.

[14] As a friend of the Court, the CCLA is not to seek costs from any party to the Application, nor will it be liable for costs to any party.

Morgan J.

Date: May 19, 2021

COURT OF APPEAL FOR ONTARIO

CITATION: P.S. v. Ontario, 2014 ONCA 160

DATE: 20140228

DOCKET: M43397/M43413/M43422 (C57256)

Laskin J.A. (in Chambers)

BETWEEN

P.S.

Applicant (Appellant)

and

Her Majesty the Queen in Right of Ontario, Centre for Addiction and Mental Health, Royal Ottawa Health Care Group, St. Joseph's Health Care, London, Attorney General for Ontario and Waypoint Centre for Mental Health Care

Respondents (Respondents in Appeal)

Karen R. Spector, for the moving party the Mental Health Legal Committee

David Morritt and Eric Morgan, for the moving party the Canadian Civil Liberties Association

Mercedes Perez and Karen Steward, for the appellant P.S.

Hart Schwartz and Joshua Hunter, for the respondents Her Majesty the Queen in Right of Ontario and the Attorney General for Ontario

Susan Adam Metzler and Kathryn Frelick, for the respondent Waypoint Centre for Mental Health Care

Heard: February 7, 2014

Laskin J.A.:

[1] The Canadian Civil Liberties Association ("CCLA") and the Mental Health Legal Committee ("MHLC") seek leave to intervene as friends of the court in a forthcoming appeal, *P.S. v. Ontario*. The appellant, Mr. S., supports the motions to intervene. The respondents, Her Majesty the Queen in Right of Ontario, the Attorney General of Ontario and the Waypoint Centre for Mental Health Care, oppose them. For the following reasons, I grant the motions.

FACTS

[2] Mr. S. has been detained as an involuntary patient at Waypoint under the *Mental Health Act*, R.S.O. 1990 c. M.7 ("MHA"), since 1996. In 2007, he brought an application for *habeas corpus* seeking a declaration that Waypoint had breached his rights under ss. 7, 9, 10(a), 12 and 15(1) of the *Charter*, and seeking remedies for those infringements under s. 24(1). In 2011, Mr. S. filed an amended notice of application seeking a declaration that the involuntary detention and review provisions in ss. 20(1), 20(3), 20(4), 20(5), 34, 39(1), 41(1), 41(2) and 41(3) of the MHA are inconsistent with ss. 7, 9, 12 and 15(1) of the *Charter* and are of no force and effect.

[3] In 2013, the application was dismissed, except for a finding that Mr. S.'s section 15(1) equality right was infringed by Waypoint's predecessor institution, the Mental Health Centre Penetanguishene: *P.S. v. Ontario*, 2013 ONSC 2970.

[4] Mr. S. appeals that decision. His appeal has been perfected but has not been scheduled. Mr. S. has asked that the appeal be heard by a five-judge panel so that the court may revisit its decision in *Starnaman v. Penetanguishene Mental Health Centre* (1995), 24 O.R. (3d) 701, motion to extend time in which to apply for leave dismissed, [1996] S.C.C.A. No. 129. In that case, the court held that the involuntary detention scheme in the MHA does not infringe ss. 7 or 12 of the *Charter*. In the decision under appeal, the application judge cited *Starnaman* as having "answered conclusively" that the MHA does not infringe the *Charter* and that it complies with the procedural component of the principles of fundamental justice: at para. 43.

THE MOTIONS

(1) The test for intervention as a friend of the court

[5] Rule 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permits a non-party to intervene as a friend of the court "for the purpose of rendering assistance to the court by way of argument." The test for intervention is set out in the familiar words of Dubin C.J.O. in *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164, at p. 167:

Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the

applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

[6] In a *Charter* case, the proposed intervener usually has to establish at least one of three criteria: it has a real, substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with a special expertise and a broadly identifiable membership base: *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, 98 O.R. (3d) 792, at para. 2.

[7] On these motions, the respondents acknowledge that the proposed interveners meet at least one of these criteria. However they submit that the proposed interveners both fail to meet the final prong of the test set out in *Peel*: the CCLA will not make a useful contribution because its arguments are duplicative of the appellant's; and the MHLC would cause injustice because it proposes to raise a new issue not raised before the application judge.

(2) The CCLA's motion

[8] The CCLA submits, and the respondents acknowledge, that it has specific expertise on several of the issues raised on this appeal: ss. 7, 9, 12 and 15 of the *Charter*; the intersection between different *Charter* rights; the application of the *Charter* in various contexts; and the treatment and accommodation of mentally ill people.

[9] If granted leave to intervene, the CCLA proposes to make three submissions. First, the MHA violates ss. 7 and 9 of the *Charter* because it lacks sufficient safeguards, oversight and opportunities to review a person's involuntary detention. Second, a failure to accommodate pre-lingual deafness (as alleged in Mr. S.'s case) violates ss. 7, 9, 12 and 15. Third, the *Charter* applies to non-governmental mental health facilities and the government cannot evade its *Charter* obligations by divesting or outsourcing its functions to a corporation such as Waypoint.

[10] The respondents counter that the CCLA will not make a useful contribution to the appeal because its proposed submissions duplicate Mr. S.'s (on the issue of the alleged *Charter* breaches) or else are not contested (on the issues of whether the *Charter* applies to Waypoint and whether it has a duty to accommodate Mr. S.'s disability).

[11] I am satisfied that the CCLA will make a useful contribution to the court's understanding of the issues and therefore should be granted leave to intervene as a friend of the court. As a national organization concerned with the protection of civil liberties generally, the CCLA can offer its views on the systemic implications of the outcome of the case. This is a perspective that is not otherwise reflected in the appellant's submissions. I note that at para. 51 of his reasons, the application judge held:

The Applicant asserts that the very fact that he has been housed in a maximum security facility for sixteen years is proof that the MHA is not designed to handle long term detainees. This argument overlooks the more fundamental question of how other long term detainees have fared under the same scheme. The Applicant's experience of long term detention under the MHA is

relevant to the court but, in the absence of other comparable cases, only limited use should be made of it within the framework of a s. 52 analysis.

[12] I am also satisfied that there are live issues between the parties about the *extent* to which the *Charter* applies to Waypoint and about the measures it must take to accommodate Mr. S.

[13] Although I agree that the potential exists for some overlap between the CCLA's arguments and those of Mr. S., Mr. Morritt has undertaken to ensure that his submissions will not be repetitive. That undertaking should be sufficient to alleviate Ontario's concerns about the CCLA's intervention.

(3) The MHLC's motion

[14] Like the CCLA, the MHLC has both a substantial interest and special expertise in the issues raised on this appeal.

[15] The MHLC's proposed submissions focus on what it says is a "legislative gap" that arises as a result of the Consent and Capacity Board's inability to supervise the terms of an involuntary patient's detention under the MHA. The MHLC submits that, under the current regime, people such as Mr. S. have no recourse to challenge the terms of their involuntary detention other than though the lengthy, complex and expensive process of a *habeas corpus* application in the Superior Court. This, the MHLC submits, poses significant barriers to access to justice – yet access to justice is "essential for compliance with the Rule of Law and Canada's international law commitments."

[16] The MHLC submits that the legislative gap can be cured in one of two ways: (i) by conferring s. 24(1) *Charter* jurisdiction on the Board, in accordance with the decision in *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; or (ii) by striking down the challenged provisions of the MHA so that the Act can be amended to provide the Board with the necessary powers of oversight.

[17] The respondents oppose the MHLC's intervention for two reasons. First, they submit that the MHLC proposes to raise issues that were not raised in the court below. They say that nowhere in Mr. S.'s lengthy factum on the application did he raise the issues of whether the Board should be granted s. 24(1) jurisdiction or whether the rule of law and Canada's international law commitments require access to an administrative tribunal rather than the ordinary courts. Second, Ontario submits that it would be prejudiced if the MHLC were permitted to raise those issues for the first time on appeal because it might have chosen to lead evidence on these issues if they had arisen on the *habeas corpus* application.

[18] I draw a distinction between the MHLC's arguments about the potential s. 24(1) jurisdiction of the Board, and about the rule of law and Canada's international commitments. I agree with counsel for the MHLC that the rule of law and Canada's international commitments are not new, stand-alone issues but rather are interpretive tools to inform the court's analysis of the principles of fundamental justice: see *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at paras. 35-39; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 50-52; and Ruth

Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007), at pp. 34-35, 238-44. Submissions on these interpretive tools provide the sort of distinct perspective that makes intervention worthwhile for the court.

[19] Whether the MHLC should be permitted to argue that the Consent and Capacity Board has s. 24(1) jurisdiction is a more difficult question. On my reading of the materials, Mr. S. did not take the position that the Board has, or should be deemed to have, the power to grant remedies under s. 24(1). On the contrary, the crux of Mr. S.'s argument both before the application judge and on appeal is that the MHA scheme is unconstitutional precisely because the Board's jurisdiction is limited to affirming or rescinding a person's involuntary status (and since 2010, ordering a transfer to a different facility); it has no power to supervise the terms of the person's detention with a view to maximizing the person's liberty. It appears to be implicit in his argument that the Board also lacks the power to grant s. 24(1) remedies for individual breaches of the *Charter*.

[20] Viewed in this way, I am not persuaded that the MHLC's submissions on the Board's potential s. 24(1) jurisdiction raise a new issue. Rather, those submissions arise logically out of the issues already squarely before the court on the appeal. Mr. S.'s primary submission is – and has consistently been – that the involuntary detention and review scheme created by the MHA is wholly inadequate to address the needs of long-term involuntary detainees like himself. To analyse that submission, the court will have to consider the scheme as a whole. That may include a consideration of any remedial powers the Board does or does not have to redress *Charter* breaches.

[21] This is not a case like *Bedford v. Canada (A.G.)*, 2011 ONCA 209, 231 C.R.R. (2d) 113, in which the proposed interveners sought to argue not just that Canada's prostitution laws violate ss. 2(b) and 7 of the *Charter*, as the applicants had successfully argued below, but also that the laws violate s. 15. In dismissing the motion to intervene, O'Connor A.C.J.O. noted, at para. 6, that the proposed intervention "does not merely raise an alternative legal argument in relation to the ss. 7 and 2(b) issues but rather raises an entirely new ground on which to challenge the legislation."

[22] In my view, the MHLC's submissions on s. 24(1) are in the nature of an "alternative legal argument" that relate to issues raised and decided on the *habeas corpus* application.

[23] I am also not persuaded that the respondents would suffer any injustice if the MHLC is permitted to intervene. The MHLC submits that, in the light of *Conway*, the question whether the Board has s. 24(1) jurisdiction is strictly a matter of legal argument and will not require the parties to call any new evidence. I am inclined to agree.

[24] In *Conway*, the Supreme Court set out a two-part inquiry to determine whether an administrative tribunal can grant s. 24(1) remedies, at paras. 81-82:

[T]he first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of

competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.

Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function. [Citation omitted.]

[25] The Attorney General submits it might have chosen to lead evidence on the legislative history of the Board to establish that the legislature intended it to hold hearings concerning specific narrow legal issues in a very short time frame. In my view, these arguments go to the Board's "statutory mandate, structure and function", all of which can presumably be gleaned from an examination of the statute itself and relevant case law. At this stage, I do not anticipate a need for the parties to add to the record to address the *Conway* inquiry. However, if Ontario believes it is necessary to file fresh evidence, I will remain seized of the file and will case manage this or other issues that arise.

CONCLUSION

[26] The CCLA and MHLC are granted leave to intervene. They shall accept the record as it stands, subject to any further order of the court. They may each file a factum of not more than 20 double-spaced pages, to be filed by March 28, 2014. They will each be allocated 20 minutes for oral argument.

[27] The respondents are directed to file their factums by May 30, 2014.

"John Laskin J.A."

February 27, 2014

Citation: Reference Re Earth Future Lottery (P.E.I.) 2002 PESCAD 8

Date: 20020424
Docket: S1-AD-0923
Registry: Charlottetown

PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - APPEAL DIVISION

In the Matter of a Reference from the Lieutenant Governor in Council pursuant to section 18 of the *Supreme Court Act*, R.S.P.E.I. 1988, Cap. S-10, regarding the Earth Future Lottery and section 207 of the *Criminal Code of Canada*, R.S.C. 1985, c.Cap.C-46

Before: The Honourable Chief Justice G.E. Mitchell
The Honourable Mr. Justice J.A. McQuaid
The Honourable Madam Justice L.K. Webber

Cyndria L. Wedge	Counsel for the Attorney General of Prince Edward Island
Stanley W. McDonald and Roger R. LeClair	Counsel for the Attorney General of Canada
Kenneth L. Godfrey and Pierre LaPointe, Q.C.	Counsel for the Attorney General of Québec
Eugene P. Rossiter, Q.C. and Marlys A. Edwardh	Counsel for the Earth Fund/Fond Pour La Terre
Mark Ledwell and Michael L. Phelan	Counsel for Interprovincial Lottery Corporation, Ontario Lottery and Gaming Corporation, Loto-Québec, Western Canada Lottery Corporation and British Columbia Lottery Corporation
John A. Carr, Q.C. and Maria C. MacDonald	Counsel for solicitor for The Prince Edward Island Wildlife Federation and the P.E.I. Council of the Atlantic Salmon Federation
Place and Date of Hearing	Charlottetown, Prince Edward Island January 28, 29, and 30, 2002
Place and Date of Judgment	Charlottetown, Prince Edward Island April 24, 2002

Written Reasons by:
The Honourable Chief Justice G. E. Mitchell

Concurred in by:
The Honourable Mr. Justice J. A. McQuaid
The Honourable Madam Justice L. K. Webber

Citation: Reference Re Earth Future Lottery (P.E.I.) 2002 PESCAD 8

Date: 20020424
Docket: S1-AD-0923
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In the Matter of a Reference from the Lieutenant Governor in Council pursuant to section 18 of the *Supreme Court Act*, R.S.P.E.I. 1988, Cap. S-10, regarding the Earth Future Lottery and section 207 of the *Criminal Code of Canada*, R.S.C. 1985, c.Cap.C-46

(21 pages)

Before: Mitchell, C.J.P.E.I.; McQuaid, and Webber JJ.A.
Heard: January 28, 29, and 30, 2002
Judgment: April 24, 2002

Reference - S.18 Supreme Court Act (PEI) - request for opinion of the court of appeal on legality of proposed lottery scheme - whether lawful under s. 207(1)(b) of the Criminal Code.

The Court of Appeal stated that in its opinion the proposed lottery scheme as described in the statement of facts presented to the court would be contrary to the gaming provisions of the ***Criminal Code***.

CASES CONSIDERED: R. v. Mackenzie Securities Ltd. et al, [1966] 4 C.C.C. 29 (Man. C.A.); ***R. v. Trudel, ex parte Horbas and Myhaluk***, [1969] 3 C.C.C. 95 (Man. C.A.); ***R. v. Libman***, [1985] 2 S.C.R. 178 (SCC)

STATUTES CONSIDERED: Supreme Court Act, R.S.P.E.I. 1988 Cap S- 10, S.18; ***Criminal Code of Canada***, ss. 206, 207; ***Interpretation Act*** R.S.C., C. I-23, s. 12

Cyndria L. Wedge, for the Attorney General of Prince Edward Island
Stanley W. McDonald and Roger R. LeClair, for the Attorney General of Canada
Kenneth L. Godfrey and Pierre LaPointe, Q.C., for the Attorney General of Québec
Eugene P. Rossiter, Q.C. and Marlys A. Edwardh, for the Earth Fund/Fond Pour La Terre
Mark Ledwell and Michael L. Phelan, for Interprovincial Lottery Corporation, Ontario Lottery and Gaming Corporation, Loto-Québec, Western Canada Lottery Corporation and British Columbia Lottery Corporation
John A. Carr, Q.C. and Maria C. MacDonald, for solicitor for The Prince Edward Island Wildlife Federation and the P.E.I. Council of the Atlantic Salmon Federation

MITCHELL C.J.P.E.I.:

[1] The Lieutenant Governor in Council of Prince Edward Island, pursuant to its power to do so under s. 18 of the ***Supreme Court Act***, R.S.P.E.I. 1988 Cap S-10, has referred a number of questions to this court for hearing and consideration. They pertain to whether the Earth Future Lottery ("the Lottery") conducted, managed, and operated as hereinafter described by the intervener, Earth Fund/Fond Pour La Terre ("Earth Fund"), pursuant to a license granted by the Lieutenant Governor in Council would be lawful under the gaming provisions of the ***Criminal Code* .**

FACTUAL CONTEXT

[2] The reference requests the court consider and answer the questions posed in the following factual context submitted to the court by the Office of the Attorney General of Prince Edward Island:

EARTH LOTTERY REFERENCE

STATEMENT OF FACTS

1. Lottery License: On February 8, 2000 pursuant to s.207(1)(b) of the Criminal Code of Canada the Earth Fund/Fond Pour La Terre was granted a license by the Lieutenant Governor in Council of Prince Edward Island to conduct, manage and operate a lottery scheme to be known as the Earth Future Lottery from its place of business in the Province of Prince Edward Island. A copy of the Lottery License is attached hereto as Appendix 'A'.

2. Legal Opinion: Prior to issuing the Lottery License, the Lieutenant Governor in Council of Prince Edward Island did commission a legal opinion from The Honourable Charles L. Dubin, O.C., O.Ont., Q.C., LL.D. The legal opinion dated May 20, 1999 is attached hereto as Appendix 'B'.

3. Ontario Application: On September 7, 2000 the Interprovincial Lottery Corporation, Ontario Lottery and Gaming Corporation, Western Canada Lottery Corporation, British Columbia Lottery Corporation and Loto Quebec commenced an application in the Superior Court of Justice in the Province of Ontario against Earth Fund and Lottery Management (P.E.I.) Inc. The application seeks certain declarations with respect to the Earth Fund Lottery and sections 206 and 207 of the Criminal Code of Canada. The Ontario application was adjourned sine die.

THE EARTH FUND

4. The Earth Fund: The Earth Fund/Fond Pour La Terre is a Canadian non-profit, charitable corporation, incorporated under Part II of the Canadian Corporations Act, by letters patent dated August 11, 1976.

5. Charitable Objects: The objects of the Earth Fund are:

(I) To promote the preservation and enhancement of the environment for human life and well-being on Earth.

(ii) To promote, encourage and support programs and activities for the creation of greater public awareness of environmental issues to mobilize the resources of private citizens and organizations to contribute to the resolution of such issues.

(iii) To provide for the holding of educational lectures, exhibitions, public meetings, classes and conferences for the discussion of and exchange of views and dissemination of knowledge concerning matters relating to the environment.

(iv) To assist and support other organizations, citizens groups and individuals with objects similar to and/or compatible with those of the Corporation.

(v) To purchase, acquire or take by gift, bequest or donation for the purposes of the Corporation and its objects, but for no other purpose, and to sell, lease or otherwise dispose of, and subject to the provisions of Section 65 of the Canada Corporation Act, to mortgage any real or personal property. Provided that if at any time the Corporation shall dissolve or cease to exist the remaining funds and property of the Corporation, after the payment of all of its debts and liabilities, shall be distributed or disposed of to one or more charitable organizations in Canada, the objects of which are as nearly as may be similar to those set forth herein.

(vi) To enter into any arrangements with any authorities, public or academic or otherwise, that may seem conducive to the Corporation's objects or any of them and

to obtain from such authority, any rights, privileges, and concessions which the Corporations may think it desirable to obtain and to carry out, exercise and comply with any such arrangements, rights, privileges, and concessions.

(vii) To use, apply, give, accumulate or distribute from time to time all or part of the income of the Fund to or for any Canadian charitable organization.

6. Additional Objects: By Supplementary Letters Patent issued by the Government of Canada on June 14, 1999, the objects of the Earth Fund were amended and the Corporation was empowered:

(viii) To raise funds by any means including an on-going global or other lottery, and to directly or indirectly fund projects relating to the objects of the Corporation and the global environment, ecology and humanitarian activities relating to health, habitat, migration of refugees or other population groups, natural or non-natural catastrophes, health and welfare of children and environmentally sustainable development, on its own behalf or through its charitable agents or beneficiaries.

7. Charitable Beneficiaries: Other charitable beneficiaries of the Earth Fund and the Earth Future Lottery will include:

WORLD CONSERVATION UNION (IUCN). ... MEDECINS SANS FRONTIERES (MSF). ... HUMA
INTERNATIONAL AND HUMANE SOCIETY OF THE UNITED STATES. .. INTERNATIONAL COUNCIL FOR LOCAL ENVIRONMENTAL INITIATIVES (ICLEI). ... EARTH COUNCIL. ... and an ENVIRONMENTAL FOUNDATION OF P.E.I. ...

8. Charity Registration: On June 21, 2001 the Earth Fund/Fond Pour Le [sic] Terre was registered as a Charity pursuant to the *Charities Act*, R.S.P.E.I. 1988, C-4.

9. License Requirements: By Order of Executive Council dated March 27, 2001 the Lieutenant Governor in Council did agree to amend the Earth Fund License issued on February 8, 2000 to eliminate the requirement for charitable status under the *Income Tax Act (Canada).*

EARTH FUTURE LOTTERY

10. Earth Future Lottery: The Earth Future Lottery is patterned after other charitable lotteries licensed and operated in Canada. It will be a monthly, limited-subscription, draw lottery based in Prince Edward Island in which a maximum of between 200,000 to 300,000 tickets will be sold for each draw at a purchase price of US$50 and prizes will range from US$1,000 to US$1,000,000. The Earth Fund proposes to solicit offers to purchase tickets and accept and fulfill those subscriptions from permitted purchasers via its Internet server located in Prince Edward Island and by means of toll-free or other telephone lines.

11. Advertising and Promotion: The Earth Fund, in accordance with the License, intends to advertise and promote the Lottery outside of Prince Edward Island by means of the Internet, newspapers, radio, television and other forms of advertising and to invite prospective permitted purchasers from outside of Prince Edward Island to visit the Lottery website via the Internet to offer to purchase a ticket in the lottery, in the same manner that lottery schemes conducted, managed and operated by provincial governments in other provinces pursuant to Section 207(1)(a) advertise and promote those lottery schemes outside their respective provinces. For example, the lottery schemes known as the Windsor Casino and Casino Niagara, conducted, managed and operated by the Ontario Lottery and Gaming Corporation, pursuant to Section 207(1)(a) of the Criminal Code (Canada) are regularly advertised and promoted outside of the province of Ontario by means of the Internet, newspapers, radio televisions, and outdoor billboards and other forms of advertising in a variety of locations including the states of New York, Ohio, Pennsylvania, and Michigan.

12. Conduct and Management: The Internet server, which connects the lottery by telephone lines to the Internet or the World Wide Web, hosts the Earth Future Lottery web page or web site through which the lottery may be accessed by means of its unique web address or 'Uniform Resource Locator' (URL), **[http//www.EarthFutureLottery.com/]** which is similar in function to a telephone number. This server which is the means of communications by which all lottery related sales transactions will be conducted and managed, will be physically located in the secure data-centre facilities of Island Tel Advanced Solutions, in the city of Charlottetown, P.E.I. Access to the service will be available through the Internet to persons beyond the Province of Prince Edward Island. It is through this mechanism of communications that the invitation to treat is originated and the offer to purchase accepted and the contract made.

13. Lottery Operations in P.E.I.: The running and coordination of all of the lottery operations, including staffing, administration, the location, management and operation of the Internet server, validation of the purchaser's credit card, recording and registration of the ticket holders identity in the books and records of the Lottery, acceptance of the offer to purchase a ticket, telemarketing and customer service operations, draws of the winning ticket numbers, deposit and maintenance of the prize funds and the payment of prizes will all take place in Prince Edward Island.

14. Head Office of Earth Fund and Earth Future Lottery Offices: The head office of the Earth Fund and the offices of the Earth Future Lottery are located at 9 Brook Street, P.O. Box 1119, Montague, Kings County, Prince Edward Island, C0A 1R0.

15. Purchase Process: Prospective purchasers are invited to electronically attend at the lottery's website through its server located in Prince Edward Island and to offer to subscribe for a ticket. Any person who (a) is of the age of majority as defined in the Age of Majority Act, R.S.P.E.I. 1988, Cap. A-8; (b) satisfies the conditions of purchase; (c) agrees to comply with the Rules and Regulations of the Lottery; and (d) agrees to purchase a ticket through the Internet or other lawful means of communications, may offer to purchase a ticket. A prospective purchaser must provide the Lottery staff in Prince Edward Island via the Internet server in Charlottetown with their name, proof of age and other identifying information, together with their credit card number by which payment of the purchase price of US$50 per ticket is to be made, and agree to be bound by and comply with the Rules and Regulations. Once this information and the eligibility of the purchaser has been confirmed and the credit card number validated, the Lottery may, in its discretion, accept the offer. If the offer is accepted a ticket number will be issued by the Lottery from its data base in Prince Edward Island and registered against the player's name in the Register of Ticket Holders in the books and records of the Lottery in Prince Edward Island thereby completing the purchase transaction. Supplementary confirmation of that purchase and registration will be communicated to the purchaser via email from Prince Edward Island to the address provided at the time of registration.

16. Audit and Control: Audit control and security for the Lottery will be provided by KPMG, an international public accounting firm with extensive gaming industry

experience. ...

17. Rules and Regulations: The Rules and Regulations of the Lottery made pursuant to the License and approved by the Lieutenant Governor in Council of Prince Edward Island will be prominently displayed on the Earth Future Lottery website and form part of any lottery contract.

18. Compliance with Rules and Regulations: As part of the purchase process and before being allowed to proceed further with the transaction, each purchaser is asked to review the Rules and Regulations, and in accordance with Section 3 of the Rules and Regulations, must specifically agree to comply with, abide by and be bound by the Rules and Regulations before submitting his or her offer to purchase. The Rules and Regulations also provide that the contract of purchase and sale of the ticket shall be completed only upon the acceptance of the subscription by the Lottery as evidenced by the registration of the participant's name and address and other identifying information against the corresponding ticket number and draw date in the Books and Records of the Lottery in Prince Edward Island.

19. Governing Law: Both Section 3.3 of the Rules and Regulations and Section 2.3 of the License, provide that the transaction of purchase and sale shall be deemed to occur within the Province of Prince Edward Island and shall be governed by the laws in effect in Prince Edward Island. Section 12.2 of the Rules and Regulations further provides that the transaction of purchase or sale of all tickets of the lottery shall be deemed to occur within the Province of Prince Edward Island and shall be governed by the Criminal Code (Canada) and the laws of Prince Edward Island.

20 Attornment: Section 12.3 of the Rules and Regulations provides that by subscribing for and purchasing a ticket for the Lottery, every participant attorns to the jurisdiction of the Courts of Prince Edward Island in respect of all disputes, claims, matters or things arising out of their participation or attempted participation in the Earth Future Lottery.

21. Deposit of Prize Funds: Prior to tickets being issued or made available for sale, a sum equal to the total amount of all of the prizes eligible to be awarded in any draw are required to be deposited in a special prize account in the offices of the Canadian Imperial Bank of Commerce in Charlottetown.

22. Draws and Selection Winning Ticket Numbers: On a monthly basis, or more frequently in the case of 'early bird' draws, a draw will be held in Prince Edward Island to determine the winning ticket number. No computer or random number generator or similar device will be used in the selection of the winning number or the determination of the outcome of the lottery. Winning ticket numbers will be selected using a series of five mechanical devices or drums manufactures by Smartplay International Inc., suppliers of secure drawing equipment to most state and provincial lotteries in the world. The first drum will be loaded with numbered rubber balls bearing the first two digits of all of the six-digit ticket numbers eligible for the draw. The second, third, fourth, fifth and sixth drums will be loaded with ten balls each, numbered 0 to 9, representing the third, fourth, fifth and sixth digits of all of the six digit ticket numbers eligible for the draw. Under the supervision of the independent Official Draw Supervisor appointed by the Auditor, the drums will be activated and one ball allowed to drop from each drum. The numbers to these balls, when read together from left to right, constitute the winning six-digit ticket number.

23. Payment of Prizes: Lottery staff will use this ticket number to access the Lottery records to determine the identity of the winner from the Registrar of Ticket Holders, notify him or her by email or telephone and arrange to have them claim their prize, either by direct electronic funds transfer for prizes under $25,000 or by attending personally to collect their prizes at the lottery offices in Prince Edward Island in case of larger prizes ($25,000 to $1,000,000).

24. Use of Proceeds: After the payment of prizes and the cost of operations all of the proceeds of the Earth Future Lottery (which are expected to exceed 41% of total sales and total over US$50 million per year) will be paid over to the Earth Fund to be used for charitable purposes of the Fund, its charitable beneficiaries and an Environmental Foundation created by the Government of Prince Edward Island to support environmental projects and programs in Prince Edward Island.

. . . . .

THE QUESTIONS

[3] The specific questions submitted by the Lieutenant Governor in Council are as follows:

1. Having regard to the Statement of Facts to be submitted to

the Appeal Division by the Office of the Attorney General, does the Lieutenant Governor in Council of the Province of Prince Edward Island have authority under clause 207(1)(b) of the ***Criminal Code (Canada)*** to authorize the Earth Fund/Fond Pour La Terre to conduct, manage and operate the Earth Future Lottery (hereinafter referred to as 'the Lottery') and to advertise, promote, solicit and offer for sale, and to accept and fulfill orders for tickets of subscriptions for the Lottery by means of the Internet or other lawful means of telecommunication in accordance with the License issued via Order-in-Council EC2000-72 on the 8th day of February 2000?

And more particularly having regard to the Statement of Facts and the License:

(a) will the Lottery be conducted, managed and operated in the Province of Prince Edward Island?

(b) will the Lottery be conducted, managed and operated outside the Province of Prince Edward Island? and

(c) will the contract arising out of the purchase and sale of the Lottery ticket be performed in, and governed by the laws of, the Province of Prince Edward Island?

2. Having regard to the Statement of Facts,

(a) does inviting a prospective purchaser outside of Prince Edward Island to offer to purchase a ticket by means of an Internet server located in Prince Edward Island, and accepting that offer to purchase the ticket in Prince Edward Island by means of that Internet server, constitute selling that lottery ticket

(i) in the jurisdiction in which that prospective purchaser resides, or

(ii) in Prince Edward Island? and

(b) for the purposes of clause 207(1)(e) of the ***Criminal Code (Canada)***, is a ticket offered for sale and purchased under the

circumstances described above, 'sold'

(i) in the jurisdiction in which that prospective purchaser resides, or

(ii) in Prince Edward Island? and

(c) where a lottery scheme has been licensed in Prince Edward Island pursuant to clause 207(1)(b) of the ***Criminal Code (Canada)***, is it prohibited by the ***Criminal Code (Canada)*** to advertise or publish, or cause or procure to be advertised or published, that lottery scheme outside of Prince Edward Island if all of the gaming activities relating to that lottery scheme, such as the deposit of the prizes; the acceptance of the offer to purchase a ticket; the receipt of the ticket purchase price; the allocation of the ticket number to the purchaser; the registration and retention of the ticket, ticket number and ticket holder's name in the official records of the lottery; the conduct of the draws or drawings whereby the winning ticket number is selected; and, the award and payment of the prizes, take place in or will be performed in Prince Edward Island?

3. Having regard to the Statement of Facts and clause 207(4)(c) of the ***Criminal Code (Canada)***, is the Lottery a game, proposal, scheme, plan, means, device, contrivance or operation that is operated on or through a computer, video device or slot machine, within the meaning of subsection 198(3) of the ***Criminal Code (Canada)***?

ANALYSIS

[4] This reference concerns the lawfulness of an internet lottery scheme. There is no doubt the internet age presents new challenges to the enforcement of gaming laws. There are those who argue that banning internet gaming is not realistic and that lawmakers would be better to direct their efforts toward regulating it. Some of the submissions made on this reference urged the court to consider the benefits that certain charities could derive from the Earth Future lottery proceeds. Others pointed out that a ban only results in a loss of revenue within the country because it is nearly impossible

to police internet gambling operating in the country from foreign-based sites. Still others argued that opponents of the scheme were only concerned about protecting their own market share. However, none of these submission are relevant to the task of the court. As a court our role is to advise the Lieutenant Governor in Council whether the internet lottery scheme described in the statement of facts would be lawful under the present state of the law. It is not for the court to change the law or even to recommend changes. It is up to our parliamentarians to decide whether changes to our gaming laws are desirable because of modern realities or social or economic conditions.

[5] The essence of the several questions put to the court is that the Lieutenant Governor In Council wants to know whether in the opinion of this court the Lottery complies with the ***Criminal Code*** as presently written. The central question is not one of constitutional or private contract law but of criminal law. The answer requires consideration of two sections of the ***Criminal Code*** dealing with gaming. It will not be necessary to answer all of individual sub-questions submitted in order to advise the Lieutenant Governor In Council whether in the opinion of the court the Lottery complies with the ***Code***.

[6] The relevant provisions of the ***Criminal Code*** are as follows:

> 206.(1) Everyone one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who
>
> (a) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property by lots, cards, tickets or any mode of chance whatever;
>
> (b) sells, barters, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatever;
>
> (c) knowingly sends, transmits, mails, ships, delivers or allows to be sent, transmitted, mailed, shipped or delivered, or knowingly accepts for carriage or transport or conveys any article that is used or intended for use in carrying out

any device, proposal, scheme or plan for advancing, lending, giving, selling or otherwise disposing of any property by any mode of chance whatever;

(d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, lent, given, sold or disposed of;

(e) conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, on payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;

(f) disposes of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration;

(g) induces any persons to stake or hazard any money or other valuable property or thing on the result of any dice game, three-card monte, punch board, coin table or on the operation of a wheel of fortune;

. . . . .

206.(4) Every one who buys, takes or receives a lot, ticket or other device mentioned in subsection (1) is guilty of an offence punishable on summary conviction.

. . . . .

207.(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

(a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province;

(b) for a charitable or religious organization, pursuant to a license issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose;

(c) for the board of a fair or of an exhibition or an operator of a concession leased by that board, to conduct and manage a lottery scheme in a province where the Lieutenant Governor in Council of the province or such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof has

(i) designated that fair or exhibition as a fair or exhibition where a lottery scheme may be conducted and managed, and

(ii) issued a licence for the conduct and management of a lottery scheme to that board or operator;

(d) for any person, pursuant to a license issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme at a public place of

amusement in that province if

(i) the amount or value of each prize awarded does not exceed five hundred dollars, and

(ii) the money or other valuable consideration paid to secure a chance to win a prize does not exceed two dollars;

(e) for the government of a province to agree with the government of another province that lots, cards or tickets in relation to a lottery scheme that is by any of paragraphs (a) to (d) authorized to be conducted and managed in that other province may be sold in the province;

(f) for any person, pursuant to a licence issued by the Lieutenant Governor in Council of a province or such other person or authority in the province as may be designated by the Lieutenant Governor in Council thereof, to conduct and manage in the province a lottery scheme that is authorized to be conducted and managed in one or more other provinces where the authority by which the lottery scheme was first authorized to be conducted and managed consents thereto;

(g) for any person, for the purpose of a lottery scheme that is lawful in a province under any of paragraphs (a) to (f), to do anything in the province, in accordance with the applicable law or licence, that is required for the conduct, management or operation of the lottery scheme or for the person to participate in the scheme; and

(h) for any person to make or print anywhere in Canada or to cause to be made or printed anywhere in Canada anything relating to gaming and betting that is to be used in a place where it is or would, if certain conditions provided by law are met, be lawful to use such a thing, or to send, transmit, mail, ship, deliver or allow to be sent, transmitted, mailed, shipped or delivered or to accept for carriage or

transport or convey any such thing where the destination thereof is such a place.

. . . . .

207.(3) Every one who, for the purposes of a lottery scheme, does anything that is not authorized by or pursuant to a provision of this section

(a) in the case of the conduct, management or operation of that lottery scheme,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, or

(ii) is guilty of an offence punishable on summary conviction; or

(b) in the case of participating in that lottery scheme, is guilty of an offence punishable on summary conviction.

207.(4) In this section, 'lottery scheme' means a game or any proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1(a) to (g), whether or not it involves betting, pool selling or a pool system of betting other than ...

(c) for the purposes of paragraphs (1)(b) to (f), a game or proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a) to (g) that is operated on or through a computer, video device or slot machine, within the meaning of subsection 198(3), or a dice game.

[7] Like other federal enactments, the ***Criminal Code*** is a remedial statute and is to be given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects. See: ***Interpretation Act*** R.S.C., C. I-23, s. 12. The provisions set out above clearly demonstrate that Parliament does not happily abide gaming activities of any sort in Canada. The little it tolerates, it does so grudgingly. Section 206 is prohibitive in nature, not regulatory. The purpose of Parliament in enacting it was generally to outlaw gaming and lotteries, not just to ensure they would be run honestly. Subsection 206(1) creates a number of indictable offences proscribing a comprehensive range of gaming and gaming-related activities. Subsection 206(4) makes it a summary conviction offence to buy, take or receive a lot, ticket, other device mentioned in 206(1). Although s. 207 allows some tightly circumscribed exceptions to

s. 206, it too contains a broad prohibition. Subsection 207(3) makes it an offence **to do anything** for the purpose of the conduct, management, operation of, or participation in a lottery scheme unless the doing of it is authorized by or pursuant to some provision of 207. Thus, even permitted lotteries must strictly adhere to the limits imposed by the terms and conditions of s. 207.

[8] Although it has not yet begun selling lottery tickets, the Earth Fund obtained a license from the Lieutenant Governor In Council of Prince Edward Island on February 8th, 2000. A copy of the license is attached as appendix "A" to the statement of facts submitted to the court by the Attorney General of Prince Edward Island. The scope of the license is set forth in paragraph 2.1 thereof which states as follows:

> During the term of this license, and so long as it is not in default hereunder, the licensee is authorized to conduct, manage, and operate the [Earth Future Lottery] from its place of business in the province and subject to the terms of [the license] and the provisions of the ***Criminal Code***, to advertise, promote, solicit and offer for sale, and to accept and fulfil orders for tickets or subscriptions for the lottery from any permitted purchaser [as defined in paragraph 1.1.27 of the License], within the global market, by means of the Internet or any lawful means of telecommunication.

According to the statement of facts this license was issued pursuant to s. 207(1)(b) of the ***Criminal Code***.

[9] The exceptions to s. 206 provided for in s. 207, including s-s 207(1)(b), are subject to a number of restrictions relating to what can be done, who can do it, and where it can be done. Subsection 207(1)(b) permits a charitable organization such as the Earth Fund to conduct and manage a lottery scheme in a province pursuant to a license issued by the Lieutenant Governor in Council of that province. However, the type of lottery scheme permitted under s-s. 207(1)(b) is restricted by the definition in s-s. 207(4)(c) to one not operated on or through a computer. Another restriction applying to a s-s. 207(1)(b) lottery schemes is found in s-s. 207(1)(g). It permits the doing of anything "in the province" required to conduct, manage, operate or participate in a lawful lottery scheme under s-s. 207(1)(b). The only extra-provincial activities authorized by s. 207 are those permitted according to s-ss. 207(1)(a),(e),(f), and (h). As mentioned earlier, s-s.207(3) makes it an offence to do anything for the purpose of conducting, managing, operating or participating in a lottery scheme unless it is done pursuant to the authority of some provision of s. 207.

1. In the province

[10] In order for a lottery to be lawful under s-s. 207(1)(b) it must, be conducted and managed **in** the province. A key aspect of the Earth Future Lottery as described in the statement of facts is its proposed use of the internet as a means of accessing the global market and having persons physically located outside Prince Edward Island participate

in the lottery using its interactive website through their home computers. Paragraph 1 of the statement of facts states: *"... the Earth Fund/Fond Pour La Terre was granted a license by the Lieutenant Governor of Prince Edward Island to conduct, manage and operate a lottery scheme known as the Earth Future Lottery* ***from its place of business in Prince Edward Island***". This is confirmed by paragraph 2.1 of the license itself which states: *"... the Licensee is authorized to conduct , manage and operate the Lottery* ***from its place of business in the Province*** *..."* However, according to the opening paragraph of the operational plans and procedures of the proposed lottery scheme set out in schedule "A" to the license "*the* ***licensee shall conduct a*** *monthly, limited subscription, sweepstakes or draw lottery* ***in the global market*** *via the Internet with tickets priced at US$50*". Paragraph 10 of the facts states that the Earth Future Lottery *"... will be a monthly, limited-subscription draw lottery* ***based in*** *Prince Edward Island in which a maximum of 200,000 to 300,000 tickets will be sold for each draw at a purchase price of US$50 and prizes will range from US$1000 to US$1,000,000. The Earth Fund proposes to solicit offers to purchase tickets and accept and fulfill those subscriptions from permitted purchasers via its internet server located in Prince Edward Island ..."*. In my view the above stated plan to **"conduct"** the lottery **in the global market** would render the scheme ineligible for licensing under s-s. 207(1)(b). It is obvious from the foregoing references that the intention is to conduct a lottery in the worldwide market from headquarters and through infrastructure based in Prince Edward Island. However, conducting a lottery **"from"** Prince Edward Island is not the same as conducting it **"in"** Prince Edward Island. A lottery conducted **from** Prince Edward Island is not necessarily conducted **in** the province. Here the intent is to conduct a lottery throughout the world. Subsection 207(1)(b) requires that the lottery scheme be conducted and managed **in** the province, **not just from the province**. The global market extends far beyond the boundaries of this province and is therefore outside the territorial limitation imposed by s-s. 207(1)(b). Subsection 207(1)(b) does not authorize the Lieutenant Governor in Council of Prince Edward island to license a charitable organization to conduct or manage a lottery scheme **from the province**. It only authorizes the granting of a license to conduct and manage a lottery **in the province**. For a license to be validly issued under s-s. 207(1)(b), it would have to require the licensee to conduct the lottery in the province and not merely from its place of business in the province. There is no authority under s-s. 207(1)(b) to issue a license authorizing a licensee to conduct a lottery in the global village from its place of business in the province.

[11] However, I hasten to point out it is not the use of the word "conduct" in the license that is the deciding factor as to the legality of the Lottery. The scheme would not be lawful even if the term "operate" was used in place of "conduct". Section 207 does not permit conducting, managing, or operating a lottery scheme outside the province. In addition to the territorial limitation in s-s. 207(1)(b) itself, s-s. 207(1)(g) provides that it is lawful for any person **for the purpose of a lottery scheme** that is lawful in the province under paragraphs (a) to (f) of 207 to **do anything *in the province***, in accordance with the applicable law or license, that is required for the *conduct*,

management, **or operation** of the lottery scheme **or for the person to participate in the scheme.** On the other hand, subsection 207(3) makes it an offence for **anyone** for the purposes of conducting, managing, operating or participating in a lottery scheme **to do anything** that is **not authorized by or pursuant to a provision of s. 207.** Obviously, Parliament meant to ensure that the activities of lotteries exempted from criminality would be strictly confined territorially.

[12] Parliament's purpose in enacting s. 207 was to create a narrow exception to s. 206 legalizing certain provincially run or licensed lottery schemes. It did not intend s. 207 lottery schemes could be conducted, managed, or operated outside the borders of the province running or licensing them except with the consent of another province. The only sources of authority for extra-provincial activity found in s. 207 are contained in paragraphs (a),(e), (f) and (h) of s-s. 207(1). Subsections 207(1)(a),(e) and (f) have no application in this reference as there is no authorization from another province. Absent such interprovincial cooperation, the only activities Parliament permits to occur extra-provincially relating to gaming is the making, printing, and transporting of anything to be used in a place where it would be legal. Those extra-provincial activities are authorized by s-s. 207(1)(h). However, the authorization is not broad enough to permit all the activities that would be taking place extra-provincially in the operation of the Earth Future Lottery. The list of permitted extra-provincial activities under s-s.207(1)(h) is very limited. The fact s-s. 207(1)(h) exists at all serves to indicate that even the few extra-provincial activities referred to therein would not be permitted in its absence. It also indicates Parliament intended that any activity necessary to gaming not referred to in s-s 207(1)(h) must occur, if at all, only in the province where it is lawful. This view of Parliament's intention is reinforced by s-s 207(3).

[13] Although based in Prince Edward Island, it is obviously intended the Earth Future Lottery will operate and carry on business in the worldwide market. According to the license issued it is planned to conduct the lottery in the global market, selling, via the internet, as many as 200,000 to 300,000 tickets per month at a price set in U.S. dollars and to have prizes paid in U.S. dollars. It is also planned to advertise and promote the lottery outside this province. The problem is that extra-provincial and international lottery sales transactions are not permitted by s-s. 207(1)(b) or by any other provision of s. 207. According to paragraph 16 of the statement of facts, it is proposed to deal with this legal difficulty by the inclusion in the license of a provision deeming that all purchases and sales of tickets occur within this province and by requiring the purchaser to submit to Prince Edward Island jurisdiction.

[14] Deeming provisions in the license or the rules and regulations for the Lottery approved by the Lieutenant Governor in Council are ineffective to render legal, under s. 207 of the ***Criminal Code***, transactions that in reality do not occur in their entirety within the province. A transaction from a criminal law perspective may occur simultaneously in more than one place or jurisdiction. Thus, regardless of private

contract or provincial regulations, from a criminal law perspective a trans-border transaction would be taking place every time an offer is made over the internet to sell a ticket to a consumer located outside Prince Edward Island and every time he or she buys one. Neither provincial licensing conditions nor the rules and principles of private civil contract law are determinative of where the *actus reus* of an criminal offence occurs. See: ***R. v. Mackenzie Securities Ltd. et al***, [1966] 4 C.C.C. 29 (Man. C.A.), ***R. v. Trudel, ex parte Horbas and Myhaluk***, [1969] 3 C.C.C. 95 (Man. C.A.), ***R. v. Libman***, [1985] 2 S.C.R. 178 (SCC).

[15] According to paragraphs 11 and 15 of the statement of facts, the Earth Fund will not be selling or offering tickets for sale outside Prince Edward Island rather it is said they will be soliciting offers to purchase from persons located outside. Assuming that is a proper characterization of what will be happening, it would still be illegal because it would constitute doing something for the purpose of the conduct, management, or operation of the scheme which is not authorized by any provision of s. 207. The solicitation would be happening wherever in the universe the consumer would be located at the time of receiving it. Subsections 207(1)(b) and 207(1)(g) only authorize doing things **in the province** required for the conduct, management, or operation or participation in the lottery scheme. As I said before, the only things that can be legally done for the purpose of the conduct, management, operation of or participation in a lottery scheme are those authorized by or done pursuant to some provision of s. 207.

[16] The only sources of authority provided in the ***Criminal Code*** for extra-provincial marketing of a s-s 207(1)(b) lottery scheme are found in s-ss. 207(1)(e)and(f). If s-s.207(1)(b) itself authorized the sale of tickets in another province s-s. 207(1)(e) and (f) would be meaningless. That cannot be the case. These two subsections were intended to regulate interprovincial lottery marketing and to prevent poaching. Parliament did not want a province subjected to lotteries unless it chose to be. By enacting paragraphs (e) and (f), Parliament obviously intended that if there was to be any interprovincial marketing of lottery schemes it would take place only as a result of agreements among the provinces involved. There are no such agreements in place authorizing the Earth Future Lottery to be marketed in any province other than Prince Edward Island. Accordingly, there is no authorization under s. 207 for extra-provincial marketing and therefore it would be contrary to s-s. 207(3).

2. **On or through a Computer**

[17] The Earth Future Lottery constitutes a game, or proposal, scheme, plan, means, device, contrivance or operation described in s-s. 206(1)(b) of the ***Criminal Code***. According to the statement of facts, the Earth Future Lottery is designed so that computers with internet connections will be the exclusive means through which virtually all gaming transactions, save choosing of the winning number, will be

conducted. As mentioned earlier, this means of operation poses a legal problem. Subsection 207(4) of the ***Code*** defines "lottery scheme" for the purpose of 207(1)(b). The definition specifically excludes a game, or proposal, scheme, plan, means, device, contrivance or operation described in s-s 206(1)(b) that is "operated on or through a computer." As described, the Earth Future Lottery would surely constitute such a scheme. Computers would be the exclusive means of accessing it, of purchasing chances and of obtaining a potential winning number. The scheme as described to the court also contemplates the use of computers to advertise and promote the Earth Future Lottery, to provide confirmation of the issuance and registration of ticket numbers, and in some cases to deliver prizes. In fact, without the use of computers the Earth Future Lottery would not be viable. Hence, it is not lawful under s-s. 207(1)(b) of the ***Criminal Code***.

ANSWERS

[18] In accordance with the foregoing reasons I would certify my opinion in respect of the various questions referred to the court by the Lieutenant Governor In Council as follows:

Question	1.	No.
Question	1.(a)	Not exclusively.
Question	1.(b)	Not exclusively.
Question	1.(c)	I would decline to answer this question because it would not help to resolve the legality of the proposed scheme under the criminal law.
Question	2.(a)	I would decline to answer this question because it would not help to resolve the legality of the proposed scheme under the criminal law.
Question	2.(b)	I would decline to answer this question because it would not help to resolve the legality of the proposed scheme under the criminal law.

Question 2.(c) Yes.

Question 3. Yes.

_____
The Honourable Chief Justice G.E. Mitchell

I AGREE: _____
The Honourable Mr. Justice J.A. McQuaid

I AGREE: _____
The Honourable Madam Justice L.K. Webber

IN THE MATTER of a Reference from the Lieutenant Governor in Council pursuant to section 18 of the *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, regarding the Earth Future Lottery and section 207 of the *Criminal Code* of Canada, R.S.C. 1985, c. C-46

Attorney General of Prince Edward Island and Earth Fund *Appellants*

v.

Attorney General of Canada, Interprovincial Lottery Corporation, the Ontario Lottery and Gaming Corporation, Loto-Québec, Western Canada Lottery Corporation and British Columbia Lottery Corporation *Respondents*

and

Attorney General of Ontario and Attorney General of Quebec *Interveners*

DANS L'AFFAIRE du renvoi présenté par le lieutenant-gouverneur en conseil, conformément à l'article 18 de la *Supreme Court Act*, R.S.P.E.I. 1988, ch. S-10, relativement à la Earth Future Lottery et à l'article 207 du *Code criminel* du Canada, L.R.C. 1985, ch. C-46

Procureur général de l'Île-du-Prince-Édouard et Fonds pour la terre *Appelants*

c.

Procureur général du Canada, Société de la loterie interprovinciale, Société des loteries et des jeux de l'Ontario, Loto-Québec, Western Canada Lottery Corporation et British Columbia Lottery Corporation *Intimés*

et

Procureur général de l'Ontario et procureur général du Québec *Intervenants*

INDEXED AS: REFERENCE RE EARTH FUTURE LOTTERY

Neutral citation: 2003 SCC 10.

File No.: 29213.

2003: March 11.

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

RÉPERTORIÉ : RENVOI RELATIF À LA EARTH FUTURE LOTTERY

Référence neutre : 2003 CSC 10.

N° du greffe : 29213.

2003 : 11 mars.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR PRINCE EDWARD ISLAND

Criminal law — Gaming and betting — Lotteries — Lieutenant Governor in Council issuing licence to charitable organization to conduct lottery — Lawfulness of Internet lottery scheme.

APPEAL from a judgment of the Prince Edward Island Court of Appeal (2002), 211 Nfld. & P.E.I.R. 311, 633 A.P.R. 311, 166 C.C.C. (3d) 373, 215 D.L.R. (4th) 656, [2002] P.E.I.J. No. 34 (QL), 2002

EN APPEL DE LA COUR D'APPEL DE L'ÎLE-DU-PRINCE-ÉDOUARD

Droit criminel — Jeux et paris — Loteries — Permis d'organiser une loterie délivré par le lieutenant-gouverneur en conseil à une oeuvre de bienfaisance — Légalité du système de loterie par Internet.

POURVOI contre un arrêt de la Cour d'appel de l'Île-du-Prince-Édouard (2002), 211 Nfld. & P.E.I.R. 311, 633 A.P.R. 311, 166 C.C.C. (3d) 373, 215 D.L.R. (4th) 656, [2002] P.E.I.J. No. 34 (QL),

PESCAD 8, finding a lottery scheme unlawful. Appeal dismissed.

Cyndria L. Wedge and *Brian A. Crane*, *Q.C.*, for the appellant the Attorney General of Prince Edward Island.

Marlys A. Edwardh, *Richard Litkowski* and *Marshall Pollock*, *Q.C.*, for the appellant Earth Fund.

Robert W. Hubbard and *Paul B. Adams*, for the respondent the Attorney General of Canada.

Michael L. Phelan and *D. Michael Brown*, for the respondents the Interprovincial Lottery Corporation et al.

Scott C. Hutchison, for the intervener the Attorney General of Ontario.

Joanne Marceau and *Pierre Lapointe*, for the intervener the Attorney General of Quebec.

The judgment of the Court was delivered orally by

1 THE CHIEF JUSTICE — It will not be necessary to hear from the respondents or the interveners. The Court would dismiss the appeal, substantially for the reasons of the Chief Justice of Prince Edward Island. The appeal is dismissed.

Judgment accordingly.

Solicitor for the appellant the Attorney General of Prince Edward Island: Office of the Attorney General, Charlottetown.

Solicitors for the appellant Earth Fund: Ruby & Edwardh, Toronto.

Solicitor for the respondent the Attorney General of Canada: Department of Justice, Ontario Regional Office, Toronto.

Solicitors for the respondents the Interprovincial Lottery Corporation et al.: Ogilvy Renault, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Crown Attorney Office, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

2002 PESCAD 8, concluant à l'illégalité d'une loterie. Pourvoi rejeté.

Cyndria L. Wedge et *Brian A. Crane*, *c.r.*, pour l'appelant le procureur général de l'Île-du-Prince-Édouard.

Marlys A. Edwardh, *Richard Litkowski* et *Marshall Pollock*, *c.r.*, pour l'appelant Fonds pour la terre.

Robert W. Hubbard et *Paul B. Adams*, pour l'intimé le procureur général du Canada.

Michael L. Phelan et *D. Michael Brown*, pour les intimées la Société de la loterie interprovinciale et autres.

Scott C. Hutchison, pour l'intervenant le procureur général de l'Ontario.

Joanne Marceau et *Pierre Lapointe*, pour l'intervenant le procureur général du Québec.

Version française du jugement de la Cour rendu oralement par

LA JUGE EN CHEF — Il ne sera nécessaire d'entendre ni les intimés ni les intervenants. La Cour est d'avis de rejeter l'appel essentiellement pour les mêmes motifs que ceux exposés par le Juge en chef de l'Île-du-Prince-Édouard. L'appel est rejeté.

Jugement en conséquence.

Procureur de l'appelant le procureur général de l'Île-du-Prince-Édouard : Bureau du procureur général, Charlottetown.

Procureurs de l'appelant Fonds pour la terre : Ruby & Edwardh, Toronto.

Procureur de l'intimé le procureur général du Canada : Ministère de la Justice, Bureau régional de l'Ontario, Toronto.

Procureurs des intimées la Société de la loterie interprovinciale et autres : Ogilvy Renault, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Bureau des procureurs de la Couronne, Toronto.

Procureur de l'intervenant le procureur général du Québec : Ministère de la Justice, Sainte-Foy.

Alfred Frederick Bélanger *Appellant*;

and

Her Majesty the Queen *Respondent.*

1970: February 4; 1970: March 2.

Present: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Dangerous driving—Passenger turned police cruiser into path of oncoming car—Whether within ambit of s. 221(4) of the Criminal Code—Whether dangerous driving under s. 221(4) an included offence on the facts—Criminal Code, 1953-54 (Can.), c. 51, ss. 192, 221(4), 569(4).

The appellant was charged with criminal negligence, contrary to s. 192 of the *Criminal Code*. The jury found him guilty of dangerous driving. The appellant, whose vehicle had been in an accident in which no other vehicle was involved, was being driven home in a police cruiser. He grabbed the steering wheel with both hands and turned it to the left, causing the cruiser to veer sharply to the left where it immediately collided head-on with an oncoming car, causing the death of one of its occupants. The conviction was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this Court on the grounds that there was no evidence upon which the jury could find that he was driving

Alfred Frederick Bélanger *Appelant*;

et

Sa Majesté la Reine *Intimée.*

1970: le 4 février; 1970: le 2 mars.

Présents: Le Juge en Chef Cartwright et les Juges Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence et Pigeon.

EN APPEL DE LA COUR D'APPEL D'ONTARIO

Droit criminel—Conduite dangereuse—Passager fait dévier voiture de patrouille vers automobile venant en sens inverse—Tombe-t-il sous le coup des dispositions de l'art. 221(4) du Code criminel—Conduite dangereuse prévue à l'art. 221(4) est-elle une infraction moindre dans les circonstances—Code criminel, 1953-54 (Can.), c. 51, art. 192, 221(4), 569(4).

L'appelant a été accusé de négligence criminelle en contravention de l'art. 192 du *Code criminel*. Le jury l'a déclaré coupable de conduite dangereuse. L'appelant avait eu avec sa voiture un accident n'impliquant pas d'autre véhicule, et il se faisait reconduire chez lui dans une voiture de patrouille. Il a saisi le volant des deux mains et l'a tourné vers la gauche, ce qui a fait virer l'automobile brusquement vers la gauche causant immédiatement une collision frontale avec un véhicule venant en sens inverse. Une passagère de ce dernier véhicule est morte par suite de cette collision. La Cour d'appel a confirmé la déclaration de culpabilité. L'appelant a obtenu la permission d'en appeler à cette Cour

and that the Court of Appeal erred in failing to hold that the trial judge erred in instructing the jury that dangerous driving under s. 221(4) was an included offence on the facts in the case.

Held (Cartwright C.J. and Hall and Spence JJ. dissenting: The appeal should be dismissed.

Per Fauteux, Abbott, Martland, Judson, Ritchie and Pigeon JJ.: For the few moments while the cruiser was being driven from its own right hand lane directly into the lane which was reserved for the traffic approaching from the opposite direction, it was being driven by someone in a manner dangerous to the public. Any person who has created the danger by consciously assuming physical control over the direction of the vehicle is within the ambit of s. 221(4) as being a person whose act caused the vehicle to be driven dangerously. For those few moments, the appellant was "one who drives a motor vehicle on a . . . highway . . . in a manner that is dangerous to the public . . ." within the natural and ordinary meaning of those words as they occur in s. 221(4). There was no error on the part of the trial judge in charging that dangerous driving under s. 221(4) was an included offence on the facts.

Per Cartwright C.J. and Hall and Spence JJ., *dissenting*: It is not possible by the ordinary usage of the English language, giving to the words "who drives a motor vehicle" in s. 221(4) their meaning in the speech of plain men, to say that the appellant was driving the cruiser.

APPEAL from a judgment of the Court of Appeal for Ontario affirming the appellant's conviction for dangerous driving. Appeal dismissed, Cartwright C.J. and Hall and Spence JJ. dissenting.

John O'Driscoll, Q.C., and *R. V. Donohue*, for the appellant.

R. M. McLeod, for the respondent.

The judgment of Cartwright C.J. and of Hall and Spence JJ. was delivered by

pour les motifs qu'il n'y avait pas de preuve qui puisse permettre au jury de conclure que l'appelant conduisait et que la Cour d'appel a commis une erreur en ne jugeant pas que le juge de première instance avait lui-même commis une erreur en disant au jury que la conduite dangereuse prévue à l'art. 221(4) constituait une infraction moindre dans les circonstances de l'affaire.

Arrêt: L'appel doit être rejeté, le Juge en Chef Cartwright et les Juges Hall et Spence étant dissidents.

Les Juges Fauteux, Abbott, Martland, Judson, Ritchie et Pigeon: Pendant les quelques instants où la voiture de patrouille a quitté sa voie à la droite pour entrer dans la voie réservée aux véhicules voyageant en sens inverse, quelqu'un la conduisait de façon dangereuse pour le public. Celui qui crée la situation en prenant physiquement la direction du véhicule tombe sous le coup des dispositions de l'art. 221(4), comme étant celui dont les agissements sont la cause de la conduite dangereuse. Pendant ces quelques instants, l'appelant était quelqu'un qui «conduit un véhicule à moteur dans . . . une grande route . . . de façon dangereuse pour le public . . .» au sens ordinaire et courant que ces mots ont à l'art. 221(4). Le juge de première instance n'a pas commis d'erreur en disant au jury que la conduite dangereuse prévue à l'art. 221(4) constitue une infraction moindre dans les circonstances.

Le Juge en Chef Cartwright et les Juges Hall et Spence, *dissidents*: Il n'est pas possible de dire dans le sens ordinaire du langage courant, en donnant à l'expression de l'art. 221(4) «quiconque conduit un véhicule à moteur» le sens qu'elle a dans la bouche de l'homme de la rue, que l'appelant conduisait la voiture de patrouille.

APPEL d'un jugement de la Cour d'appel d'Ontario confirmant une déclaration de culpabilité pour conduite dangereuse. Appel rejeté, le Juge en Chef Cartwright et les Juges Hall et Spence étant dissidents.

John O'Driscoll, c.r., et *R. V. Donohue*, pour l'appelant.

R. M. McLeod, pour l'intimée.

Le jugement du Juge en Chef Cartwright et des Juges Hall et Spence a été rendu par

THE CHIEF JUSTICE (*dissenting*)—This appeal is brought, pursuant to leave granted by this Court, from a unanimous judgment of the Court of Appeal for Ontario delivered, without recorded reasons, on October 23, 1969, dismissing the appellant's appeal from his conviction at his trial before Grant J. and a jury at Sarnia on April 3, 1969.

The charge against the appellant was as follows:

At the Township of Moore, in the County of Lambton, on or about the 19th day of January, 1969, ALFRED BÉLANGER did unlawfully cause the death of Viola Momney, by Criminal Negligence, in that he did deliberately grab the steering wheel of a police cruiser in which he was a passenger, from the control of Constable J. W. Bateman, and did recklessly and wantonly turn the said cruiser into the path of an oncoming car with which it collided, contrary to Section 192 of the *Criminal Code* of Canada.

The verdict of the jury as announced by the foreman was:

The jury finds the prisoner not guilty of the charge of criminal negligence but guilty of the lesser charge of dangerous driving.

The learned trial Judge imposed a sentence of imprisonment in the Ontario Reformatory for six months definite and two months indeterminate and made an order prohibiting the appellant from driving a motor vehicle on the highway in Canada for a period of one year from his release from the Reformatory.

The grounds on which leave to appeal to this Court was granted are:

(1) That there was no evidence upon which the jury could find that the appellant was driving.

(2) That the Court of Appeal erred in failing to hold that the learned trial Judge erred in instructing the jury that 'dangerous driving' under Section 221(4) of the *Criminal Code* of Canada was an included offence on the facts in the case.

LE JUGE EN CHEF (*dissident*)—Le présent pourvoi, qui fait suite à l'autorisation d'appeler accordée par cette Cour, est à l'encontre d'un arrêt de la Cour d'appel de l'Ontario, rendu sans motifs écrits le 23 octobre 1969. Cet arrêt a rejeté le pourvoi de l'appelant à l'encontre de la déclaration de culpabilité à son procès par jury devant le Juge Grant, à Sarnia, le 3 avril 1969.

L'inculpation contre le prévenu est la suivante:

[TRADUCTION] ALFRED BÉLANGER est accusé d'avoir, dans le canton de Moore, comté de Lambton, le 19 janvier 1969, ou vers cette date, illégalement causé la mort de Viola Momney par négligence criminelle, en se saisissant volontairement du volant d'une voiture de patrouille dans laquelle il était véhiculé et l'arrachant des mains de l'agent de police J. W. Bateman et d'avoir par insouciance déréglée et téméraire fait dévier la voiture de patrouille vers une automobile venant en sens inverse avec laquelle elle est entrée en collision, le tout en contravention de l'article 192 du *Code criminel* du Canada.

Le chef du jury a annoncé le verdict dans les termes suivants:

[TRADUCTION] Le jury déclare le prévenu non coupable à l'accusation de négligence criminelle, mais coupable à l'accusation moindre de conduite dangereuse.

Le savant Juge de première instance a prononcé une sentence de six mois d'emprisonnement dans la maison de correction de l'Ontario et d'une période subséquente indéterminée de deux mois, et il a rendu une ordonnance interdisant à l'appelant de conduire un véhicule à moteur sur une grande route au Canada, pendant une période d'un an à compter de sa sortie de la maison de correction.

Les moyens sur lesquels cette Cour a accordé l'autorisation d'appeler sont les suivants:

[TRADUCTION] (1) Qu'il n'y avait pas de preuve qui puisse permettre au jury de conclure que l'appelant conduisait.

(2) Que la Cour d'appel a commis une erreur en ne jugeant pas que le savant Juge de première instance avait lui-même commis une erreur en disant au jury que la «conduite dangereuse» prévue à l'article 221(4) du *Code criminel* du Canada constitue une infraction moindre dans les circonstances de l'affaire.

While there was a sharp conflict of evidence at the trial it is clear, from their verdict considered in the light of the charge of the learned trial Judge, that the jury must have accepted the evidence of the Crown witness, Constable Bateman, and the appeal was argued by both counsel on the basis that the relevant facts were as follows.

On the evening of January 19, 1969, at about 8.30 p.m., Constable Bateman at a point on Highway No. 40 about 0.6 miles north of its intersection with Lambton County Road No. 2, found that the appellant's vehicle had been in an accident in which no other vehicle was involved. The appellant identified himself as the driver of the vehicle; he had with him a passenger named Gary Anderson. At that time, no arrests were made. The appellant's vehicle, because of the damage it had suffered, could not be operated and Bateman called a tow-truck and then offered to drive the appellant and Anderson back to their homes in Corunna, Ont. This journey commenced at about 9:15 p.m.; Bateman was sitting in the driver's seat and was driving the police cruiser, the appellant was seated to his right and to the appellant's right sat Anderson. Almost immediately Bateman told the appellant that he would be charged with careless driving as the result of the accident; Anderson and the appellant argued with Bateman regarding the proposed charge of careless driving, but after a short time, this argument ceased.

As Bateman was proceeding north he had his left hand on the steering-wheel and in his right hand he was holding the two-way police radio and resting this hand on the steering-wheel as he awaited a chance to complete a radio call to the dispatcher at Chatham. At this time neither the appellant nor Anderson said anything; as the police crusier was entering an "S" curve to the north of the Hydro Plant on Highway No. 40, at a speed of about forty miles an hour, the appellant reached over quickly, grabbed the steering-wheel with both hands and turned it to the left, causing the cruiser to veer sharply to the left where it immediately collided head-on with a southbound vehicle; as a result the death of Viola Momney was caused.

Bien qu'il y ait eu de nettes contradictions dans les témoignages au procès, il est clair d'après le verdict du jury en regard des directives du savant Juge du procès, que le jury a ajouté foi au témoignage de l'agent Bateman pour la poursuite. L'avocat de l'appelant et celui de l'intimée ont plaidé le pourvoi en prenant pour acquis que les faits essentiels de l'affaire étaient les suivants.

Le soir du 19 janvier 1969, vers 8h.30, l'agent Bateman a constaté que l'appelant avait eu avec sa voiture, sur la route nº 40, à 0.6 mille au nord de l'intersection de celle-ci avec le chemin nº 2 du comté de Lambton, un accident n'impliquant pas d'autre véhicule. L'appelant s'est présenté comme le conducteur du véhicule accidenté; il y était accompagné d'un nommé Gary Anderson. Personne n'a été mis en état d'arrestation à ce moment-là. L'automobile n'étant pas en état de rouler par suite des avaries causées par l'accident, l'agent Bateman a appelé une dépanneuse et a offert à l'appelant et à Anderson de les reconduire chez eux, à Corunna (Ont).

Ils sont partis vers 9h.15; l'agent Bateman conduisait la voiture de patrouille, l'appelant était immédiatement à droite de Bateman et Anderson à la droite de l'appelant. Presque dès le départ, Bateman a dit à l'appelant qu'on l'accuserait de conduite dangereuse par suite de cet accident. Anderson et l'appelant ont eu une discussion avec Bateman à propos de l'accusation de conduite dangereuse, mais au bout d'un moment la discussion a cessé.

Tout en se dirigeant vers le nord, Bateman tenait le volant de la main gauche et le microphone du radiotéléphone de la main droite qu'il appuyait sur le volant en attendant une occasion de terminer une communication au contrôleur à Chatham. A cet instant-là, ni l'appelant, ni Anderson ne disaient quoi que ce soit. Au moment où la voiture de patrouille s'engageait dans un virage en S, au nord de la station hydroélectrique, sur la route nº 40, filant à environ 40 milles à l'heure, l'appelant s'est précipité, a saisi le volant des deux mains et l'a tourné vers la gauche, ce qui a fait virer l'automobile brusquement vers la gauche causant immédiatement une collision frontale avec un véhicule venant en sens inverse. Viola Momney est morte par suite de cette collision.

The appellant's defence was a flat denial of having touched the steering-wheel; it is obvious that this was rejected by the jury.

It seems clear that, in the absence of excuse or explanation, the conduct of the appellant would have warranted a verdict of guilty of criminal negligence; the question of law which we have to decide is whether it fell within the terms of s. 221(4) of the *Criminal Code* which reads as follows:

(4) Every one who drives a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place, is guilty of

(*a*) an indictable offence and is liable to imprisonment for two years, or

(*b*) an offence punishable on summary conviction.

The two grounds on which leave to appeal was granted really raise a single question. That what the appellant did was dangerous is unquestionable; but can it be said that he drove the police cruiser? I have reached the conclusion that it cannot.

In the course of the argument reference was made to a large number of reported decisions but none of these are directly in point. The closest case on the facts is the decision of my brother Spence, then sitting in the High Court of Justice for Ontario, in *McKenzie v. The Western Assurance Company*[1], in which it was held that the intoxicated owner of an automobile, which was being driven for him by a competent driver, who suddenly grasped the steering-wheel and thereby caused a collision was not driving the automobile. However, that case is distinguishable from the case at bar in that it was held that the owner's action in grasping the wheel was unintentional.

The case at bar appears to me to depend on the true construction of the words of s. 221(4), and particularly the words "who drives a motor

[1] [1954] O.R. 964, [1955] 1 D.L.R. 271.

En défense, l'appelant a nié catégoriquement avoir touché au volant. Il est manifeste que le jury ne l'a pas cru.

Il est clair que, faute d'excuse ou d'explication, le comportement de l'appelant justifiait un verdict de négligence criminelle. Le point de droit dont nous avons à décider est si l'art. 221(4) du *Code criminel,* qui se lit comme suit, peut s'appliquer à ce comportement:

(4) Quiconque conduit un véhicule à moteur dans une rue, sur un chemin, une grande route ou dans un autre endroit public, de façon dangereuse pour le public, compte tenu de toutes les circonstances, y compris la nature et l'état de cet endroit, l'utilisation qui en est faite ainsi que l'intensité de la circulation alors constatable ou raisonnablement prévisible à cet endroit, est coupable

a) d'un acte criminel et encourt un emprisonnement de deux ans, ou

b) d'une infraction punissable sur déclaration sommaire de culpabilité.

Les deux moyens sur lesquels cette Cour a accordé l'autorisation d'appeler ne soulèvent en fait qu'une seule question. Il est incontestable que ce qu'a fait l'appelant était dangereux; mais, peut-on dire qu'il conduisait la voiture de patrouille? J'en suis venu à la conclusion que non.

Pendant la plaidoirie, on a cité un très grand nombre de décisions publiées, mais aucune d'elles ne se rapportait directement à ce point précis. Le précédent qui se rapproche le plus de la présente affaire quant aux faits est le jugement rendu par mon collègue le Juge Spence, alors qu'il siégeait à la Haute Cour d'Ontario, dans *McKenzie v. The Western Assurance Company*[1], où il a statué que le propriétaire d'une voiture qui la faisait conduire par une personne sobre parce qu'il était ivre et qui avait soudainement saisi le volant et ainsi causé une collision, ne conduisait pas la voiture. Cependant, cette affaire-là se distingue de celle qui nous occupe du fait qu'on y a conclu que le geste du propriétaire du véhicule de se saisir du volant avait été accidentel.

La solution de la présente affaire me semble dépendre de l'interprétation correcte des termes de l'art. 221(4), notamment des mots «quicon-

[1] [1954] O.R. 964, [1955] 1 D.L.R. 271.

vehicle". The well-settled rule of construction has recently been re-stated by Lord Reid in *Pinner v. Everett*[2]:

In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.

Lord Reid went on, at p. 259, to state the task of the Court as follows:

I must therefore consider in what circumstances a person can, by the ordinary usage of the English language, properly be said to be driving a car.

Suppose that after the collision another Police Officer had arrived at the scene and questioned Bateman as to who was driving the cruiser at the time of the crash, can it be doubted that he would have answered: "I was; but this man, Bélanger, caused the collision by grasping the wheel", or words to the same effect? If the conduct with which the appellant is reproached is to be described in plain English it is not driving the automobile but interfering with the driving of Bateman.

I do not find it possible by the ordinary usage of the English language, giving to the words "who drives a motor vehicle" their meaning in the speech of plain men, to say that the appellant was driving the cruiser.

If the matter were doubtful, which I do not think, I would apply the following passages from the reasons of McRuer J.A., as he then was, giving the unanimous judgment of the Court of Appeal in *Rex v. Wright*[3]:

In this, as in all criminal cases, the onus is on the Crown to make out a case against the accused beyond a reasonable doubt in law as well as in fact.

[2] [1969] 3 All E.R. 257 at 258, 259.
[3] [1946] O.W.N. 77 at 78, 1 C.R. 40, 85 C.C.C. 397, 3 D.L.R. 250.

que conduit un véhicule à moteur». La règle d'interprétation bien établie vient d'être réaffirmée par Lord Reid dans l'affaire *Pinner v. Everett*[2]:

[TRADUCTION] Pour établir le sens d'un mot ou d'une phrase dans une loi, la première question à se poser est toujours: quel est le sens normal ou ordinaire du mot et de la phrase dans le contexte où on l'emploie dans la loi? C'est seulement quand ce sens conduit à un résultat qu'on ne peut raisonnablement croire être le but du législateur qu'il y a lieu de chercher un autre sens possible de ce mot ou de cette phrase. On nous a maintes fois prévenus qu'il est mal à propos et dangereux de faire l'interprétation en substituant d'autres mots à ceux de la Loi.

Lord Reid continue, à la p. 259, à énoncer le rôle de la Cour de la façon suivante:

[TRADUCTION] Je dois donc examiner dans quelles circonstances on peut dire, à proprement parler, selon le sens courant du langage, qu'une personne conduit une automobile.

Supposons qu'après la collision un autre agent de police soit arrivé sur les lieux de l'accident et ait demandé à l'agent Bateman qui conduisait la voiture de patrouille au moment de la collision, peut-on douter qu'il aurait répondu: «Je conduisais, mais c'est lui, Bélanger, qui a causé la collision en saisissant le volant», ou quelque chose d'analogue? Si l'on veut décrire en langage courant le geste qu'on impute à Bélanger, on ne dira pas qu'il conduisait l'automobile mais qu'il s'est interposé dans la conduite par Bateman.

Je ne crois pas possible de dire dans le sens ordinaire du langage courant, en donnant à l'expression «quiconque conduit un véhicule à moteur» le sens qu'elle a dans la bouche de l'homme de la rue, que l'appelant conduisait la voiture de patrouille.

Même s'il y avait un doute, ce que je ne crois pas, j'appliquerais la règle suivante tirée des motifs du Juge d'appel McRuer, alors juge puîné, qui rendait une décision unanime de la Cour d'appel dans *Rex v. Wright*[3]:

[TRADUCTION] Dans la présente affaire, comme dans toute affaire criminelle, il incombe à la poursuite d'établir contre le prévenu une preuve hors de tout doute raisonnable, tant sur les questions de droit que sur les questions de fait.

[2] [1969] 3 All E.R. 257 à 258, 259.
[3] [1946] O.W.N. 77 à 78, 1 C.R. 40, 85 C.C.C. 397, 3 D.L.R. 250.

The quotation from Maxwell on Interpretation of Statutes, 7th ed. 1929, p. 244, relied upon by Lord Hewart C.J. in *Rex v. Chapman*, (1931) 2 K.B. 606 at 609, is directly applicable to this case:

> Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself.
>
> * * *

I think it is of first importance in interpreting words used in a statute passed for the purpose of regulating the conduct of individuals and imposing penalties, to give to them the meaning that would ordinarily be given by the ordinary individuals whose conduct it is sought to regulate.

I would allow the appeal, quash the conviction and direct a verdict of acquittal to be entered.

The judgment of Fauteux, Abbott, Martland, Judson, Ritchie and Pigeon JJ. was delivered by

RITCHIE J.—I have had the advantage of reading the reasons for judgment of the Chief Justice in which he reviews the facts giving rise to this appeal and I will endeavour not to repeat those facts except insofar as appears necessary for the understanding of my own reasons.

As the Chief Justice has pointed out, the appellant was originally charged under s. 192 of the *Criminal Code* with criminal negligence in that he "did recklessly and wantonly turn the said cruiser into the path of an oncoming car with which it collided . . .".

By its verdict the jury found that the appellant was "not guilty of criminal negligence but guilty of the lesser offence of dangerous driving." This constituted a finding that the appellant was in breach of the provisions of s. 221(4) of the *Criminal Code*, which gives rise to the question that lies at the heart of this appeal, of whether it can be said that, at the time and place in question, the appellant was "one who drives a motor vehicle on a . . . highway . . . in a manner that is dangerous to the public, having regard to all the circumstances."

Le passage de l'ouvrage de Maxwell, Interpretation of Statutes, 7e éd. 1929, p. 244, sur lequel s'est appuyé le Lord Juge en chef Hewart dans l'affaire *Rex v. Chapman* (1931) 2 K.B. 606, à la page 609, s'applique exactement à la présente affaire:

> [TRADUCTION] Lorsqu'un mot équivoque ou une phrase obscure laisse subsister un doute raisonnable que les règles d'interprétation ne permettent pas d'éclaircir, le bénéfice du doute doit profiter au citoyen et contre le législateur qui ne s'est pas exprimé clairement.
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> * * *

Je crois qu'il est de la plus haute importance, pour interpréter les termes employés dans une loi visant à réglementer la conduite des citoyens et à leur imposer des peines, de donner à ces termes le sens que leur donnent normalement les personnes ordinaires dont on veut régir la conduite.

J'accueillerais le pourvoi, j'annulerais la déclaration de culpabilité et j'ordonnerais d'inscrire un verdict d'acquittement.

Le jugement des Juges Fauteux, Abbott, Martland, Judson, Ritchie et Pigeon a été rendu par

LE JUGE RITCHIE—J'ai eu le privilège de lire les motifs de jugement du Juge en chef, où il résume les faits qui ont donné lieu au présent pourvoi. Je vais donc m'efforcer de n'en faire à nouveau l'exposé, qu'en autant que cela me paraît nécessaire à l'intelligence de mes propres motifs.

Comme l'a signalé le Juge en chef, l'appelant a été inculpé de négligence criminelle, en vertu de l'art. 192 du *Code criminel*, soit [TRADUCTION] «d'avoir par insouciance déréglée et téméraire fait dévier la voiture de patrouille vers une automobile venant en sens inverse avec laquelle elle est entrée en collision . . .».

Par son verdict, le jury a déclaré l'appelant [TRADUCTION] «non coupable à l'accusation de négligence criminelle, mais coupable à l'accusation moindre de conduite dangereuse». Ce verdict signifie que l'appelant a commis l'infraction visée par l'art. 221(4) du *Code criminel*, d'où la question qui est au cœur du présent pourvoi, soit de savoir si l'on peut dire qu'aux temps et lieu de l'accident l'appelant conduisait «un véhicule à moteur dans . . . une grande route . . . de façon dangereuse pour le public, compte tenu de toutes les circonstances.»

It seems to me important in construing s. 221(4) to consider the context in which the words are used and to have in mind the fact that the section was enacted for the protection of lawful users of the highway against motor vehicles which are being driven to the public danger. In this regard there cannot, I think, be any doubt that for the few moments while the police cruiser was being driven from its own right-hand lane of the highway directly into the lane which was reserved for traffic approaching from the opposite direction, it was being driven by someone "in a manner . . . dangerous to the public," and it cannot be said that there was at any time anything "dangerous to the public" in the conduct of the police constable or in his manner of driving.

If a motor vehicle is being driven carefully and lawfully on the public highway and it is suddenly diverted so as to be driven in such a manner as to be dangerous to the public, any person who has created the danger by consciously assuming physical control over the direction of the vehicle is, in my opinion, within the ambit of s. 221(4) as being a person whose act caused the vehicle to be driven dangerously.

The fact is that the police cruiser was driven from its own lane directly into the lane reserved for approaching traffic because the appellant had deliberately grabbed the steering wheel and taken control from the hands of the constable. Under these circumstances, with the greatest respect for those who hold a different view, I am of opinion that for the brief period during which the appellant assumed control, he was solely responsible for the dangerous driving of the cruiser and he was for those few moments "one who drives a motor vehicle on a . . . highway . . . in a manner that is dangerous to the public . . ." within the natural and ordinary meaning of those words as they occur in the context of s. 221(4) of the *Criminal Code*.

I have given careful consideration to the reasons for judgment rendered by Mr. Justice Spence at trial in *McKenzie v. The Western Assurance Co.*[4], and like the Chief Justice, I see a clear distinction between the unintentional act

[4] [1954] O.R. 964, [1955] 1 D.L.R. 271.

Il me paraît important pour interpréter l'art. 221(4) de tenir compte du contexte où les mots sont employés et de se rappeler qu'on a édicté cet article dans le but de protéger ceux qui font un usage légitime de la route contre ceux qui conduisent de façon dangereuse. Vu sous cet angle, il ne peut y avoir de doute, selon moi, que pendant les quelques instants où la voiture de patrouille a quitté sa voie à la droite pour entrer dans la voie réservée aux véhicules voyageant en sens inverse, quelqu'un la conduisait «de façon dangereuse pour le public» et l'on ne peut dire que les agissements ou la façon de conduire de l'agent de police aient présenté quelque danger pour le public.

Si une personne conduit sur une grande route un véhicule automobile avec prudence et conformément à la loi, et que quelqu'un d'autre fait brusquement dévier le véhicule d'une façon dangereuse pour le public, celui qui crée la situation en prenant physiquement la direction du véhicule tombe, d'après moi, sous le coup des dispositions de l'art. 221(4), comme étant celui dont les agissements sont la cause de la conduite dangereuse.

En réalité, c'est parce que l'appelant s'est délibérément saisi du volant et a enlevé la direction du véhicule des mains de l'agent de police, que la voiture de patrouille est passée de sa voie à la voie réservée aux véhicules venant en sens inverse. Dans ces circonstances, en toute déférence pour ceux qui sont de l'avis contraire, je suis d'avis que pendant les quelques instants où l'appelant a pris la direction il était le seul responsable de la conduite dangereuse de la voiture de patrouille, et qu'il était à ce moment quelqu'un qui «conduit un véhicule à moteur dans . . . une grande route . . . de façon dangereuse pour le public . . .» au sens ordinaire et courant que ces mots ont à l'art. 221(4) du *Code criminel*.

J'ai étudié avec soin les motifs de jugement du Juge Spence, en première instance, dans *McKenzie v. The Western Assurance Co.*[4]. Tout comme le Juge en chef, je trouve une nette différence entre le geste accidentel de McKenzie de

[4] [1954] O.R. 964, [1955] 1 D.L.R. 271.

of McKenzie in grabbing the wheel when he slipped from the seat and the deliberate action of the appellant in grabbing the wheel of the police cruiser and taking control from the constable.

It appears to me to be clear that the charge of criminal negligence under s. 192 was a charge "arising out of the operation of a motor vehicle" and having regard to the provisions of s. 569(4) of the *Criminal Code,* there was, in my opinion, no error on the part of the learned trial judge in charging the jury that "dangerous driving under s. 221(4) was an included offence on the facts of the case." The relevant portions of s. 569(4) read as follows:

> Where a count charges an offence under section 192 . . . arising out of the operation of a motor vehicle . . . and the evidence does not prove such offence but does prove an offence under subsection (4) of section 221 . . . the accused may be convicted of an offence under subsection (4) of section 221 . . .

For all these reasons I would dismiss the appeal.

Appeal dismissed, CARTWRIGHT C.J. *and* HALL *and* SPENCE JJ. *dissenting.*

Solicitors for the appellant: O'Driscoll, Kelly & McRae, Toronto.

Solicitor for the respondent: W. C. Bowman, Toronto.

saisir le volant en glissant en bas du siège et le geste délibéré de l'appelant de saisir le volant de la voiture de patrouille et d'en enlever la direction des mains de l'agent de police.

Il me semble évident que l'accusation de négligence criminelle en vertu de l'art. 192 «découlait de la conduite d'un véhicule à moteur» et, vu les dispositions de l'art. 569(4) du *Code criminel,* à mon avis le savant Juge de première instance n'a pas commis d'erreur en disant au jury [*traduction*] «que la conduite dangereuse prévue à l'art. 221(4) constitue une infraction moindre, dans les circonstances de l'affaire». Les dispositions pertinentes de l'art. 569(4) sont les suivantes:

> Lorsqu'un chef d'accusation inculpe d'une infraction prévue à l'article 192 . . . découlant de la conduite d'un véhicule à moteur . . . et que les témoignages ne prouvent pas la perpétration de cette infraction, mais prouvent la perpétration d'une infraction prévue par le paragraphe (4) de l'article 221 . . . l'accusé peut être déclaré coupable d'une infraction visée par le paragraphe (4) de l'article 221 . . .

Pour tous ces motifs, je suis d'avis de rejeter ce pourvoi.

Appel rejeté, le Juge en Chef CARTWRIGHT *et* les Juges HALL *et* SPENCE *étant dissidents.*

Procureurs de l'appelant: O'Driscoll, Kelly & McRae, Toronto.

Procureur de l'intimée: W. C. Bowman, Toronto.

Robert Stewart Pierre Marcotte *Appellant*;

and

The Deputy Attorney General for Canada

and

The Warden of Joyceville Federal Institution *Respondents.*

1974: November 13; 1974: November 27.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Statutes—Interpretation—Ambiguity—Legislative history—Forfeiture of remission on revocation of parole—Penitentiary Act, 1960-61 (Can.), ss. 22, 25—Parole Act, 1958 (Can), ss. 2, 16, 18.

The appellant was serving sentences totalling 15 years imposed on February 28, 1962. He was released on parole but the parole was suspended 45 days later and later revoked. There were 582 days of statutory remission to his credit at the time of his release but upon revocation this accumulated statutory remission was taken by the authorities to have been forfeited. An application for *habeas corpus* with *certiorari* in aid was granted but later set aside by the Court of Appeal.

Held (Martland, Judson, Ritchie and de Grandpré JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Spence, Dickson and Beetz JJ.: Whether a paroled inmate whose parole is revoked thereby loses his entitlement to statutory remission standing to his credit at the time of his release on parole depends on the proper construction of the *Penitentiary Act*, as of the date of parole revocation. Section 22 of the Act contains an entire code governing grant and forfeiture of statutory remission. The credit of statutory remission is not a deferred credit but a real and immediate entitlement. Subsections (3) and (4) of s. 22 alone provide for forfeiture of such remission, but then only for conviction in a disciplinary court for a disciplinary offence or conviction in a criminal court for escape or attempted escape. Even in these cases the extent of the forfeiture is subject to certain limitations and controls. Thus a recommitted parolee is required to serve the term that remained unexpired at the time of parole but is

Robert Stewart Pierre Marcotte *Appelant*;

c.

Le sous-procureur général du Canada

et

Le Directeur de l'Institution fédérale de Joyceville *Intimés.*

1974: le 13 novembre; 1974: le 27 novembre.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Lois—Interprétation—Ambiguïté—Historique de la législation—Annulation de réduction de peine par révocation de libération conditionnelle—Loi sur les pénitenciers, 1960-61 (Can.), art. 22, 25—Loi sur la libération conditionnelle de détenus, 1958 (Can.), art. 2, 16, 18.

L'appelant purgeait une peine cumulative de 15 ans qui lui avait été infligée le 28 février 1962. Il a été mis en liberté conditionnelle mais celle-ci a été suspendue 45 jours plus tard et ensuite révoquée. Il y avait 582 jours de réduction statutaire de peine inscrits à son crédit au moment de sa mise en liberté, mais lorsque sa libération conditionnelle a été révoquée, cette réduction statutaire accumulée a été considérée par les autorités comme ayant été annulée. Une demande d'*habeas corpus* accompagnée d'un *certiorari* a été accordée, mais par la suite la Cour d'appel l'a écartée.

Arrêt (les juges Martland, Judson, Ritchie et de Grandpré étant dissidents): le pourvoi doit être accueilli.

Le juge en chef Laskin et *les* juges Spence, Dickson et Beetz: la solution du litige, à savoir si un libéré conditionnel dont la libération a été révoquée a ainsi perdu son droit à la réduction statutaire de peine inscrite à son crédit au moment de sa mise en liberté conditionnelle, dépend de la juste interprétation de la *Loi sur les pénitenciers* telle qu'elle existait à l'époque de la révocation de la libération conditionnelle. L'article 22 de la Loi constitue un code complet régissant l'octroi et le retrait de la réduction statutaire. Le crédit de réduction statutaire n'est pas un crédit différé mais un droit véritable et immédiat. Seuls les par. (3) et (4) de l'art. 22 prévoient le retrait d'une telle réduction mais uniquement dans le cas de déclaration de culpabilité prononcée par un tribunal disciplinaire en raison d'une infraction à la discipline ou de déclaration de culpabilité prononcée par un tribunal criminel en raison d'une infraction relative à l'éva-

entitled to the statutory remission standing to his credit unless forfeited in whole or in part pursuant to s. 22(3) or (4) of the *Penitentiary Act*. Section 25 of the *Penitentiary Act* does not apply to s. 16(1) of the *Parole Act*. Its purpose is only to define the term of imprisonment while the parolee is at large. The legislative history supports this conclusion. There was a provision for forfeiture of remission which was not carried forward when the *Ticket of Leave Act* was replaced by the *Parole Act*.

Per Pigeon J.: Under the law in force when appellant's parole was revoked the revocation did not involve forfeiture of statutory remission standing to his credit.

Per Martland, Judson, Ritchie and de Grandpré JJ., *dissenting*: For the reasons given by Martin J.A. in the Court of Appeal, with which Gale C.J.O. agreed, the appeal should be dismissed.

[*Re Morin* (1968), 66 W.W.R. 566; *R. v. Howden* [1974] 2 W.W.R. 461; *Ex parte Hilson* (1973), 12 C.C.C. (2d) 343; *Re Abbott* (1970), 1 C.C.C. (2d) 147; *Ex parte Kolot* (1973), 13 C.C.C. (2d) 417; *Ex parte Rae* (1973), 14 C.C.C. (2d) 5, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1] allowing an appeal pursuant to s. 719 of the *Criminal Code* from a judgment of Henderson J.[2] releasing the appellant on a *habeas corpus* application. Appeal allowed, Martland, Judson, Ritchie and de Grandpré JJ. dissenting.

R. R. Price, and *A. D. Gold*, for the appellant.

A. C. Pennington, and *P. Evraine*, for the respondents.

[1] (1973), 13 C.C.C. (2d) 114.
[2] (1973), 10 C.C.C. (2d) 441.

sion ou à la tentative d'évasion. Même dans ces cas, le retrait demeure sujet à certaines réserves et à certains contrôles quant à sa portée. Un détenu dont la libération conditionnelle octroyée a été révoquée doit donc purger la partie de sa peine qui n'était pas encore expirée au moment de l'octroi de sa libération mais il a droit à la réduction statutaire de peine inscrite à son crédit au moment de sa réception à un pénitencier, à moins qu'il n'y ait eu déchéance en tout ou en partie conformément aux par. (3) et (4) de l'art. 22 de la *Loi sur les pénitenciers*. L'article 25 de cette même loi ne s'applique pas au par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus*. L'article 25 traite seulement des fins de la loi relative à la libération conditionnelle alors que le libéré conditionnel est en liberté. L'historique de la législation appuie la conclusion ci-dessus. Lorsque la loi antérieure a été remplacée par la loi actuelle sur la libération conditionnelle de détenus, on n'a pas reproduit une disposition qui prévoyait l'annulation de toute remise de peine antérieurement gagnée.

Le juge Pigeon: Suivant le droit en vigueur lorsque la libération conditionnelle de l'appelant a été révoquée, la révocation n'a pas entraîné la déchéance de la réduction statutaire de peine inscrite à son crédit.

Les juges Martland, Judson, Ritchie et de Grandpré, *dissidents*: Pour les motifs énoncés par le juge d'appel Martin en Cour d'appel, motifs auxquels le juge en chef de l'Ontario, le juge Gale, a souscrit, le pourvoi devrait être rejeté.

[Arrêts mentionnés: *Re Morin* (1968), 66 W.W.R. 566; *R. v. Howden*, [1974] 2 W.W.R. 461; *Ex parte Hilson* (1973), 12 C.C.C. (2d) 343; *Re Abbott* (1970), 1 C.C.C. (2d) 147; *Ex parte Kolot* (1973), 13 C.C.C. (2d) 417; *Ex parte Rae* (1973), 14 C.C.C. (2d) 5.]

POURVOI interjeté à l'encontre d'un arrêt de la Cour d'appel de l'Ontario[1] qui a accueilli un appel interjeté en conformité des dispositions de l'art. 719 du *Code criminel* à l'encontre d'un jugement du juge Henderson[2] libérant l'appelant à la suite de sa demande d'*habeas corpus*. Pourvoi accueilli, les juges Martland, Judson, Ritchie et de Grandpré étant dissidents.

R. R. Price et *A. D. Gold*, pour l'appelant.

A. C. Pennington et *P. Evraine*, pour les intimés.

[1] (1973), 13 C.C.C. (2d) 114.
[2] (1973), 10 C.C.C. (2d) 441.

The judgment of The Chief Justice and Spence, Dickson and Beetz JJ. was delivered by

DICKSON J.—In my view this appeal should succeed. The issue is whether a paroled inmate whose parole was revoked on August 29, 1968, thereby lost his entitlement to statutory remission standing to his credit at the time of his release on parole. The resolution of the issue depends on the proper construction, as of that date (the legislation having since been amended), of s. 22(1), (3), (4), s. 24 and s. 25 of the *Penitentiary Act*, 1960-61 (Can.), c. 53, reading:

22. (1) Every person who is sentenced or committed to penitentiary for a fixed term shall, upon being received into a penitentiary, be credited with statutory remission amounting to one-quarter of the period for which he has been sentenced or committed as time off subject to good conduct.

. . .

(3) Every inmate who, having been credited with remission pursuant to subsection (1) or (2), is convicted in disciplinary court of any disciplinary offence is liable to forfeit, in whole or in part, the statutory remission that remains to his credit, but no such forfeiture of more than thirty days shall be valid without the concurrence of the Commissioner, nor more than ninety days without the concurrence of the Minister.

(4) Every inmate who is convicted by a criminal court of the offence of escape or attempt to escape forthwith forfeits three-quarters of the statutory remission standing to his credit at the time that offence was committed.

24. Every inmate may, in accordance with the regulations, be credited with three days' remission of his sentence in respect of each calendar month during which he has applied himself industriously to his work, and any remission so earned is not subject to forfeiture for any reason.

25. Where, under the *Parole Act*, authority is granted to an inmate to be at large during his term of imprisonment, the term of imprisonment, for all purposes of that Act, includes any period of statutory remission standing to his credit when he is released but does not include any period of earned remission standing to his credit at that time.

Le jugement du Juge en chef et des juges Spence, Dickson et Beetz a été rendu par

LE JUGE DICKSON—A mon avis, le présent appel devrait être accueilli favorablement. La question en litige est de savoir si un libéré conditionnel dont la libération a été révoquée le 29 août 1968, a ainsi perdu son droit à la réduction statutaire de peine inscrite à son crédit au moment de sa mise en liberté conditionnelle. La solution du litige dépend de la juste interprétation des par. (1), (3) et (4) de l'art. 22, de l'art. 24 et de l'art. 25 de la *Loi sur les pénitenciers,* 1960-61, (Can.) c. 53, tels qu'ils existaient alors (la loi ayant été depuis modifiée),et qui se lisent comme suit:

22. (1) Quiconque est condamné ou envoyé au pénitencier pour une période déterminée doit, dès sa réception à un pénitencier, bénéficier d'une réduction statutaire de peine équivalant au quart de la période pour laquelle il a été condamné ou envoyé au pénitencier, à titre de remise de peine sous réserve de bonne conduite.

. . .

(3) Chaque détenu qui, ayant bénéficié d'une réduction de peine conformément au paragraphe (1) ou (2), est déclaré coupable devant un tribunal disciplinaire d'une infraction à la discipline encourt la déchéance, en tout ou en partie, de son droit à la réduction statutaire de peine inscrite à son crédit, mais une telle déchéance ne peut être valide à l'égard de plus de trente jours sans l'assentiment du commissaire, ni à l'égard de plus de quatre-vingt-dix jours sans l'assentiment du Ministre.

(4) Chaque détenu déclaré coupable par un tribunal criminel de l'infraction d'évasion ou de tentative d'évasion est immédiatement déchu de son droit aux trois quarts de la réduction statutaire de peine, inscrite à son crédit au moment où l'infraction a été commise.

24. Chaque détenu peut, en conformité avec les règlements, bénéficier d'une réduction de peine de trois jours pour chaque mois civil durant lequel il s'est adonné assidûment à son travail et toute semblable réduction de peine ainsi méritée n'est pas susceptible d'annulation pour quelque motif que ce soit.

25. Lorsque, en vertu de la *Loi sur les libérations conditionnelles*, il est accordé à un détenu l'autorisation d'être en liberté pendant la période de son emprisonnement, la durée de l'emprisonnement comprend, à toutes les fins de cette loi, les périodes de réduction statutaire de peine inscrites à son crédit lorsqu'il est mis en liberté mais ne comprend pas une période quelconque de réduction de peine méritée alors inscrite à son crédit.

and of s. 16(1) of the *Parole Act*, 1958 (Can.), c. 38, reading:

16. (1) Where the parole granted to an inmate has been revoked, he shall be recommitted to the place of confinement to which he was originally committed to serve the sentence in respect of which he was granted parole, to serve the portion of his original term of imprisonment that remained unexpired at the time his parole was granted.

This Court has had the benefit, if I may say so, of two excellent judgments delivered in the Court of Appeal for Ontario, one by Mr. Justice Martin with whom Chief Justice Gale agreed, the other by Mr. Justice Estey. Mr. Justice Martin concluded that the appellant, upon revocation of his parole, was not entitled to the benefit of statutory remission standing to his credit at the time of his release on parole. Mr. Justice Estey, for reasons which I find persuasive, reached the opposite conclusion.

Section 22 of the *Penitentiary Act* contains, in my opinion, an entire code governing the grant and the forfeiture of statutory remission. Every person sentenced to penitentiary for a fixed term is entitled as of right to be credited with statutory remission, "upon being received into a penitentiary". With great respect for those holding the contrary view, I cannot find in the language of s. 22 any substantial support for the contention that the statutory remission assured by s. 22(1) is a deferred credit which does not accrue to the inmate until such time as statutory remission, earned remission and time served equal the length of the sentence. It seems to me from s. 22(3) and (4) that the credit of statutory remission upon entering penitentiary is a real and immediate entitlement and not an elusive expectation, for one cannot forfeit what one does not have. It is true that the time off for which s. 22(1) provides is subject to good conduct but the conduct giving rise to forfeiture of remission credited, indeed the only conduct which the *Penitentiary Act* recognizes expressly as giving rise to forfeiture, is that spelled out in s. 22(3), conviction in a disciplinary court for a disciplinary offence, and in s. 22(4), escape or attempted escape. Parenthetically it may be observed that no forfeiture under s. 22(3) of more

ainsi que du par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus*, 1958 (Can.) c. 38, et qui se lit comme suit:

16. (1) Lorsque la libération conditionnelle octroyée à un détenu a été révoquée, celui-ci doit être envoyé de nouveau au lieu d'incarcération où il a été originairement condamné à purger la sentence à l'égard de laquelle il s'est vu octroyer la libération conditionnelle, afin qu'il y purge la partie de sa période originaire d'emprisonnement qui n'était pas encore expirée au moment de l'octroi de cette libération.

Cette Cour a pu profiter, si je puis m'exprimer ainsi, de deux excellents jugements rendus en Cour d'appel de l'Ontario, l'un par M. le juge Martin, auquel le juge en chef Gale a souscrit, l'autre par M. le juge Estey. M. le juge Martin a conclu que l'appelant, lorsque sa libération conditionnelle a été révoquée, n'avait pas le droit de bénéficier de la réduction statutaire inscrite à son crédit au moment de sa mise en liberté conditionnelle. M. le juge Estey, se fondant sur des motifs que je trouve convaincants, en est arrivé à la conclusion opposée.

A mon avis, l'art. 22 de la *Loi sur les pénitenciers* constitue un code complet régissant l'octroi et le retrait de la réduction statutaire. Quiconque est condamné au pénitencier pour une période déterminée a le droit de bénéficier d'une réduction statutaire, «dès sa réception à un pénitencier». Avec le plus grand respect pour ceux qui soutiennent le point de vue opposé, je ne puis trouver dans le texte de l'art. 22 aucun fondement réel à la prétention que la réduction statutaire garantie par le par. (1) de l'art. 22 est un crédit différé qui ne peut profiter au détenu avant que la période de réduction statutaire, la période de réduction de peine méritée et la période de la sentence purgée, n'équivalent à la durée de la sentence. Il me semble qu'il découle des par. (3) et (4) de l'art. 22 que le crédit de réduction statutaire, dès l'admission au pénitencier, est un droit véritable et immédiat et non une probabilité, car on ne peut retirer à quelqu'un ce qu'il n'a pas. Il est vrai que la réduction de peine prévue par le par. (1) de l'art. 22 est subordonnée à la bonne conduite, mais la conduite qui peut entraîner le retrait de la réduction de peine créditée, la seule conduite que la *Loi sur les pénitenciers* reconnaît de façon expresse comme pouvant entraîner la déchéance, est celle énoncée au par. (3) de l'art. 22, soit être déclaré

than thirty days is valid without the concurrence of the Commissioner of Penitentiaries, nor more than ninety days without the concurrence of the Minister of Justice, and that an escape or attempt to escape results in forfeiture of three-quarters of the statutory remission standing to the credit of the inmate; yet if the contentions of the respondent are correct, a person whose parole has been revoked loses the entire statutory remission to his credit at the time of revocation. Parole may be suspended whenever a member of the Board or any person designated by the Board is satisfied that the arrest of the inmate is necessary or desirable in order to prevent a breach of any term or condition of the parole, and may be revoked in the untrammelled discretion of the Board.

Turning to s. 16 of the *Parole Act*, where parole has been revoked the inmate is recommitted to serve the portion of his original term of imprisonment that remained unexpired at the time his parole was granted. If, as I conceive it, the statutory remission is truly credited upon the person being received into a penitentiary, then, unless forfeited in whole or in part pursuant to s. 22(3) or (4) of the *Penitentiary Act*, that credit must be taken into account in computing the unexpired portion of the original term of imprisonment.

The difficulty to which the legislation has given rise would seem to originate in s. 25 of the *Penitentiary Act* and more particularly in the words "for all purposes of that Act", *i.e.*, the *Parole Act*. The argument briefly is that for all purposes of the *Parole Act* the term of imprisonment of an inmate released on parole includes any period of statutory remission standing to his credit when he is released. In my opinion s. 25 of the *Penitentiary*

coupable devant un tribunal disciplinaire d'une infraction à la discipline, et au par. (4) de l'art. 22, soit l'évasion ou la tentative d'évasion. On peut remarquer entre parenthèses qu'en vertu du par. (3) de l'art. 22, aucune déchéance n'est valide à l'égard de plus de trente jours sans l'assentiment du commissaire des pénitenciers ni à l'égard de plus de quatre-vingt-dix jours sans l'assentiment du ministre de la Justice et qu'une évasion ou une tentative d'évasion entraîne la déchéance du droit aux trois quarts de la réduction statutaire de peine inscrite au crédit du détenu; malgré cela, si les prétentions de l'intimé sont justifiées, une personne dont la libération conditionnelle est révoquée perd la totalité de la réduction statutaire de peine inscrite à son crédit au moment de la révocation. La libération conditionnelle peut être suspendue toutes les fois qu'un membre de la Commission, ou une personne désignée par celle-ci, est convaincu que l'arrestation du détenu est nécessaire ou souhaitable en vue d'empêcher la violation d'une modalité de la libération conditionnelle et elle peut être révoquée à la discrétion absolue de la Commission.

Passons à l'art. 16 de la *Loi sur la libération conditionnelle de détenus*, selon lequel lorsque la libération conditionnelle octroyée à un détenu a été révoquée, celui-ci doit purger la partie de sa période originaire d'emprisonnement qui n'était pas encore expirée au moment de l'octroi de sa libération. Si, comme je le conçois, la réduction statutaire est véritablement créditée au détenu dès sa réception à un pénitencier, alors, à moins qu'il n'y ait eu déchéance en tout ou en partie conformément aux par. (3) et (4) de l'art. 22 de la *Loi sur les pénitenciers*, on doit tenir compte de ce crédit en calculant la partie de la période originaire d'emprisonnement qui n'est pas expirée.

Les problèmes qu'ont suscités les textes législatifs semblent découler de l'art. 25 de la *Loi sur les pénitenciers* et plus particulièrement des mots «à toutes les fins de cette loi», c.-à-d., la *Loi sur la libération conditionnelle de détenus*. Brièvement, la prétention est qu'à toutes les fins de la *Loi sur la libération conditionnelle de détenus*, la durée de l'emprisonnement d'un détenu en liberté conditionnelle comprend toute période de réduction statu-

Act does not apply to s. 16(1) of the *Parole Act*. The *Parole Act* empowers the Board to review the cases of inmates, grant parole where the Board considers that reform and rehabilitation will be aided by the grant of parole, and revoke parole where necessary. The length of the remaining term on the recommitment is a consequence of the revocation; it does not appear to be a purpose of the enactment. It should be noted also that the only section of the *Parole Act* purporting to touch upon sentence is s. 18 (whipping) which is significantly found under a different heading "Additional Jurisdiction". It is not one of the purposes of the *Parole Act* to effect changes in sentences. Mr. Justice Martin finds that revocation generally is the partial purpose of the *Act* and that the additional loss of statutory remission is further incentive to abide by the parole conditions. But as intimated by Mr. Justice Estey, the loss of liberty and the necessity of re-serving parole time are sufficient incentives to the parolee without the added burden of loss of statutory remission. Mr. Justice Estey also draws attention to the disincentive to parole which would be created if the potential parolee were faced with the prospect of losing all statutory remission referable to time served in the event his parole is revoked.

In determining whether s. 25 of the *Penitentiary Act* affects s. 16(1) of the *Parole Act*, the words "where ... authority is granted ... to be at large ...." must be given effect. Section 25 is confined to the purposes of the parole legislation while the parolee is at large. This is understandable. The purpose is to ensure an extended period of supervision while at large and also, when the authorities

taire de peine inscrite à son crédit lorsqu'il est mis en liberté. A mon avis, l'art. 25 de la *Loi sur les pénitenciers* ne s'applique pas au par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus*. La *Loi sur la libération conditionnelle de détenus* donne à la Commission le pouvoir d'examiner les cas des détenus, d'accorder la liberté conditionnelle si la Commission considère que l'octroi de la libération conditionnelle facilitera le redressement et la réhabilitation, et de révoquer la libération conditionnelle si nécessaire. La durée de la période d'emprisonnement que le détenu a à purger lorsqu'il est incarcéré de nouveau est une conséquence de la révocation; elle n'apparaît pas être une des fins visées par la loi. Il faudrait également remarquer que le seul article de la *Loi sur la libération conditionnelle de détenus* visant la question de la sentence est l'art. 18 (peine de fouet) qui, de façon significative, se retrouve sous un en-tête différent «Juridiction additionnelle». Ce n'est pas l'une des fins de la *Loi sur la libération conditionnelle de détenus* de modifier les sentences. M. le juge Martin conclut que généralement la révocation est partiellement la fin de la Loi et que la perte additionnelle de la réduction statutaire est une incitation supplémentaire à se conformer aux conditions de la libération. Mais comme le donne à entendre M. le juge Estey, la perte de liberté et l'obligation de purger à nouveau la partie de la peine passée en libération conditionnelle sont des incitations suffisantes pour le libéré conditionnel sans qu'il soit nécessaire d'y ajouter le fardeau de la perte de réduction statutaire. M. le juge Estey a également fait remarquer qu'on pourrait créer un désintéressement pour la libération conditionnelle si les libérés conditionnels éventuels étaient placés dans la perspective de perdre tous leurs droits à la réduction statutaire acquise pour la période purgée en prison au cas où leur libération conditionnelle est révoquée.

Pour déterminer si l'art. 25 de la *Loi sur les pénitenciers* touche le par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus*, il faut donner un effet aux mots «lorsque ... il est accordé ... l'autorisation d'être en liberté ...». L'article 25 traite seulement des fins de la loi relative à la libération conditionnelle alors que le libéré conditionnel est en liberté. Ceci est compré-

contemplate revocation of a parole, they must know the date on which the sentence expires (*vide* ss. 11 and 12 of the *Parole Act*). The relevant sections speak in terms of "inmate", defined by s. 2 as a person under "sentence of imprisonment". Section 25 of the *Penitentiary Act* supplies the required definition of this "term of imprisonment". I conclude that s. 16(1) is quite independent of and unaffected by s. 25.

The legislative history supports the foregoing conclusion. If one examines the *Penitentiary Act* R.S.C. 1952, c. 206, s. 69, it will be seen that provision was made there for a convict earning remission not exceeding six days for every month of good conduct and in addition, when the convict had at his credit seventy-two days of remission, he might be allowed, for every subsequent month during which his conduct and industry were satisfactory, ten days' remission per month. Subsection (4) of s. 69 then provided:

> (4) Every convict who escapes, attempts to escape, breaks prison, attempts to break prison, breaks out of his cell, or makes any breach therein with intent to escape, or assaults any officer or servant of the penitentiary, or being the holder of a licence under the Ticket of Leave Act, forfeits such licence, shall forfeit the whole of the remission which he has earned. (Emphasis added)

A licence under the *Ticket of Leave Act* was the equivalent of parole, 1958 (Can.), c. 38, s. 24. The significance of the earlier legislation, in my opinion, lies in the fact that under that legislation there was express provision for forfeiture of remission on forfeiture of a licence under the *Ticket of Leave Act*, but when the legislation was changed and the present ss. 22 to 25 of the *Penitentiary Act* were enacted, the provision was not carried forward into the new legislation. It is, therefore, I think, fair to conclude that Parliament did not intend any forfeiture by ss. 22 to 25 of the new legislation and that nothing in these sections affects the plain and

hensible. L'article vise à étendre la période de surveillance du détenu pendant qu'il est en liberté et aussi, lorsque les autorités envisagent la révocation d'une libération conditionnelle, ils doivent connaître la date de l'expiration de la sentence (*vide* art. 11 et 12 de la *Loi sur la libération conditionnelle de détenus*). Les articles pertinents traitent du «détenu», tel que défini à l'art. 2, désignant une personne «condamnée à une peine d'emprisonnement». L'article 25 de la *Loi sur les pénitenciers* fournit la définition requise de cette «période d'emprisonnement». J'en conclus que le par. (1) de l'art. 16 est tout à fait indépendant de l'art. 25 et qu'il n'est pas visé par ce dernier.

L'historique de la législation appuie la conclusion ci-dessus. Si l'on examine la *Loi sur les pénitenciers*, S.R.C. 1952, c. 206, art. 69, on verra qu'on y dispose qu'un détenu peut gagner une remise de peine n'excédant pas six jours pour chaque mois de bonne conduite et qu'en plus, lorsque le détenu a à son crédit une remise de peine de soixante-douze jours, il peut obtenir pour chaque mois subséquent durant lequel il continue à donner satisfaction par sa conduite et son application une remise de dix jours pour chaque mois qui suit. Le par. (4) de l'art. 69 prescrit ensuite:

> (4) Tout détenu qui s'évade, tente de s'évader, effectue ou tente un bris de prison, s'échappe par bris de sa cellule, ou fait à sa cellule quelque dégradation dans le but de s'échapper, ou qu'il se livre à des voies de fait sur un fonctionnaire ou préposé du pénitencier, ou qui, étant porteur d'un permis prévu par la Loi sur la libération conditionnelle, est déchu de ce permis, perd toute la remise de peine par lui gagnée. (Les soulignés sont de moi)

Un permis octroyé selon la *Loi sur les libérations conditionnelles* équivalait à une libération conditionnelle, 1958 (Can.), c. 38, art. 24. L'importance du texte législatif antérieur réside, à mon avis, dans le fait que dans ce texte législatif il y avait une disposition expresse relative à la perte de remise de peine dans le cas de déchéance du permis octroyé en vertu de la *Loi sur les libérations conditionnelles* mais lorsque la loi a été modifiée et que les présents art. 22 à 25 de la *Loi sur les pénitenciers* ont été adoptés, la disposition n'a pas été reproduite dans la nouvelle loi. Par conséquent, je pense qu'il est juste de conclure que

ordinary meaning of the words used in s. 16(1) of the *Parole Act* (the earlier counterpart of which was s. 9(1) of the *Ticket of Leave Act*).

Even if I were to conclude that the relevant statutory provisions were ambiguous and equivocal—a conclusion one could reach without difficulty on reading *Re Morin*[3], *R. v. Howden*[4], *Ex Parte Hilson*[5], *Re Abbott*[6], and then reading *Ex Parte Kolot*[7] and *Ex Parte Rae*[8]—I would have to find for the appellant in this case. It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of Henderson J.

The judgment of Martland, Judson, Ritchie and de Grandpré JJ. was delivered by

MARTLAND J. (*dissenting*)—I agree with the reasons given by Martin J.A. in the Court of Appeal, with which Gale C.J.O. agreed. I would dismiss this appeal.

PIGEON J.—I agree with Dickson J.'s conclusion on his view that under the law in force when appellant's parole was revoked this did not involve

[3] (1968), 66 W.W.R. 566.
[4] [1974] 2 W.W.R. 461.
[5] (1973), 12 C.C.C. (2d) 343.
[6] (1970), 1 C.C.C. (2d) 147.
[7] (1973), 13 C.C.C. (2d) 417.
[8] (1973), 14 C.C.C. (2d) 5.

le Parlement n'a pas voulu inclure aucune mesure de déchéance dans les art. 22 à 25 de la nouvelle loi et que rien dans ces articles ne peut toucher le sens clair et ordinaire des mots employés au par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus* (dont le par. (1) de l'art. 9 de la *Loi sur les libérations conditionnelles* était antérieurement l'équivalent).

Même si je devais conclure que les dispositions pertinentes sont ambiguës et équivoques—une conclusion à laquelle on peut arriver sans difficulté en lisant les arrêts *Re Morin*[3], *R. v. Howden*[4], *Ex Parte Hilson*[5], *Re Abbott*[6], et en lisant ensuite *Ex Parte Kolot*[7], et *Ex Parte Rae*[8]—je devrais conclure en faveur de l'appelant en l'espèce. Il n'est pas nécessaire d'insister sur l'importance de la clarté et de la certitude lorsque la liberté est en jeu. Il n'est pas besoin de précédent pour soutenir la proposition qu'en présence de réelles ambiguïtés ou de doutes sérieux dans l'interprétation et l'application d'une loi visant la liberté d'un individu, l'application de la loi devrait alors être favorable à la personne contre laquelle on veut exécuter ses dispositions. Si quelqu'un doit être incarcéré, il devrait au moins savoir qu'une loi du Parlement le requiert en des termes explicites, et non pas, tout au plus, par voie de conséquence.

Je serais d'avis d'accueillir l'appel, d'infirmer l'arrêt de la Cour d'appel et de rétablir le jugement du juge Henderson.

Le jugement des juges Martland, Judson, Ritchie et de Grandpré a été rendu par

LE JUGE MARTLAND (*dissident*)—Je souscris aux motifs énoncés par le juge d'appel Martin en Cour d'appel, motifs auxquels le juge en chef de l'Ontario, le juge Gale, a souscrit. Je suis d'avis de rejeter cet appel.

LE JUGE PIGEON—Je souscris à la conclusion du juge Dickson en adoptant son avis que, suivant le droit en vigueur lorsque la libération condition-

[3] (1968), 66 W.W.R. 566.
[4] [1974] 2 W.W.R. 461.
[5] (1973), 12 C.C.C. (2d) 343.
[6] (1970), 1 C.C.C. (2d) 147.
[7] (1973), 13 C.C.C. (2d) 417.
[8] (1973), 14 C.C.C. (2d) 5.

forfeiture of statutory remission standing to his credit.

Appeal allowed, MARTLAND, JUDSON, RITCHIE *and* DE GRANDPRÉ JJ. *dissenting.*

Solicitors for the appellant: Pomerant, Pomerant & Greenspan, Toronto and R. R. Price, Kingston.

Solicitor for the respondent: The Deputy Attorney General, Ottawa.

nelle de l'appelant a été révoquée, la révocation n'a pas entraîné la déchéance de la réduction statutaire de peine inscrite à son crédit.

Appel accueilli, les JUGES MARTLAND, JUDSON, RITCHIE *et* DE GRANDPRÉ *étaient dissidents.*

Procureurs de l'appelant: Pomerant, Pomerant & Greenspan, Toronto; R. R. Price, Kingston.

Procureur des intimés: Le sous-procureur général, Ottawa.

Her Majesty The Queen *Appellant*

v.

D.L.W. *Respondent*

and

Animal Justice *Intervener*

Indexed as: R. *v.* D.L.W.

2016 SCC 22

File No.: 36450.

2015: November 9; 2016: June 9.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Bestiality — Elements of offence — Interpretation — Accused convicted of bestiality — Accused put peanut butter on complainant's vagina and had dog lick it off while he videotaped — Whether term "bestiality" has well-understood legal meaning in common law and if so, whether Parliament intended to depart from that meaning when that term was first introduced in English version of Criminal Code — Whether penetration an essential element of offence of bestiality — Criminal Code, R.S.C. 1985, c. C-46, s. 160.

After a 38-day trial, D.L.W. was convicted of numerous sexual offences against his two stepdaughters committed over the course of 10 years, including a single count of bestiality. D.L.W. first brought the family dog into the bedroom with the older complainant when she was 15 or 16 years old. He attempted to make the dog have intercourse with her and, when that failed, he spread peanut butter on her vagina and took photographs while the dog licked it off. He later asked her to do this again so he could make a video. At trial, D.L.W. was found to have done all of this for a sexual purpose. The trial judge was of the view that bestiality in the *Code* means touching between a person and an animal for a person's sexual purpose and he concluded that penetration was not required. The trial judge preferred to interpret the elements of bestiality so that they would reflect the current views

Sa Majesté la Reine *Appelante*

c.

D.L.W. *Intimé*

et

Animal Justice *Intervenante*

Répertorié : R. *c.* D.L.W.

2016 CSC 22

N° du greffe : 36450.

2015 : 9 novembre; 2016 : 9 juin.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Bestialité — Éléments de l'infraction — Interprétation — Accusé reconnu coupable de bestialité — Accusé étendant du beurre d'arachides sur le vagin de la plaignante et faisant en sorte que le chien le lèche alors qu'il captait la scène sur bande vidéo — Le terme « bestialité » a-t-il un sens juridique bien défini en common law et, dans l'affirmative, le législateur a-t-il voulu s'écarter de cette signification lorsque ce terme a été introduit pour la première fois dans la version anglaise du Code criminel? — La pénétration est-elle un élément essentiel de l'infraction de bestialité? — Code criminel, L.R.C. 1985, c. C-46, art. 160.

Au terme d'un procès de 38 jours, D.L.W. a été reconnu coupable de nombreuses infractions d'ordre sexuel commises contre ses deux belles-filles sur une période de 10 ans, y compris un seul chef d'accusation de bestialité. D.L.W. a amené le chien de la famille pour la première fois dans la chambre avec la plaignante plus âgée quand elle avait 15 ou 16 ans. Il a alors tenté de faire en sorte que le chien ait des rapports sexuels avec elle et, lorsque cela n'a pas fonctionné, il a étendu du beurre d'arachides sur son vagin et a pris des photos pendant que le chien le léchait. Il a par la suite demandé à la plaignante de le refaire pour qu'il puisse l'enregistrer sur vidéo. Au procès, il a été conclu que D.L.W. avait agi de la sorte à des fins d'ordre sexuel. De l'avis du juge du procès, la bestialité au sens du *Code* s'entend des attouchements auxquels se livre une personne avec un animal à des fins

on what constitutes prohibited sexual acts. A majority of the Court of Appeal allowed D.L.W.'s appeal against the bestiality conviction and acquitted him of the bestiality count. The majority concluded that the term "bestiality" had a common law meaning that included penetration as one of its essential elements. The dissenting judge found that penetration was not an element of bestiality and he would have dismissed the appeal.

d'ordre sexuel et il a conclu que la pénétration n'est pas nécessaire. Le juge du procès a préféré interpréter les éléments constitutifs de la bestialité de façon à ce qu'ils reflètent ce qui est considéré de nos jours comme des actes sexuels prohibés. La majorité de la Cour d'appel a accueilli l'appel interjeté par D.L.W. contre la déclaration de culpabilité pour bestialité et elle l'a acquitté de ce chef d'accusation. La majorité a conclu que, suivant le sens qui a été donné au terme « bestialité » en common law, la pénétration est un élément essentiel de l'infraction de bestialité. Le juge dissident a conclu que la pénétration n'était pas un élément constitutif de l'infraction de bestialité et il aurait rejeté l'appel.

Held (Abella J. dissenting): The appeal should be dismissed.

Arrêt (la juge Abella est dissidente) : Le pourvoi est rejeté.

Per McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Côté and Brown JJ.: Since 1955, criminal offences in Canada (apart from criminal contempt) have been entirely statutory. However, the common law continues to play an important role in defining criminal conduct as defining the elements of statutory offences often requires reference to common law concepts. Applying the principles that guide statutory interpretation leads to the conclusion in this case that the term "bestiality" has a well-established legal meaning and refers to sexual intercourse between a human and an animal. Penetration has always been understood to be an essential element of bestiality. Parliament adopted that term without adding a definition of it and the legislative history and evolution of the relevant provisions show no intent to depart from the well-understood legal meaning of the term. Moreover, the courts should not, by development of the common law, broaden the scope of liability for the offence of bestiality. Any expansion of criminal liability for this offence is within Parliament's exclusive domain.

La juge en chef McLachlin et les juges Cromwell, Moldaver, Karakatsanis, Côté et Brown : Depuis 1955, les infractions criminelles au Canada sont entièrement créées par la loi (sauf l'outrage criminel au tribunal). Toutefois, la common law continue de jouer un rôle important lorsqu'il s'agit de déterminer ce qui constitue un comportement criminel. En effet, il faut souvent recourir à des notions de common law pour définir les éléments d'une infraction créée par la loi. L'application des principes qui guident l'interprétation des textes de loi mène en l'espèce à la conclusion que le terme « bestialité » a un sens juridique bien établi et qu'il s'entend des rapports sexuels entre un être humain et un animal. La pénétration a toujours été considérée comme un élément essentiel de la bestialité. Le législateur a adopté ce terme sans le définir, et l'historique et l'évolution des dispositions pertinentes ne démontrent pas qu'il avait l'intention de s'écarter de sa signification juridique bien définie. De plus, les tribunaux ne devraient pas, en faisant évoluer la common law, élargir la portée de la responsabilité afférente à l'infraction de bestialité. Tout élargissement de la responsabilité criminelle liée à cette infraction relève de la compétence exclusive du législateur.

When Parliament uses a term with a legal meaning, it generally intends the term to be given that meaning. Words that have a well-understood legal meaning when used in a statute should be given that meaning unless Parliament clearly indicates otherwise. A further consideration is the related principle of stability in the law which means that absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law. Parliament is deemed to know the existing law and is unlikely to have intended any significant changes to it unless that intention is made clear. While these interpretive principles are easy to state, how they apply in particular

Lorsque le législateur utilise un terme comportant un sens juridique, il veut généralement lui donner ce sens. Lorsqu'ils sont utilisés dans une loi, les mots qui ont une signification juridique bien définie devraient recevoir cette signification, sauf si le législateur indique clairement autre chose. Une autre considération est le principe connexe de la stabilité du droit voulant qu'en l'absence d'une intention contraire exprimée clairement par le législateur, une loi ne doive pas être interprétée de façon à modifier substantiellement le droit, y compris la common law. Le législateur est censé connaître le droit existant et il n'a probablement pas voulu y apporter de changements importants à moins de l'indiquer clairement.

cases may be controversial. Sometimes, the controversy concerns the state of the common law when Parliament acted: in other words, the debate is about whether the term used had a clearly understood legal meaning when it was incorporated into the statute. In this case, the term "bestiality" did have a clear legal meaning when Parliament used that term without further definition in the English version of the 1955 *Criminal Code*. Bestiality meant buggery with an animal and required penetration. It was clear that to secure a conviction, the prosecution had to prove that penetration of an animal, or, in the case of women, penetration by an animal, had occurred. This was the state of the law when the *Offences Against the Person Act, 1861* was enacted in England. The offence in substantially the same form was carried over into the first English version of the Canadian *Criminal Code* in 1892 and continued to be in force until the offence called bestiality was introduced into the English version of the *Code* in the 1955 revisions.

In Canada, as in England, the early history of the offence shows that what was commonly called "bestiality" was subsumed under the offences named sodomy or buggery and that penetration was one of its essential elements. The English language version of the Canadian statute simply provided that buggery with an animal was an offence, but did not further define it. However, the French version of "buggery . . . with any other living creature" being "*bestialité*" shows that "buggery with an animal" and "bestiality" were the same thing. There can be no serious dispute that the Canadian offence of buggery with an animal/*la bestialité* in the 1892 *Code*, which continued to be in force until the 1955 revisions, had a widely and generally understood meaning: the offence required sexual penetration between a human and an animal. Parliament, by using that term without further definition, intended to adopt that well-understood legal meaning.

Parliament did not explicitly or by necessary implication change the well-understood legal meaning of the term "bestiality" when it amended the *Criminal Code* in 1955 and in 1988. There is no express statutory provision expanding the scope of the bestiality offence and further, there is nothing in the legislative evolution and history that supports any parliamentary intent to bring about such a change by implication. The required clarity and certainty are entirely lacking. Courts will only conclude

Bien que ces principes d'interprétation soient faciles à énoncer, la façon de les appliquer dans un cas particulier peut prêter à controverse. Parfois la controverse porte sur l'état de la common law au moment où le législateur a agi : autrement dit, le débat porte alors sur la question de savoir si le terme utilisé avait un sens juridique bien défini lorsqu'il a été introduit dans la loi. En l'espèce, le terme « *bestiality* » (bestialité) avait un sens juridique clair lorsque le législateur l'a utilisé sans le définir dans la version anglaise du *Code criminel* de 1955. La bestialité s'entendait d'un acte de sodomie avec un animal et exigeait une pénétration. Il ne faisait aucun doute que, pour obtenir une déclaration de culpabilité, la poursuite devait établir qu'un acte de pénétration avait été commis sur un animal ou, dans le cas d'une femme, que l'acte de pénétration avait été commis par l'animal. Tel était l'état du droit lorsque la *Offences Against the Person Act, 1861* a été adoptée en Angleterre. L'infraction a été importée essentiellement sous cette forme dans la première version anglaise du *Code criminel* canadien de 1892 et elle est demeurée en vigueur jusqu'à ce que l'infraction appelée *bestiality* soit introduite dans la version anglaise du *Code* lors de la révision de 1955.

Au Canada, tout comme en Angleterre, il ressort des origines de l'infraction que ce que l'on appelait communément « bestialité » était compris dans l'infraction appelée sodomie et que la pénétration était l'un de ses éléments essentiels. La version de langue anglaise de la loi canadienne prévoyait simplement que la sodomie avec un animal était une infraction, mais elle ne l'a pas définie davantage. Or, comme l'équivalent français de « *buggery [. . .] with any other living creature* » est « bestialité », cela démontre que « *buggery with an animal* » et « bestialité » désignent la même chose. Il est impossible de mettre sérieusement en doute le fait que l'infraction canadienne de bestialité/*buggery with an animal* prévue au *Code* de 1892 qui est demeurée en vigueur jusqu'à la révision de 1955 avait un sens généralement reconnu : l'infraction exigeait une pénétration sexuelle impliquant un être humain et un animal. En utilisant ce terme sans le définir, le législateur voulait retenir son sens juridique bien défini.

Le législateur n'a pas modifié explicitement ou par déduction nécessaire le sens juridique bien défini du terme « bestialité » lorsqu'il a modifié le *Code criminel* en 1955 et en 1988. Aucune disposition légale n'élargit expressément la portée de l'infraction de bestialité. En outre, l'évolution et l'historique législatifs ne permettent aucunement de conclure que le législateur a voulu faire implicitement une telle modification. La clarté et la certitude requises sont totalement absentes. Les tribunaux

that a new crime has been created if the words used to do so are certain and definitive. This approach not only reflects the appropriate respective roles of Parliament and the courts, but the fundamental requirement of the criminal law that people must know what constitutes punishable conduct and what does not, especially when their liberty is at stake. The important questions of penal and social policy involved in broadening the offence of bestiality are matters for Parliament to consider, if it so chooses. Parliament may wish to consider whether the present provisions adequately protect children and animals. But it is for Parliament, not the courts, to expand the scope of criminal liability for this offence. Absent clear parliamentary intent to depart from the clear legal definition of the elements of the offence, it is manifestly not the role of the courts to expand that definition.

The English version of the *Criminal Code* did not use the term "bestiality" until 1955, but the French version did. In the 1955 revision, the word "bestiality" was first introduced into the English version of the *Code* and the reference to "buggery . . . with any other living creature" was deleted, but with no definition of either the term "buggery" or "bestiality". The text of the 1955 revision does not suggest that any significant change in the law was intended. This appears to be simply the substitution of a more precise legal term in the English version for the previous more general expression. The absence of a statutory definition of either term is consistent only with the intent to adopt the accepted legal meanings of both terms. Here, there is no evidence that any substantive change was intended. The fact that no substantive change occurred in the French version of the offence leads almost inevitably to the conclusion that the change in terminology in the English version was simply intended to give the offence a clearer, more modern wording which would be more consistent with its French equivalent. There is nothing in this tweak to the English version of the *Code* to support the view that any substantive change to the elements of the offence was intended. The text, read in both of its official versions, the legislative history and evolution, all of the commentators and the applicable principles of statutory interpretation support the view that the 1955 revisions to the *Code* did not expand the elements of bestiality and that penetration between a human and an animal was the essence of the offence.

ne concluront à la création d'un nouveau crime que si les mots utilisés pour ce faire sont sûrs et définitifs. Cette approche tient compte non seulement des fonctions revenant à bon droit respectivement au législateur et aux tribunaux, mais également de l'exigence fondamentale en droit criminel que les gens sachent ce qui constitue une conduite punissable et ce qui ne l'est pas, surtout lorsque leur liberté est en jeu. Il revient au législateur d'examiner, s'il le juge à propos, les questions importantes de politique pénale et sociale que soulève l'élargissement de l'infraction de bestialité. Le législateur peut vouloir se demander si les dispositions actuelles protègent adéquatement les enfants et les animaux. Il appartient cependant au législateur, et non aux tribunaux, d'élargir la portée de la responsabilité criminelle liée à cette infraction. En l'absence d'une intention claire du législateur de s'écarter de la définition juridique claire des éléments de l'infraction, il n'appartient manifestement pas aux tribunaux d'élargir cette définition.

Le terme « *bestiality* » ne figurait pas dans la version anglaise du *Code criminel* avant 1955, mais on retrouvait son équivalent « bestialité » dans la version française. Lors de la révision de 1955, le terme « *bestiality* » a été introduit pour la première fois dans la version anglaise du *Code*, et le passage « *buggery [. . .] with any other living creature* » a été supprimé, mais on n'a défini ni le terme « *buggery* » (sodomie), ni celui de « *bestiality* ». Le texte de la révision de 1955 ne porte pas à croire que le législateur a voulu changer le droit de façon substantielle. Il semble s'agir là du simple remplacement de l'ancienne expression plus générale dans la version anglaise par un terme juridique plus précis. L'absence de définition de l'un ou l'autre des termes dans la loi ne s'accorde qu'avec l'intention d'adopter le sens juridique reconnu des deux termes. En l'espèce, rien ne prouve qu'un changement de fond était souhaité. L'absence de modification de fond à la version française de l'infraction mène presque inévitablement à la conclusion que le changement de terminologie dans la version anglaise ne visait qu'à donner à l'infraction une formulation plus claire et plus moderne qui concorderait mieux avec son équivalent français. Cette modification mineure de la version anglaise du *Code* ne permet aucunement d'affirmer qu'un changement de fond des éléments de l'infraction était souhaité. Le texte, lu dans ses deux versions officielles, l'évolution et l'historique législatifs, les propos de tous les auteurs ainsi que les principes applicables en matière d'interprétation législative permettent de conclure que la révision de 1955 du *Code* n'a pas élargi les éléments de l'infraction de bestialité et que la pénétration impliquant un être humain et un animal était l'essence même de l'infraction.

A complete overhaul of sexual offences against the person in 1983 was followed by the 1988 revisions which were focused on enhancing the protection of children against sexual abuse. In 1988, among other things, the new legislation repealed the former buggery offence and replaced it with the new offence of anal intercourse and bestiality was given its own section. Through all of the many changes, changes which included fundamental revisions of the definition of several sexual offences and the repeal of others, the *Code* continued to make bestiality an offence without further defining it. The fact that Parliament made no change to the definition of bestiality in the midst of a comprehensive revision of the sexual offences supports only the conclusion that it intended to retain its well-understood legal meaning. It defies logic to think that Parliament would rename, redefine and create new sexual offences in a virtually complete overhaul of the sexual offence provisions in 1983 and 1988 and yet would continue to use an ancient legal term with a well-understood meaning — bestiality — without further definition in order to bring about a substantive difference in the law. The new bestiality offences added in the 1988 revision, while not changing the definition of the underlying offence, added protections for children in relation to that offence.

Finally, contrary to the dissent's view, it does not follow that all sexually exploitative acts with animals that do not involve penetration are perfectly legal. There are other provisions in the *Code* which may serve to protect children and others from sexual activity with an animal that does not necessarily involve penetration.

Per Abella J. (dissenting): The common law origins of the offence of "buggery with mankind or with any animal" were ecclesiastical and emerged from the Church's hegemonic jurisdiction over sexual offences and its abhorrence for non-procreative sexual acts, which were condemned as being "unnatural". The Church's jurisdiction over sexual offences ended in 1533, but censorious attitudes did not, and death remained the penalty for "the detestable offence of buggery". The question whether these acts were criminal only when there was penetration is, however, far from clear.

At no time was "buggery" ever defined by Parliament. Applying the principles of interpretation requires reviewing related *Criminal Code* provisions and the context in

La refonte complète des infractions sexuelles contre la personne en 1983 a été suivie de la révision de 1988, qui visait à mieux protéger les enfants contre l'abus sexuel. En 1988, entre autres, la nouvelle loi a aboli l'ancienne infraction de sodomie et l'a remplacée par la nouvelle infraction de relations sexuelles anales, et la bestialité a fait l'objet d'une disposition distincte. Tout au long de ces nombreuses modifications, qui comprenaient une révision de fond en comble de la définition de plusieurs infractions d'ordre sexuel et l'abrogation de certaines autres, le *Code* a continué de criminaliser la bestialité sans la définir. Le fait que le législateur n'a pas modifié la définition de la bestialité au milieu de cette révision exhaustive des infractions d'ordre sexuel étaye uniquement la conclusion selon laquelle il a voulu que le terme « bestialité » conserve son sens juridique bien défini. Il est illogique de penser que le législateur renommerait ou redéfinirait des infractions existantes et créerait de nouvelles infractions d'ordre sexuel à l'occasion d'une refonte pratiquement complète des dispositions en cause en 1983 et 1988 et qu'il continuerait malgré tout d'utiliser un terme juridique ancien ayant un sens bien défini — bestialité — sans le définir afin de modifier substantiellement le droit. Bien qu'elles n'aient pas modifié la définition de l'infraction sous-jacente, les nouvelles infractions de bestialité ajoutées à la révision de 1988 ont prévu des mesures de protection supplémentaires pour les enfants relativement à cette infraction.

Enfin, contrairement au point de vue exprimé dans la dissidence, cela ne signifie pas que tous les actes d'exploitation sexuelle avec des animaux qui n'impliquent pas de pénétration sont tout à fait légaux. Le *Code* contient d'autres dispositions qui peuvent servir à protéger les enfants et d'autres personnes d'une activité sexuelle avec un animal qui n'implique pas nécessairement de pénétration.

La juge Abella (dissidente) : Les origines de l'infraction de « *buggery* avec un être humain ou avec un animal » en common law sont ecclésiastiques et elles ont émergé de l'hégémonie qu'exerçait l'Église sur les infractions d'ordre sexuel et de l'aversion de celle-ci envers les actes sexuels non procréateurs, qui étaient jugés « contre nature ». La juridiction de l'Église sur les infractions d'ordre sexuel a pris fin en 1533, mais non ses attitudes critiques, et la peine capitale est demeurée la peine prévue pour « l'infraction détestable de *buggery* ». Pour ce qui est de savoir si ces actes étaient criminels seulement quand il y avait pénétration, cela n'est, cependant, pas du tout clair.

Le Parlement n'a jamais défini le terme « *buggery* ». Pour appliquer les principes d'interprétation, il faut examiner les dispositions connexes du *Code criminel* et le

which the bestiality provision was first introduced. In 1955, for the first time, the offence of "bestiality" was expressly named as such in the English version of the *Code*. It too was never defined. The addition of the offence of "bestiality" must have been intended to mean something different from "buggery" because if the elements of bestiality and buggery were the same, the addition of "bestiality" to the 1955 *Code* was redundant and there was no need to change the provision from one prohibiting buggery, to one prohibiting buggery *and* bestiality.

Amendments in 1955 were also made to the *Code*'s animal cruelty offence to reflect an increased recognition of the importance of protecting animal welfare by expanding the category of birds and animals from only some, to all of them. It is in this transformed legal environment consisting of more protection for more animals, that the offence of "bestiality" first appeared. Whatever the common law meaning of "buggery" with animals had been, the creation of a distinct offence of bestiality in the same year that the animal cruelty provisions were expanded to protect more animals from exploitative conduct, reflected Parliament's intention to approach the offence differently. Parliament's purposes would have been inconsistent if the animal cruelty protection in the *Criminal Code* would now cover *all* birds and animals, but the bestiality provision would be limited to those animals whose anatomy permitted penetration. Requiring penetration for the offence of bestiality, technically leaves as legal all sexually exploitative acts with animals that do *not* involve penetration. This, in turn, completely undermines the concurrent legislative protections for animals from cruelty and abuse.

If there was any doubt about what Parliament intended in 1955, its intention is even clearer in light of the 1988 Amendments to the *Code*, when buggery and bestiality were divided into two separate provisions. The offence of "bestiality" was extended to include those who compelled its commission or who committed it in the presence of a child. It is difficult to accept that Parliament's intention was to protect children from seeing or being made to engage in sexual activity with animals *only* if it involved penetration. Parliament must have intended protection for children from witnessing or being forced to participate in *any* sexual activity with animals. This wider protection for children can also be inferred

contexte dans lequel la disposition sur la *bestiality* a vu le jour. C'est en 1955 que l'infraction de « *bestiality* » a été expressément nommée telle quelle pour la première fois dans la version anglaise du *Code*. Elle n'a jamais été définie non plus. L'infraction de « *bestiality* » ajoutée devait donc avoir une signification différente de celle de « *buggery* » parce que, si l'acte de *bestiality* et l'acte de *buggery* partageaient les mêmes éléments, l'ajout de la « *bestiality* » au Code de 1955 était redondant et point n'était besoin de remplacer la disposition interdisant les actes de *buggery* par une disposition interdisant ces actes *et* la *bestiality*.

En 1955, le législateur a aussi modifié l'infraction de cruauté envers les animaux prévue au *Code* en étendant sa portée à toutes les espèces d'oiseaux et d'animaux, plutôt qu'à seulement certaines d'entre elles comme c'était le cas auparavant, pour traduire une reconnaissance accrue de l'importance d'assurer le bien-être des animaux. C'est dans cet environnement juridique transformé offrant une plus grande protection aux animaux que l'infraction de « *bestiality* » a vu le jour. Quel qu'ait été le sens de « *buggery* » avec un animal en common law, la création d'une infraction distincte de *bestiality* la même année que les dispositions relatives à la cruauté envers les animaux ont été étendues pour protéger plus d'animaux de l'exploitation montre que le législateur voulait aborder l'infraction sous un autre angle. Les objectifs du Parlement seraient incompatibles si la protection offerte par le *Code criminel* aux animaux contre la cruauté s'étendait désormais à *tous* les oiseaux et animaux, mais la disposition relative à la *bestiality* se limitait aux animaux dont l'anatomie est susceptible de pénétration. Exiger que l'infraction de *bestiality* comporte un élément de pénétration rend, d'un point de vue technique, tout à fait légaux l'ensemble des actes d'exploitation sexuelle commis avec des animaux *sans* qu'il n'y ait de pénétration. Et cela sape entièrement les dispositions législatives concurrentes qui protègent les animaux contre la cruauté et l'abus.

S'il persistait quelque doute que ce soit à propos de ce que voulait le législateur en 1955, son intention paraît encore plus claire à la lumière des modifications de 1988 au *Code*, lorsqu'il a consacré à la notion de *buggery* et à celle de *bestiality* deux dispositions distinctes. L'infraction de « *bestiality* » a été étendue aux personnes qui ont forcé quelqu'un d'autre à la commettre ou qui l'ont commise en présence d'un enfant. Il est difficile d'accepter que le Parlement voulait empêcher que des enfants soient témoins d'une activité sexuelle avec des animaux ou forcés de se livrer à pareille activité *seulement* si elle comportait une pénétration. Le Parlement devait certainement vouloir empêcher que des enfants soient témoins

from the other changes to the *Code* in the 1988 Amendments, introducing the offences of sexual interference, sexual exploitation, and invitation to sexual touching, all of which protected minors and none of which required penetration. As a result, by 1988, the language, history, and evolving social landscape of the bestiality provision lead to the conclusion that Parliament intended, or at the very least assumed, that penetration was not a necessary element of the offence.

The absence of a requirement of penetration does not broaden the scope of bestiality. It is more a reflection of Parliament's common sense assumption that since penetration is physically impossible with most animals and for half the population, requiring it as an element of the offence eliminates from censure most sexually exploitative conduct with animals. Acts with animals that have a sexual purpose are inherently exploitative whether or not penetration occurs, and the prevention of sexual exploitation is what the 1988 Amendments were all about.

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de *quelque* activité sexuelle *que ce soit* avec des animaux ou forcés d'y prendre part. Cette protection plus large des enfants peut également s'inférer des autres modifications de 1988 au *Code* qui ont créé les infractions de contacts sexuels, d'exploitation sexuelle et d'incitation à des contacts sexuels, lesquelles visaient toutes à protéger les mineurs et aucune d'entre elles n'exigeait de pénétration. Par conséquent, le libellé et l'historique de la disposition sur la bestialité ainsi que l'évolution de sa réalité sociale jusqu'en 1988 mènent à la conclusion que le Parlement voulait, ou supposait à tout le moins, que la pénétration ne constitue pas un élément essentiel de l'infraction.

L'absence d'exigence de pénétration n'élargit pas la portée de la bestialité. Il s'agit plutôt d'un reflet de la supposition logique du Parlement que, comme il est physiquement impossible de pénétrer la plupart des animaux et comme la pénétration est un acte qui est physiquement impossible à accomplir par la moitié de la population, en faire un élément constitutif de l'infraction soustrait à la censure la plupart des actes d'exploitation sexuelle commis avec des animaux. Les actes de nature sexuelle commis avec des animaux relèvent intrinsèquement de l'exploitation, qu'il y ait ou non pénétration, et la prévention de l'exploitation sexuelle était la raison d'être des modifications de 1988.

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Loi sur la sécurité des rues et des communautés, L.C. 2012, c. 1, art. 15.
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Mark K. Levitz, *Q.C.*, and *Laura Drake*, for the appellant.

Eric Purtzki and *Garth Barriere*, for the respondent.

Peter Sankoff and *Camille Labchuk*, for the intervener.

The judgment of McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Côté and Brown JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] Sixty years ago, Parliament added an offence called bestiality to the English version of the *Criminal Code*, S.C. 1953-54, c. 51, s. 147 (the "1955 revisions"), but did not define its elements. Through successive — and substantial — amendments to the sexual offence provisions of the *Code*, Parliament has retained the offence of bestiality to the present day, but has never defined it. The crime is in fact a very old one which, at various times in its history, has also been referred to as a type of sodomy or buggery. But by whatever name it has been known in its

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Mark K. Levitz, *c.r.*, et *Laura Drake*, pour l'appelante.

Eric Purtzki et *Garth Barriere*, pour l'intimé.

Peter Sankoff et *Camille Labchuk*, pour l'intervenant.

Version française du jugement de la juge en chef McLachlin et des juges Cromwell, Moldaver, Karakatsanis, Côté et Brown rendu par

LE JUGE CROMWELL —

I. Introduction

[1] Il y a 60 ans, le législateur a ajouté une infraction appelée « *bestiality* » (bestialité) à la version anglaise du *Code criminel*, S.C. 1953-54, c. 51, art. 147 (la « révision de 1955 »), sans toutefois en définir les éléments constitutifs. Par le truchement de modifications successives — et substantielles — apportées aux dispositions du *Code* portant sur les infractions d'ordre sexuel, le législateur a maintenu l'infraction de bestialité jusqu'à ce jour, mais il ne l'a jamais définie. Il s'agit en fait d'une très ancienne infraction qui, à diverses époques, a aussi

long history, sexual penetration has always been one of its essential elements. Whether that is still the case under our present *Code* is the question that divided the British Columbia courts and now comes to us on appeal.

[2] The appellant Crown argues that bestiality no longer requires penetration, and is committed by engaging in any sexual activity with an animal. This submission asks us, in effect, to create a new crime. But that is not our role.

[3] In Canada, there can be no liability for common law crimes apart from criminal contempt of court: *Criminal Code*, R.S.C. 1985, c. C-46, s. 9. As a result, changes to the scope of criminal liability must be made by Parliament; judges are not to change the elements of crimes in ways that seem to them to better suit the circumstances of a particular case: D. H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (1989), at pp. 124 and 148. To accept the Crown's invitation to expand the scope of the crime of bestiality would be to turn back the clock and re-enter the period before codification of our criminal law, a period when the courts rather than Parliament could change the elements of criminal offences. My colleague Justice Abella is of the view that accepting the Crown's position on this appeal would not widen the scope of bestiality. But of course it would. That is the point of the Crown's position. If the Crown's proposed changes to the elements of bestiality are to be made, they must be made by Parliament.

[4] Like the majority of the Court of Appeal, I conclude that penetration remains, as it has always been, an essential element of the offence of bestiality. I would dismiss the appeal.

été décrite comme une forme de sodomie. Mais, quel que soit le nom qu'on lui a donné au cours de sa longue histoire, la pénétration sexuelle a toujours constitué un de ses éléments essentiels. La question de savoir si cela est toujours le cas selon le *Code* actuel a divisé les tribunaux de la Colombie-Britannique et nous en sommes maintenant saisis dans le présent pourvoi.

[2] Le ministère public appelant soutient que l'infraction de bestialité n'exige plus la pénétration, et qu'elle est commise lorsqu'une personne se livre à une activité sexuelle avec un animal. En avançant cette thèse, il nous demande en fait de créer un nouveau crime. Or, là n'est pas notre rôle.

[3] Au Canada, on ne peut être tenu responsable d'un crime de common law, hormis l'outrage criminel au tribunal (*Code criminel*, L.R.C. 1985, c. C-46, art. 9). Par conséquent, seul le législateur peut modifier l'étendue de la responsabilité criminelle; les juges ne peuvent modifier les éléments constitutifs d'un crime d'une façon qui, selon eux, conviendrait mieux dans les circonstances d'une affaire (D. H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (1989), p. 124 et 148). Accepter l'invitation du ministère public d'étendre la portée du crime de bestialité équivaudrait à faire reculer l'horloge du temps et à revenir à l'époque antérieure à la codification de notre droit criminel, une période au cours de laquelle les tribunaux et non le législateur pouvaient modifier les éléments constitutifs des infractions criminelles. Ma collègue la juge Abella estime qu'accepter la thèse du ministère public n'aurait pas pour effet d'élargir la portée de la bestialité. Mais il va sans dire que ce serait le cas. C'est la raison d'être de la thèse du ministère public. S'il convient de modifier les éléments du crime de bestialité de la manière proposée par le ministère public, c'est au législateur qu'il revient de le faire.

[4] À l'instar des juges majoritaires de la Cour d'appel, je conclus que la pénétration demeure, comme cela a toujours été le cas, un élément essentiel de l'infraction de bestialité. Je suis donc d'avis de rejeter le pourvoi.

II. Outline of the Facts and Judicial History

[5] This appeal relates solely to the respondent D.L.W.'s conviction for a single count of bestiality. That conviction was entered after a 38-day trial, at which the respondent was also convicted of numerous other sexual offences against his two stepdaughters committed over the course of 10 years: 2013 BCSC 1327. Both victims testified that the respondent began sexually fondling them by the age of 12 and, by the time they turned 14, he was forcing them to engage in oral sex and sexual intercourse and encouraging them to perform sex acts with each other. He was sentenced to a total of 16 years' imprisonment. For the bestiality conviction in relation to the older complainant, he received a sentence of two years to run consecutively to sentences totalling 14 years imposed in relation to the other offences: 2014 BCSC 43.

[6] The trial judge, Romilly J., found that the respondent first brought the family dog into the bedroom with the complainant when she was 15 or 16 years old. He attempted to make the dog have intercourse with her and, when that failed, he spread peanut butter on her vagina and took photographs while the dog licked it off. He later asked her to do this again so he could make a video. The judge found that the respondent did all of this for a sexual purpose: 2013 BCSC 1327, at paras. 317-18 (CanLII).

[7] Bestiality is not defined in the *Criminal Code*, R.S.C. 1985, c. C-46, which provides simply:

160 (1) Every person who commits bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

II. Aperçu des faits et historique judiciaire

[5] Le présent pourvoi concerne seulement la déclaration de culpabilité de l'intimé D.L.W. quant à un seul chef d'accusation de bestialité. Cette déclaration de culpabilité a été prononcée au terme d'un procès de 38 jours, à l'issue duquel l'intimé a aussi été reconnu coupable de nombreuses autres infractions d'ordre sexuel commises contre ses deux belles-filles sur une période de 10 ans (2013 BCSC 1327). Les deux victimes ont déclaré que l'intimé avait commencé à se livrer à des attouchements sexuels sur leur personne quand elles avaient 12 ans et que, lorsqu'elles ont eu 14 ans, il les forçait à avoir des rapports sexuels oraux et à avoir des relations sexuelles, et il les encourageait à se livrer à des actes sexuels entre elles. Il a été condamné à purger un total de 16 ans d'emprisonnement. En ce qui concerne la déclaration de culpabilité pour bestialité à l'égard de la plaignante plus âgée, il a été condamné à une peine de deux ans à purger consécutivement aux autres peines totalisant 14 ans infligées à l'égard des autres infractions (2014 BCSC 43).

[6] Le juge du procès, le juge Romilly, a conclu que la plaignante était âgée de 15 ou 16 ans la première fois que l'intimé a amené le chien de la famille dans la chambre avec elle. L'intimé a alors tenté de faire en sorte que le chien ait des rapports sexuels avec elle et, lorsque cela n'a pas fonctionné, il a étendu du beurre d'arachides sur son vagin et a pris des photos pendant que le chien le léchait. Il a par la suite demandé à la plaignante de le refaire pour qu'il puisse l'enregistrer sur vidéo. Le juge a conclu que l'intimé avait agi de la sorte à des fins d'ordre sexuel (2013 BCSC 1327, par. 317-318 (CanLII)).

[7] Le terme « bestialité » n'est pas défini dans le *Code criminel*, L.R.C. 1985, c. C-46, qui dispose simplement que :

160 (1) Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, quiconque commet un acte de bestialité.

The issue at trial and both levels of appeal concerns whether penetration is an essential element of the offence. If it is, the respondent must be acquitted as the alleged acts did not involve sexual penetration.

[8] The trial judge accepted the Crown's position that penetration is not required. In his view, bestiality in the *Code* means touching between a person and an animal for a person's sexual purpose. Relying on *R. v. M.G.*, 2002 CanLII 45200 (C.Q.), the judge rejected the notion that the elements of bestiality were "frozen in time", preferring instead to interpret the elements of bestiality so that they would "reflect current views on what constitutes prohibited sexual acts": paras. 314-15. He held that the respondent was a party to this offence because he facilitated the complainant's participation in bestiality by encouraging her to do so and by using the peanut butter: para. 320. The judge also concluded that the Crown had failed to prove that the respondent had compelled the complainant to commit the offence: para. 326. In other words, the trial judge in effect held that the complainant was the principal (but uncharged) offender and the respondent was a party to the offence which the complainant had committed. The Crown refers to this conclusion as "questionable" but it is relevant to the legal issue we face in this appeal to consider that the Crown's position, if accepted, could have the effect of turning the victim into an offender.

[9] A majority of the Court of Appeal (Goepel J.A. writing for himself and Lowry J.A.) allowed the respondent's appeal against the bestiality conviction and acquitted the respondent of the bestiality count: 2015 BCCA 169, 371 B.C.A.C. 51. The majority concluded that the term "bestiality" had a common law meaning that included penetration as one of its essential elements. The legislative history of the offence in Canada, the majority decided, did not show any parliamentary intent to depart from that meaning. Bauman C.J.B.C., dissenting, would have

La question soulevée au procès et aux deux instances d'appel concerne le point de savoir si la pénétration est un élément essentiel de l'infraction. Dans l'affirmative, l'intimé doit être acquitté étant donné que les actes reprochés n'impliquaient pas de pénétration sexuelle.

[8] Le juge du procès a retenu la thèse du ministère public selon laquelle la pénétration n'est pas nécessaire. À son avis, la bestialité au sens du *Code* s'entend des attouchements auxquels se livre une personne avec un animal à des fins d'ordre sexuel. S'appuyant sur *R. c. M.G.*, 2002 CanLII 45200 (C.Q.), le juge a rejeté l'idée que les éléments constitutifs de la bestialité étaient [TRADUCTION] « figé[s] dans le temps », préférant plutôt les interpréter de façon à ce qu'ils « reflètent ce qui est considéré de nos jours comme des actes sexuels prohibés » (par. 314-315). Il a conclu que l'intimé avait participé à cette infraction parce qu'il avait facilité la perpétration d'actes de bestialité par la plaignante en l'encourageant à les commettre et en utilisant du beurre d'arachides (par. 320). Toujours selon le juge, le ministère public n'a pas établi que l'intimé avait forcé la plaignante à commettre l'infraction (par. 326). Autrement dit, le juge du procès a, dans les faits, conclu que la plaignante était la principale auteure de l'infraction (mais non inculpée) et l'intimé, un participant à l'infraction commise par la plaignante. Le ministère public qualifie cette conclusion de [TRADUCTION] « douteuse », mais elle est pertinente quant à la question de droit à laquelle nous devons répondre en l'espèce puisque, si elle est acceptée, la thèse du ministère aurait pour effet de faire de la victime l'auteure de l'infraction.

[9] La majorité de la Cour d'appel (le juge Goepel s'exprimant en son nom et en celui du juge Lowry) a accueilli l'appel interjeté par l'intimé contre la déclaration de culpabilité pour bestialité et elle l'a acquitté de ce chef d'accusation (2015 BCCA 169, 371 B.C.A.C. 51). La majorité a conclu que, suivant le sens qui a été donné au terme « bestialité » en common law, la pénétration est un élément essentiel de l'infraction de bestialité. Selon les juges majoritaires, l'historique législatif de l'infraction au Canada ne démontre pas que le législateur a voulu s'écarter de

dismissed the appeal. He found that penetration was not an element of bestiality under the Canadian offence brought into force in 1955. The Crown appeals to this Court as of right by virtue of that dissent.

[10] The only issue is whether the majority of the Court of Appeal was wrong to conclude that penetration is an essential element of the offence of bestiality in s. 160(1) of the *Code*.

III. Analysis

A. *The Parties' Positions*

[11] The Crown's position is, first, that the term "bestiality" does not have a well-established and well-understood meaning in common law. In the early days of Canada's *Criminal Code*, sexual activity with an animal was criminalized, in the English version, as buggery, an offence which, in the Crown's submission, related only to anal intercourse, whether between humans or between a human and an animal. Next, the Crown submits that when the term "bestiality" was first used in the English version of the *Code* in the 1955 revisions, Parliament intended to separate it from the common law conception of buggery and give it its own meaning. Further, the argument goes that additional amendments to the *Code* effective in 1988 show that Parliament must have assumed that the term "bestiality" encompassed sexual activity of any kind between a human and an animal.

[12] The respondent, on the other hand, submits that when the term "bestiality" was introduced into the English version of the *Code* in 1955, that term had a specific, well-established and well-known legal meaning: vaginal or anal penetration between a human and an animal. Parliament, when it employed the term without further definition, must have intended its normal legal sense. None of the amendments on which the Crown relies affected the definition of the elements of the offence; Parliament simply continued to use the term without statutory definition.

ce sens. Le juge en chef Bauman, dissident, aurait rejeté l'appel. Il a conclu que la pénétration n'était pas un élément constitutif de l'infraction canadienne de bestialité qui est entrée en vigueur en 1955. Le ministère public se pourvoit de plein droit devant la Cour en raison de cette dissidence.

[10] La seule question en litige est de savoir si la majorité de la Cour d'appel a eu tort de conclure que la pénétration est un élément essentiel de l'infraction de bestialité prévue au par. 160(1) du *Code*.

III. Analyse

A. *Les thèses des parties*

[11] Le ministère public soutient d'abord que le terme « bestialité » n'a pas une signification bien établie et définie en common law. Le *Code criminel* du Canada a d'abord assimilé — si l'on se réfère à la version anglaise — le fait de se livrer à des activités sexuelles avec un animal au crime de sodomie, qui concernait uniquement, selon le ministère public, les relations anales entre êtres humains ou entre un être humain et un animal. Le ministère public fait valoir ensuite que, lorsque le terme « *bestiality* » a été utilisé pour la première fois dans la version anglaise du *Code* lors de la révision de 1955, le législateur voulait distinguer la bestialité de la notion de sodomie en common law et lui donner sa propre signification. Toujours selon le ministère public, d'autres modifications apportées au *Code* en 1988 montrent que le législateur doit avoir tenu pour acquis que le terme « bestialité » englobe toute activité sexuelle entre un être humain et un animal.

[12] L'intimé, pour sa part, fait valoir que, lorsque le terme « *bestiality* » a été introduit dans la version anglaise du *Code* en 1955, il avait une signification précise, bien établie et bien connue en droit : la pénétration vaginale ou anale impliquant un être humain et un animal. Le législateur doit avoir voulu utiliser ce terme dans son sens juridique habituel lorsqu'il l'a employé sans le définir. Aucune des modifications sur lesquelles s'appuie le ministère public n'a eu d'incidence sur la définition des éléments de l'infraction; le législateur a simplement continué d'utiliser le terme sans le définir dans la loi.

B. *The Analytical Approach*

[13] The debate in this Court concerns whether the term "bestiality" has a well-understood legal meaning in the common law and, if so, whether Parliament intended to depart from that meaning when it used the word without further definition in the English version of the *Code*. At the root of the issue, therefore, is the question of how the common law and the statutory offences in the *Code* interact. This is an important question of principle that has implications far beyond this particular offence.

[14] The common law "forms an important and complex part of the context in which legislation is enacted and operates and in which it must be interpreted": R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §17.1. Nowhere in our law is this observation more apt than in relation to our *Code*.

[15] As I mentioned at the outset, criminal offences in Canada since 1955 have been entirely statutory (with the exception of criminal contempt). However, the common law continues to play an important role in defining criminal conduct. Defining the elements of statutory offences often requires reference to common law concepts: *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 930. Those concepts continue not only to illuminate the definition of statutory offences but also to give "content to the various principles of criminal responsibility those definitions draw from": *R. v. Jobidon*, [1991] 2 S.C.R. 714, at p. 736. Many of the "basic premises" of the criminal law — the necessary conditions for criminal liability — are left to the common law: Law Reform Commission of Canada, Report 31, *Report on Recodifying Criminal Law* (1987), at p. 17.

[16] To take one obvious example, the mental element of many crimes is not specified in the *Code*.

B. *La méthode d'analyse*

[13] Le débat devant la Cour porte sur la question de savoir si le terme « *bestiality* » a un sens juridique bien défini en common law et, dans l'affirmative, si le législateur a voulu s'écarter de cette signification lorsqu'il a utilisé le terme sans le définir dans la version anglaise du *Code.* Le point de savoir comment interagissent la common law et les infractions prévues par le *Code* est donc au cœur du litige. Il s'agit d'une question de principe importante dont les ramifications vont bien au-delà de l'infraction de bestialité.

[14] La common law [TRADUCTION] « constitue une partie importante et complexe du contexte dans lequel les lois sont adoptées et s'appliquent, et dans lequel elles doivent être interprétées » (R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), §17.1). Cette observation n'est plus juste nulle part ailleurs en droit canadien qu'à l'égard de notre *Code*.

[15] Comme je l'ai mentionné d'entrée de jeu, depuis 1955, les infractions criminelles au Canada sont entièrement créées par la loi (sauf l'outrage criminel au tribunal). Toutefois, la common law continue de jouer un rôle important lorsqu'il s'agit de déterminer ce qui constitue un comportement criminel. En effet, il faut souvent recourir à des notions de common law pour définir les éléments d'une infraction créée par la loi (*United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901, p. 930). Ces notions continuent non seulement d'éclairer la définition des infractions créées par la loi mais elles donnent également « substance aux divers principes de responsabilité criminelle dont ces définitions s'inspirent » (*R. c. Jobidon*, [1991] 2 R.C.S. 714, p. 736). Bon nombre des « prémisses fondamentales » du droit criminel — les conditions nécessaires à la responsabilité criminelle — relèvent de la common law (Commission de réforme du droit du Canada, Rapport 31, *Rapport pour une nouvelle codification du droit pénal* (1987), p. 17).

[16] À titre d'exemple évident, l'élément moral de nombreux crimes n'est pas précisé dans le *Code.*

Yet, absent a contrary indication, Parliament is presumed to intend that true crimes have a subjective fault component. This is presumed because Parliament is taken to know that under the common law the act is not guilty unless the mind is guilty (*actus non facit reum nisi mens sit rea*): see, e.g., *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269, at paras. 20-23. Of course, Parliament can provide otherwise, but where it does not, the common law principle is applied.

[17] The question of how the common law interacts with statutory criminal law is not a new one. It is addressed, for example, by several pages of Sir James Fitzjames Stephen's *A History of the Criminal Law of England* (1883), vol. II, at pp. 187-92. He concluded that there are four main ways in which criminal statutes may relate to the common law. The statute law may simply assume the continuing existence of some general principles and definitions of certain crimes. The statutes, in some instances, provide that some of those offences, aggravated or modified in particular ways, are subject to special punishments. In other instances, the statutes create offences unknown to the common law and, in a few cases, alter the principles and clarify the definitions of the common law. Determining which of these sorts of interactions applies in a particular offence is a matter of statutory interpretation.

[18] A number of principles guide statutory interpretation in this sort of case. The three most important are these. First, when Parliament uses a legal term with a well-understood legal meaning, it is presumed that Parliament intended to incorporate that legal meaning into the statute. Second, any departure from that legal meaning must be clear, either by express language or necessary implication from the statute. Finally, apart from criminal contempt, there can be no liability for common law crimes. Creating and defining crimes is for Parliament; the courts must not expand the scope of criminal liability beyond that established by Parliament.

Pourtant, sauf indication contraire, le législateur est présumé avoir voulu que les véritables crimes comportent un élément de faute subjectif. Il en est ainsi parce que le législateur est censé savoir que, selon la common law, un acte ne rend pas son auteur coupable à moins que ce dernier ait une intention coupable (*actus non facit reum nisi mens sit rea*) (voir, p. ex., *R. c. A.D.H.*, 2013 CSC 28, [2013] 2 R.C.S. 269, par. 20-23). Bien sûr, le législateur peut en disposer autrement, mais s'il ne le fait pas, le principe de common law s'applique.

[17] La question de savoir comment la common law interagit avec la législation criminelle ne date pas d'hier. Par exemple, Sir James Fitzjames Stephen en traite sur plusieurs pages dans son ouvrage intitulé *A History of the Criminal Law of England* (1883), vol. II, p. 187-192. Il conclut que les lois criminelles peuvent interagir avec la common law de quatre principales façons. D'abord, il arrive que les lois tiennent simplement pour acquis que des définitions et principes généraux relatifs à certains crimes subsistent. Il arrive aussi parfois qu'elles rendent passibles de peines spéciales certains de ces crimes, sous une forme aggravée ou modifiée de façon particulière. Dans d'autres cas, les lois créent des infractions qui n'existent pas en common law et, dans certains cas, elles modifient les principes et clarifient les définitions de la common law. Déterminer laquelle de ces interactions entre en jeu dans le cas d'une infraction donnée est une question d'interprétation législative.

[18] Un certain nombre de principes guident l'interprétation des textes de loi dans un cas de ce genre, dont voici les trois principaux. Premièrement, lorsque le législateur utilise un terme juridique au sens juridique bien défini, on présume qu'il a voulu incorporer cette signification juridique dans la loi. Deuxièmement, toute dérogation au sens juridique doit découler clairement des termes exprès de la loi ou s'en dégager par déduction nécessaire. Enfin, nul ne peut être tenu responsable d'un crime de common law, sauf l'outrage criminel au tribunal. Il revient au législateur de créer et de définir les crimes; les tribunaux ne doivent pas élargir la portée de la responsabilité criminelle au-delà de celle établie par le législateur.

[19] As I will explain, applying these principles leads me to the following conclusions. The term "bestiality" has a well-established legal meaning and refers to sexual intercourse between a human and an animal. Penetration has always been understood to be an essential element of bestiality. Parliament adopted that term without adding a definition of it and the legislative history and evolution of the relevant provisions show no intent to depart from the well-understood legal meaning of the term. Moreover, the courts should not, by development of the common law, broaden the scope of liability for this offence, as the trial judge did. Any expansion of criminal liability for this offence is within Parliament's exclusive domain. In short, this case falls within Stephen's first category: our *Code* assumes the continuing existence of the common law definition of this crime.

C. *The Accepted Legal Meaning of "Bestiality"*

(1) Parliament Intends the Legal Meaning of Legal Terms

[20] When Parliament uses a term with a legal meaning, it intends the term to be given that meaning. Words that have a well-understood legal meaning when used in a statute should be given that meaning unless Parliament clearly indicates otherwise. This principle has been applied in a number of cases such as *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915, at paras. 29-30; *Townsend v. Kroppmanns*, 2004 SCC 10, [2004] 1 S.C.R. 315, at para. 9; *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 S.C.R. 217, at paras. 8-23 and 48-49. Most recently in *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, the Court noted that "Parliament is presumed to know the legal context in which it legislates" and that it is "inconceivable" that Parliament would intend to disturb well-settled law without "explicit language" or by "relying on inferences that could possibly be drawn from the order of certain provisions in the *Criminal Code*": paras. 55-56.

[19] Comme je vais l'expliquer, l'application de ces principes m'amène à tirer les conclusions suivantes. Le terme « bestialité » a un sens juridique bien établi et il s'entend des rapports sexuels entre un être humain et un animal. La pénétration a toujours été considérée comme un élément essentiel de la bestialité. Le législateur a adopté ce terme sans le définir, et l'historique et l'évolution des dispositions pertinentes ne démontrent pas qu'il avait l'intention de s'écarter de sa signification juridique bien définie. De plus, les tribunaux ne devraient pas, en faisant évoluer la common law, élargir la portée de la responsabilité afférente à cette infraction, comme l'a fait le juge du procès. Tout élargissement de la responsabilité criminelle liée à cette infraction relève de la compétence exclusive du législateur. En bref, la présente espèce entre dans la première catégorie mentionnée par Sir Fitzjames Stephen : notre *Code* tient pour acquis que la définition donnée par la common law à ce crime subsiste.

C. *Sens juridique reconnu de « bestialité »*

(1) Le législateur entend utiliser les termes juridiques dans leur sens juridique

[20] Lorsque le législateur utilise un terme comportant un sens juridique, il veut lui donner ce sens. Lorsqu'ils sont utilisés dans une loi, les mots qui ont une signification juridique bien définie devraient recevoir cette signification, sauf si le législateur indique clairement autre chose. Ce principe a été appliqué dans plusieurs arrêts tels que *Will-Kare Paving & Contracting Ltd. c. Canada*, 2000 CSC 36, [2000] 1 R.C.S. 915, par. 29-30; *Townsend c. Kroppmanns*, 2004 CSC 10, [2004] 1 R.C.S. 315, par. 9; *A.Y.S.A. Amateur Youth Soccer Association c. Canada (Agence du revenu)*, 2007 CSC 42, [2007] 3 R.C.S. 217, par. 8-23 et 48-49. Plus récemment, dans *R. c. Summers*, 2014 CSC 26, [2014] 1 R.C.S. 575, la Cour a fait remarquer que « le législateur est présumé connaître le contexte juridique dans lequel il légifère » et qu'il est « inconcevable » qu'il ait voulu modifier une règle de droit bien établie sans le faire de « manière explicite » ou en « s'en remettant [. . .] à des inférences susceptibles d'être tirées de l'ordre d'apparition de certaines dispositions dans le *Code criminel* » (par. 55-56).

[21] There is also the related principle of stability in the law. Absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law: see, generally, Sullivan, at §17.5; P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at paras. 1793 ff. This principle, if applied too strictly, may lead to refusal to give effect to intended legislative change. But it nonetheless reflects the common sense idea that Parliament is deemed to know the existing law and is unlikely to have intended any significant changes to it unless that intention is made clear: *Walker v. The King*, [1939] S.C.R. 214, at p. 219; *Nadeau v. Gareau*, [1967] S.C.R. 209, at p. 218; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at p. 764. This principle is reflected in ss. 45(2) and 45(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provide that the amendment of an enactment does not imply any change in the law and that the repeal of an enactment does not make any statement about the previous state of the law.

[22] While these interpretative principles are easy to state, how they apply in particular cases may be controversial. Sometimes, the controversy concerns the state of the common law when Parliament acted: in other words, the debate is about whether the term used had a clearly understood legal meaning when it was incorporated into the statute. For example, that was the source of the disagreement between the majority and minority in *A.Y.S.A.* More often, though, the difficult issue is whether Parliament has indicated an intention to depart from the accepted legal meaning.

[23] Both of these types of dispute arise in this case, and so I turn to the first question: Did the term "bestiality" have a clear legal meaning when Parliament used that term without further definition in the English version of the 1955 *Code*?

[21] Il y a aussi le principe connexe de la stabilité du droit. En l'absence d'une intention contraire exprimée clairement par le législateur, une loi ne devrait pas être interprétée de façon à modifier substantiellement le droit, y compris la common law (voir, de façon générale, Sullivan, §17.5; P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1793 et suiv.). Ce principe, s'il est appliqué de façon trop stricte, peut mener au refus de donner effet à une modification que le législateur a souhaité faire. Cependant, il traduit l'idée, conforme au bon sens, que le législateur est censé connaître le droit existant et qu'il n'a probablement pas voulu y apporter de changements importants à moins de l'indiquer clairement (*Walker c. The King*, [1939] R.C.S. 214, p. 219; *Nadeau c. Gareau*, [1967] R.C.S. 209, p. 218; *R. c. T. (V.)*, [1992] 1 R.C.S. 749, p. 764). Ce principe est exprimé aux par. 45(2) et (3) de la *Loi d'interprétation*, L.R.C. 1985, c. I-21, qui disposent que la modification d'un texte ne suppose pas un changement des règles de droit et que son abrogation ne constitue pas une déclaration sur l'état antérieur du droit.

[22] Bien que ces principes d'interprétation soient faciles à énoncer, la façon de les appliquer dans un cas particulier peut prêter à controverse. Parfois la controverse porte sur l'état de la common law au moment où le législateur a agi : autrement dit, le débat porte alors sur la question de savoir si le terme utilisé avait un sens juridique bien défini lorsqu'il a été introduit dans la loi. À titre d'exemple, tel était le point de désaccord entre la majorité et la minorité dans *A.Y.S.A.* Le plus souvent toutefois, la question qui pose problème consiste à savoir si le législateur a manifesté l'intention de s'écarter du sens juridique reconnu.

[23] Ces deux types de litige sont présents en l'espèce. Je passe donc à l'examen de la première question : Le terme « *bestiality* » avait-il un sens juridique clair lorsque le législateur l'a utilisé sans le définir dans la version anglaise du *Code* de 1955?

(2) Bestiality Meant Buggery With an Animal and Required Penetration

(a) *Introduction*

[24] The ancient offence of sexual intercourse with an animal was, at various times, referred to as a type of sodomy, a type of buggery and as bestiality. As we shall see, whatever it was called, the offence required penetration.

[25] The first Canadian offence of buggery with an animal was taken almost word for word from the English *Offences against the Person Act, 1861*, 24 & 25 Vict., c. 100 ("*1861 Act*"), s. 61. The offence in substantially that form was carried over into the first English version of the Canadian *Criminal Code, 1892*, S.C. 1892, c. 29 ("*1892 Code*"), and continued to be in force until the offence called bestiality was introduced into the English version of the *Code* in the 1955 revisions: s. 147. It follows that our starting place in developing an understanding of the Canadian law is the English law from which it derived.

(b) *English Offence*

[26] Although bestiality was often subsumed in terms such as sodomy or buggery, penetration was the essence — "the defining act" — of the offence. It was clear that to secure a conviction, the prosecution had to prove that "penetration of an animal, or, in the case of women, penetration by an animal, had occurred": C. Thomas, "'Not Having God Before his Eyes': Bestiality in Early Modern England" (2011), 26 *The Seventeenth Century* 149, at p. 153. This was true from at least the mid-16th century: Thomas, at p. 154; see also A. F. Niemoeller, *Bestiality and the Law: A Resume of the Law and Punishments for Bestiality with Typical Cases from Fifteenth Century to the Present* (1946); and H. Miletski, "A history of bestiality", in A. M. Beetz and A. L. Podberscek, eds., *Bestiality and Zoophilia: Sexual Relations with Animals* (2005), 1.

(2) La bestialité s'entendait d'un acte de sodomie avec un animal et exigeait une pénétration

a) *Introduction*

[24] L'ancienne infraction consistant à avoir des rapports sexuels avec un animal a été à différentes époques considérée comme un type de sodomie et un acte de bestialité. Comme nous le verrons, quel que soit le nom qu'on lui donnait, l'infraction exigeait qu'il y ait eu pénétration.

[25] La première infraction canadienne de sodomie avec un animal a été tirée presque mot pour mot de la loi d'Angleterre intitulée *The Offences against the Person Act, 1861*, 24 & 25 Vict., c. 100 (la « *Loi de 1861* »), art. 61. L'infraction a été importée essentiellement sous cette forme dans la première version anglaise du *Code criminel, 1892* canadien, S.C. 1892, c. 29 (« *Code de 1892* »), et elle est demeurée en vigueur jusqu'à ce que l'infraction appelée *bestiality* soit introduite dans la version anglaise du *Code* lors de la révision de 1955 (art. 147). Il faut donc, pour arriver à saisir le droit canadien, prendre comme point de départ le droit anglais d'où il prend sa source.

b) *L'infraction anglaise*

[26] Bien que la bestialité ait souvent été désignée par le terme « sodomie », la pénétration constituait l'élément essentiel — « l'acte définitoire » — de l'infraction. Il ne faisait aucun doute que, pour obtenir une déclaration de culpabilité, la poursuite devait établir qu'[TRADUCTION] « un acte de pénétration avait été commis sur un animal ou, dans le cas d'une femme, que l'acte de pénétration avait été commis par un animal » (C. Thomas, « "Not Having God Before his Eyes" : Bestiality in Early Modern England » (2011), 26 *The Seventeenth Century* 149, p. 153). Il en a été ainsi au moins à partir du milieu du seizième siècle (Thomas, p. 154; voir aussi A. F. Niemoeller, *Bestiality and the Law : A Resume of the Law and Punishments for Bestiality with Typical Cases from Fifteenth Century to the Present* (1946); et H. Miletski, « A history of bestiality », dans A. M. Beetz et A. L. Podberscek, dir., *Bestiality and Zoophilia : Sexual Relations with Animals* (2005), 1).

[27] Originally under the authority of the Church Courts, "buggery comyttid with mankynde or beaste" became a felony in 1533: *An Acte for the punysshement of the vice of Buggerie* (Eng.), 25 Hen. 8, c. 6. It was typically men who were prosecuted for the crime because it was necessary to prove penetration to establish the commission of the offence. Women were therefore "unlikely offenders": Thomas, at p. 158. There were nevertheless some prosecutions of women for the offence and men were prosecuted for penetrating both male and female animals: Thomas, at p. 158. Edward Coke described buggery as including carnal knowledge (i.e. penetration) between a man or a woman and an animal: *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (1797, first published 1644), at p. 59.

[28] The statute from Henry's time was repealed in 1553 but reinstated in 1562 and remained in that form until it was confirmed in 1828: *An Act for consolidating and amending the Statutes in England relative to Offences against the Person* (U.K.), 9 Geo. 4, c. 31 (the "1828 statute"). That statute of 1828 clarified that "actual Emission of Seed" was not an essential element of the offence, and further that "carnal Knowledge" would be "deemed complete upon Proof of Penetration only": s. 18; see G. Parker, "Is A Duck An Animal? An Exploration of Bestiality as a Crime", in L. A. Knafla, ed., *Crime, Police and the Courts in British History* (1990), 285, at pp. 292-93.

[29] All of the other old sources that I have reviewed confirm that penetration was an essential element of the offence and that buggery with an animal was not restricted to anal intercourse: see, e.g., M. Hale, *Pleas of the Crown: A Methodical Summary* (1678), at p. 117; M. Hale, *Historia Placitorum Coronae* (1736), vol. I, at p. 669; E. H. East, *A Treatise of the Pleas of the Crown* (1803), vol. I, at p. 480. (I pause to note that, contrary to Justice Abella's understanding, there was no uncertainty

[27] Relevant au départ des tribunaux ecclésiastiques, l'[TRADUCTION] « acte de sodomie commis avec un être humain ou un animal » est devenu un crime en 1533 (*An Acte for the punysshement of the vice of Buggerie* (Angl.), 25 Hen. 8, c. 6). C'était habituellement des hommes qui faisaient l'objet de poursuites parce qu'il était nécessaire de prouver qu'il y avait eu pénétration pour établir que l'infraction avait été commise. Les femmes étaient donc des [TRADUCTION] « auteures improbables de l'infraction » (Thomas, p. 158). Il arrivait tout de même parfois que des femmes soient poursuivies pour cette infraction, et des hommes faisaient l'objet de poursuites pour avoir pénétré des animaux mâles et femelles (Thomas, p. 158). Edward Coke indique que la sodomie comprend la connaissance charnelle (c.-à-d. la pénétration) entre un homme ou une femme et un animal (*The Third Part of the Institutes of the Laws of England : Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (1797, publié pour la première fois en 1644), p. 59).

[28] La loi adoptée à l'époque d'Henri VIII a été abrogée en 1553, mais rétablie en 1562, et elle est demeurée en vigueur sous cette forme jusqu'à ce qu'elle soit confirmée en 1828 (*An Act for consolidating and amending the Statutes in England relative to Offences against the Person* (R.-U.), 9 Geo. 4, c. 31 (la « *Loi de 1828* »)). La *Loi de 1828* précisait que [TRADUCTION] « l'émission de semence » n'était pas un élément essentiel de l'infraction, et que la « connaissance charnelle » serait « réputée complète sur preuve de la pénétration seule » (art. 18; voir G. Parker, « Is A Duck An Animal? An Exploration of Bestiality as a Crime », dans L. A. Knafla, dir., *Crime, Police and the Courts in British History* (1990), 285, p. 292-293).

[29] Toutes les autres sources anciennes que j'ai étudiées confirment que la pénétration était un élément essentiel de l'infraction et qu'un acte de sodomie commis avec un animal ne se limitait pas à une relation sexuelle anale (voir, p. ex., M. Hale, *Pleas of the Crown : A Methodical Summary* (1678), p. 117; M. Hale, *Historia Placitorum Coronae* (1736), vol. I, p. 669; E. H. East, *A Treatise of the Pleas of the Crown* (1803), vol. I, p. 480). (Je signale que, contrairement à ce que pense la juge

about whether penetration was required. Neither the Crown nor the dissenting judge in the Court of Appeal thought that there was any lack of clarity about the fact that penetration was required before the 1955 revisions.)

[30] This was the state of the law when the English *1861 Act* was enacted. Under the title "Unnatural Offences" and with the marginal note "Sodomy and Bestiality", the *1861 Act* provided:

> **61.** Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years.

The *1861 Act* in s. 63 also continued the 1828 clarifications that emission of seed was not required but that penetration was.

[31] The fifth edition of *Russell on Crime* deals with the s. 61 offence under the heading "sodomy", making it clear that that term included buggery "with any animal": W. O. Russell, *A Treatise on Crimes and Misdemeanors* (5th ed. 1877), at p. 879. The author goes on to state that the s. 61 offence "consists in a carnal knowledge committed against the order of nature [i.e. *per anum*] by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with beast": *ibid*. (emphasis added). "[C]arnal knowledge" meant penetration: *ibid*., at pp. 879-80. That penetration was required was made explicit in the English 1878 Draft Code: s. 101(*a*). This is also the case in the Draft Code appended to the *Report of the Royal Commission appointed to consider the Law relating to Indictable Offences* (1879) (the "1879 Draft Code"), s. 144 (Appendix, at p. 95). That Draft Code tracked the language of the *1861 Act* by providing that "[e]very one shall be guilty of an indictable offence . . . who commits buggery either with a human being or with any other living creature": *ibid*. The provision went on to specify that the offence was complete upon penetration. In their commentary on the 1879 Draft Code, the Commissioners did not note any change

Abella, il n'y avait aucune incertitude quant à savoir si la pénétration était nécessaire. Ni le ministère public, ni le juge dissident, de la Cour d'appel ne croyaient qu'il y avait de la confusion à cet égard avant la révision de 1955.)

[30] Tel était l'état du droit lorsque la *Loi de 1861* de l'Angleterre a été adoptée. Sous le titre [TRADUCTION] « Infractions contre nature », l'art. 61, auquel était accolé la note marginale « Sodomie et bestialité », était libellé comme suit :

> [TRADUCTION] **61.** Quiconque est reconnu coupable du crime abominable de sodomie, commis soit avec un être humain, soit avec un animal, est passible, à la discrétion de la Cour, de travaux forcés à perpétuité ou d'une peine minimale de dix ans.

À l'instar de la *Loi de 1828*, la *Loi de 1861*, à l'art. 63, précisait que l'émission de semence n'était pas requise, mais que la pénétration l'était.

[31] La cinquième édition de *Russell on Crime* traite de l'infraction prévue à l'art. 61 sous la rubrique [TRADUCTION] « sodomie », ce qui indique clairement que le terme englobe un acte de sodomie commis « avec un animal » (W. O. Russell, *A Treatise on Crimes and Misdemeanors* (5e éd. 1877), p. 879). L'auteur ajoute que cette infraction « consiste en une connaissance charnelle contre nature [c.-à-d. anale] entre deux hommes ou une telle connaissance charnelle entre homme et femme, ou toute connaissance charnelle entre un homme ou une femme et un animal » (*ibid.* (je souligne)). Le terme « connaissance charnelle » signifiait pénétration (*ibid.*, p. 879-880). L'exigence de pénétration a été mentionnée expressément dans le *Draft Code* anglais de 1878 (al. 101(*a*)). Il en est de même dans le *Draft Code* annexé au *Report of the Royal Commission appointed to consider the Law relating to Indictable Offences* (1879) (le « *Draft Code* de 1879 »), art. 144 (annexe, p. 95). Ce projet de code reprend le libellé de la *Loi de 1861* : [TRADUCTION] « [e]st coupable d'un acte criminel quiconque [. . .] commet un acte de sodomie soit avec un être humain, soit avec tout autre être vivant » (*ibid.*). La disposition précisait en outre que l'infraction était complète dès lors qu'il y avait

from the previous law with respect to the elements of the offence: pp. 21-22.

[32] The requirement for penetration is reflected in Sir James Fitzjames Stephen's *A Digest of the Criminal Law (Crimes and Punishments)* (1878), art. 168, at p. 115. (Remember that since the 1828 statute, it had been clear that the "actual Emission of Seed" was not required and that "carnal Knowledge" would be "deemed complete upon Proof of Penetration only": s. 18.)

[33] The old case law is not abundant, but what there is supports the view that penetration was an essential element of the offence. In *R. v. Cozins* (1834), 6 Car. & P. 351, 172 E.R. 1272, a case of bestiality with a ewe, Park J. directed the jury that if there was penetration, even though there had been no emission, the offence was complete.

[34] This understanding of the offence continued in England for many years. Later commentators are almost uniformly of the view that buggery with an animal required penetration. I have already referred to *Russell on Crime*. In 1957, in *Sexual Offences: A Report of the Cambridge Department of Criminal Science*, at p. 345, the director of the department, Leon Radzinowicz, commented on s. 12(1) of the *Sexual Offences Act, 1956* (U.K.), 4 & 5 Eliz. 2, c. 69, which made it a felony for a person to commit buggery with another person or with an animal. This section is virtually identical to the version of the offence found in the *1861 Act* and therefore to the English version of the Canadian offence up until 1955. The report explains that

> [t]he crime consists of carnal knowledge, or sexual intercourse, by man with man *per anum*, man with woman *per anum*, or man or woman with beast in any manner. The word 'sodomy' is frequently used to indicate the

eu pénétration. Dans leurs commentaires concernant le *Draft Code* de 1879, les commissaires n'ont relevé aucune modification du texte législatif antérieur en ce qui concerne les éléments constitutifs de l'infraction (p. 21-22).

[32] L'exigence de pénétration trouve écho dans l'ouvrage de Sir James Fitzjames Stephen intitulé *A Digest of the Criminal Law (Crimes and Punishments)* (1878), art. 168, p. 115 (rappelons que depuis l'adoption de la *Loi de 1828*, il était clair que « l'émission de semence » n'était pas requise et que la « connaissance charnelle » serait « réputée complète sur preuve de la pénétration seule » (art. 18)).

[33] La jurisprudence ancienne est peu abondante, mais celle dont nous disposons permet d'affirmer que la pénétration était un élément essentiel de l'infraction. Dans *R. c. Cozins* (1834), 6 Car. & P. 351, 172 E.R. 1272, une décision portant sur un acte de bestialité commis avec une brebis, le juge Park a précisé au jury que s'il y avait eu pénétration, l'infraction était complète même s'il n'y avait pas eu émission de semence.

[34] Cette conception de l'infraction a perduré en Angleterre pendant de nombreuses années. Les auteurs plus contemporains sont presque tous d'avis que l'infraction de sodomie avec un animal exigeait la pénétration. J'ai déjà fait référence à *Russell on Crime*. En 1957, dans *Sexual Offences : A Report of the Cambridge Department of Criminal Science*, p. 345, le directeur du département, Leon Radzinowicz, a commenté le par. 12(1) de la *Sexual Offences Act, 1956* (R.-U.), 4 & 5 Eliz. 2, c. 69, suivant lequel commettait un crime quiconque se livrait à un acte de sodomie avec une autre personne ou un animal. Cette infraction est pratiquement identique à celle que l'on retrouve dans la *Loi de 1861* et, par le fait même, à la version anglaise de l'infraction canadienne jusqu'en 1955. Le rapport explique que

> [TRADUCTION] [l]e crime consiste en une connaissance charnelle ou des rapports sexuels anaux entre deux hommes ou entre un homme et une femme, ou tout rapport sexuel entre un homme ou une femme et un animal.

offence when committed with mankind, and 'bestiality' when committed with an animal. [p. 345]

[35] The 1965 edition of the English criminal law treatise by J. C. Smith and B. Hogan described the elements of buggery at common law as an "intercourse *per anum* by a man with a man or woman; or intercourse *per anum* or *per vaginam* by a man or a woman with an animal": *Criminal Law* (1965), at p. 321 (footnotes omitted).

[36] The later case law is also consistent with this view. In *R. v. Bourne* (1952), 36 Cr. App. R. 125, in upholding convictions of a husband for aiding and abetting his wife to commit buggery with a dog, Lord Chief Justice Goddard stated that "if a woman has connection with a dog, or allows a dog to have connection with her, that is the full offence of buggery": p. 128. The court noted that the offence was "commonly called bestiality": p. 127.

(c) *Canadian Offence*

[37] In Canada, as in England, the early history of the offence shows that what was commonly called "bestiality" was subsumed under the offences named sodomy or buggery and that penetration was one of its essential elements.

[38] The English *1861 Act* was adopted, almost word for word, by the first English version of the Canadian codification of the offence in 1869: *An Act respecting Offences against the Person*, S.C. 1869, c. 20, s. 63. With the marginal note "[s]odomy and bestiality", the following offence appears:

63. Whosoever is convicted of the abominable crime of buggery committed either with mankind or with any

On utilise souvent le terme « sodomie » pour désigner l'infraction lorsqu'elle est commise avec un être humain, et le terme « bestialité » lorsqu'elle est commise avec un animal. [p. 345]

[35] L'édition de 1965 du traité de droit criminel anglais de J. C. Smith et de B. Hogan décrit en ces termes les éléments constitutifs de la sodomie en common law : [TRADUCTION] « une relation sexuelle anale entre deux hommes ou entre un homme et une femme ou une relation sexuelle anale ou vaginale entre un homme ou une femme et un animal » (*Criminal Law* (1965), p. 321 (notes de bas de page omises)).

[36] La jurisprudence plus récente s'accorde également avec ce point de vue. Dans *R. c. Bourne* (1952), 36 Cr. App. R. 125, le lord juge en chef Goddard a dit ce qui suit lorsqu'il a confirmé les déclarations de culpabilité prononcées contre un mari pour avoir aidé et encouragé sa femme à commettre un acte de sodomie avec un chien : [TRADUCTION] « . . . si une femme a des rapports sexuels avec un chien, ou permet qu'un chien ait une relation sexuelle avec elle, l'infraction de sodomie est complète » (p. 128). La cour a en outre relevé que l'infraction était « communément appelée "bestialité" » (p. 127).

c) *L'infraction canadienne*

[37] Au Canada, tout comme en Angleterre, il ressort des origines de l'infraction que ce que l'on appelait communément « bestialité » était compris dans l'infraction appelée sodomie et que la pénétration était l'un de ses éléments essentiels.

[38] Le libellé de la *Loi de 1861* de l'Angleterre a été repris pratiquement tel quel dans la première version anglaise de la codification de l'infraction au Canada en 1869 (*An Act respecting Offences against the Person* (*Acte concernant les offenses contre la Personne*), S.C. 1869, c. 20, art. 63). L'infraction suivante y figure, accompagnée de la note marginale « *[s]odomy and bestiality* » (sodomie et bestialité) :

63. Whosoever is convicted of the abominable crime of buggery committed either with mankind or with any

animal, shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years.

[39] The French version of this provision, with the marginal note "*[s]odomie*" reads as follows:

63. Quiconque est convaincu du crime abominable de sodomie, commis soit avec un être humain, soit avec un animal, sera passible de l'incarcération dans le pénitencier pour la vie, ou pour un terme de pas moins de deux ans.

[40] In 1874, Henri Elzéar Taschereau (later a judge of this Court) published *The Criminal Law Consolidation and Amendment Acts of 1869, 32-33 Vict. for the Dominion of Canada, with Notes, Commentaries, Precedents of Indictments, &c*. He confirms that the offence of sodomy or buggery with an animal is committed by carnal knowledge by mankind or by womankind with "brute beast" and that "[a]s in the case of rape, penetration alone is sufficient to constitute the offence": pp. 344-45. He also provides a model indictment for both buggery by a human and for buggery with an animal, referring to the latter as bestiality: p. 345.

[41] The 1869 provision, with minor amendments in 1886, was incorporated into the first Canadian *Criminal Code* in 1892: *An Act respecting Offences against Public Morals and Public Convenience*, R.S.C. 1886, c. 157, s. 1; *1892 Code*, s. 174. This version of the offence remained in force until the 1955 revisions: *Criminal Code*, R.S.C. 1906, c. 146, s. 202; *Criminal Code*, R.S.C. 1927, c. 36, s. 202. It is worth noting that while the English version continued to refer to "buggery . . . with any other living creature", the French version used the word "*bestialité*" to express this part of the English version of the offence. The word "*bestialité*" has been used consistently since the 1886 Act and in all French versions of the *Code* since 1892. The English version read:

174. Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery,

animal, shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years.

[39] La version française de la disposition précitée, accompagnée de la note marginale « [s]odomie », est ainsi libellée :

63. Quiconque est convaincu du crime abominable de sodomie, commis soit avec un être humain, soit avec un animal, sera passible de l'incarcération dans le pénitencier pour la vie, ou pour un terme de pas moins de deux ans.

[40] En 1874, Henri Elzéar Taschereau (plus tard juge de la Cour) a publié *The Criminal Law Consolidation and Amendment Acts of 1869, 32-33 Vict. for the Dominion of Canada, with Notes, Commentaries, Precedents of Indictments, &c.* Il confirme que l'infraction de sodomie avec un animal est commise lorsqu'il y a connaissance charnelle entre un homme ou une femme et une [TRADUCTION] « bête brute » et que « [t]out comme dans le cas du viol, la pénétration est suffisante à elle seule pour constituer l'infraction » (p. 344-345). Il propose également un modèle d'acte d'accusation pour la sodomie pratiquée par un être humain et la sodomie avec un animal, qu'il appelle bestialité (p. 345).

[41] La disposition de 1869, à laquelle des modifications mineures ont été apportées en 1886, a été intégrée au premier *Code criminel* canadien en 1892 (*Acte concernant les crimes et délits contre les mœurs et la tranquillité publiques*, S.R.C. 1886, c. 157, art. 1; *Code de 1892*, art. 174). Cette version de l'infraction est demeurée en vigueur jusqu'à la révision de 1955 (*Code criminel*, S.R.C. 1906, c. 146, art. 202; *Code criminel*, S.R.C. 1927, c. 36, art. 202). Il vaut la peine de signaler que, même si la version anglaise renfermait toujours l'expression « *buggery [. . .] with any other living creature* », le terme « bestialité » était employé dans la version française pour exprimer cette partie de la version anglaise de l'infraction. Le terme « bestialité » a été employé invariablement depuis la loi de 1886 et dans toutes les versions françaises du *Code* depuis 1892. Voici le texte de la version anglaise :

174. Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery,

either with a human being or with any other living creature.

[42] The French version was as follows:

174. Est coupable d'un acte criminel et passible d'emprisonnement à perpétuité, celui qui commet la sodomie ou la bestialité.

[43] As in England, the English language version of the Canadian statutes simply provided that buggery with an animal (i.e. "any other living creature") was an offence, but did not further define it. However, the French version equivalent of "buggery . . . with any other living creature" being "*bestialité*" shows that buggery with an animal and bestiality were the same thing. Thus, the use of these legal words without statutory definition puts this provision into Stephen's first category of how the statute and the common law interact: the statute assumes "in the reader a previous knowledge . . . of the common law definitions of certain crimes which the Act punishes but does not define": J. F. Stephen, *A General View of the Criminal Law of England* (2nd ed. 1890), at p. 109; see also Stephen, *A History of the Criminal Law of England*, at pp.188-91. Professor Sullivan refers to this legislative technique as "incorporation": a legal term (in this case, buggery with an animal/*la bestialité*) is incorporated into the legislation with the legislative intent that it will continue to bear its common law meaning (§17.1).

[44] Sources just before and contemporaneous with the *1892 Code* confirm that this offence required penetration.

[45] Before the *1892 Code*, George Wheelock Burbidge defines the crime of sodomy, in part, as consisting of carnal knowledge (i.e. sexual penetration) of any animal: *A Digest of the Criminal Law of Canada (Crimes and Punishments)* (1890), at p. 161 (art. 213). After the *Code*, H. E. Taschereau's 1893 annotated *Criminal Code* (i.e., commentaries, annotations and precedents on the *1892 Code*) states in relation to the buggery with an animal offence

either with a human being or with any other living creature.

[42] Voici le texte de la version française :

174. Est coupable d'un acte criminel et passible d'emprisonnement à perpétuité, celui qui commet la sodomie ou la bestialité.

[43] Tout comme en Angleterre, la version de langue anglaise des lois canadiennes prévoyait simplement que la sodomie avec un animal (soit « *any other living creature* » (tout autre être vivant)) était une infraction, mais elle ne l'a pas définie davantage. Or, comme l'équivalent français de « *buggery [. . .] with any other living creature* » est « bestialité », cela démontre que « *buggery with an animal* » et « bestialité » désignent la même chose. Ainsi, l'utilisation de ces termes juridiques en l'absence de définition dans la loi place cette disposition dans la première catégorie d'interaction entre la loi et la common law décrite par Sir Stephen : la loi tient pour acquis que [TRADUCTION] « le lecteur connaît déjà [. . .] les définitions que donne la common law de certains crimes que la Loi sanctionne mais ne définit pas » (J. F. Stephen, *A General View of the Criminal Law of England* (2e éd. 1890), p. 109; voir également Stephen, *A History of the Criminal Law of England*, p. 188-191). La professeure Sullivan appelle cette technique législative l'« incorporation » : un terme juridique (en l'occurrence, la bestialité/*buggery with an animal*) est intégré à la loi dans le but qu'il conserve le sens qu'il a en common law (§17.1).

[44] La doctrine publiée juste avant l'adoption du *Code de 1892* ou à la même époque confirme que l'infraction susmentionnée exigeait une pénétration.

[45] Avant le *Code de 1892*, George Wheelock Burbidge indique que le crime de sodomie s'entend entre autres de la connaissance charnelle (c.-à-d. la pénétration) avec un animal (*A Digest of the Criminal Law of Canada (Crimes and Punishments)* (1890), p. 161 (art. 213)). Après le *Code*, le *Criminal Code* annoté de 1893 de H. E. Taschereau (commentaires, annotations et précédents concernant le *Code de 1892*) mentionne, en ce qui concerne l'infraction

found in s. 174 that "[a]s in the case of rape, penetration alone is sufficient to constitute the offence": *The Criminal Code of the Dominion of Canada as amended in 1893, with Commentaries, Annotations, Precedents of Indictments, &c.* (1893), at p. 117.

[46] The pre-1955 case of *Henry v. Henry*, [1953] O.J. No. 347 (QL) (C.A.), is also consistent with the view that penetration was required. The court said that "there was penetration to some extent, and even if the penetration was to a very slight degree, the offence of bestiality would be thereby committed": para. 2. In *R. v. Wishart* (1954), 110 C.C.C. 129 (B.C.C.A.), the court relied on the English decision of *Bourne*, which I have referred to earlier and which stated that penetration was required.

[47] In my view, there can be no serious dispute that the Canadian offence of buggery with an animal/*la bestialité* in the *1892 Code*, which continued to be in force until the 1955 revisions, had a widely and generally understood meaning: the offence required sexual penetration between a human and an animal. It is also clear, in my view, that the term "bestiality" was understood to mean sodomy or buggery with an animal.

[48] The Crown made much of the paucity of case law authoritatively settling the elements of the offence. But respectfully that is beside the point. The question is not whether there was binding authority from the House of Lords or the Judicial Committee of the Privy Council setting out the elements of the offence. The question is whether the offence of buggery with an animal had a well-understood legal meaning when it was used by Parliament without further definition in the *1892 Code*. The contemporary sources make it overwhelmingly clear that it did. Any lawyer who was asked in 1892 whether the offence of buggery with an animal required penetration would have replied in the affirmative. Parliament, by using that term without further definition, intended to adopt that well-understood legal meaning.

de sodomie avec un animal prévue à l'art. 174, que [TRADUCTION] « [t]out comme dans le cas du viol, la pénétration est suffisante à elle seule pour constituer l'infraction » (*The Criminal Code of the Dominion of Canada as amended in 1893, with Commentaries, Annotations, Precedents of Indictments, &c.* (1893), p. 117).

[46] L'arrêt *Henry c. Henry*, [1953] O.J. No. 347 (QL) (C.A.), rendu avant la révision de 1955, concorde lui aussi avec le point de vue selon lequel il devait y avoir pénétration. La cour a indiqué qu'[TRADUCTION] « il y avait eu pénétration dans une certaine mesure, et même s'il s'agissait d'une très légère pénétration, l'infraction de bestialité serait de ce fait commise » (par. 2). Dans *R. c. Wishart* (1954), 110 C.C.C. 129 (C.A. C.-B.), la cour s'est appuyée sur l'arrêt anglais *Bourne*, que j'ai mentionné précédemment et qui indique qu'il devait y avoir pénétration.

[47] À mon avis, il est impossible de mettre sérieusement en doute le fait que l'infraction canadienne de bestialité/*buggery with an animal* prévue au *Code de 1892* qui est demeurée en vigueur jusqu'à la révision de 1955 avait un sens généralement reconnu : l'infraction exigeait une pénétration sexuelle impliquant un être humain et un animal. Il est également clair, à mon avis, que le terme anglais « *bestiality* » visait la sodomie entre un être humain et un animal.

[48] Le ministère public a fait grand cas de la rareté des précédents qui établissent péremptoirement les éléments constitutifs de l'infraction. Toutefois, avec égards, là n'est pas la question. Il ne s'agit pas de savoir s'il existait un arrêt de la Chambre des lords ou du Comité judiciaire du Conseil privé ayant force de précédent en la matière. Il faut plutôt se demander si l'infraction de sodomie avec un animal avait un sens juridique bien défini lorsqu'elle a été utilisée par le législateur sans être définie dans le *Code de 1892*. Il ressort sans l'ombre d'un doute des sources de cette époque que tel était le cas. Tout avocat auquel on aurait demandé en 1892 si l'infraction de sodomie avec un animal exigeait la pénétration aurait répondu par l'affirmative. En utilisant ce terme sans le définir, le législateur voulait retenir son sens juridique bien défini.

[49] The Crown also noted that there may be some room for debate about whether buggery with an animal/*la bestialité* was limited to cases of anal penetration, as discussed by Bauman C.J.B.C. in his dissenting reasons. That view is supported by at least one legal dictionary, P. G. Osborn, *A Concise Law Dictionary* (4th ed. 1954), at p. 61, "buggery", and by *Kenny's Outlines of Criminal Law* (19th ed. 1966), at p. 205. However, as I have reviewed earlier, all other commentators, including Stephen himself, the Court of Criminal Appeal in *Bourne* and detailed studies of prosecutions in England from the mid-1500s to the late 1800s support the view that buggery with an animal required penetration, be it vaginal or anal. In any case, the Crown's position is somewhat beside the point we have to decide here. On any view of the law, the 1892 Canadian offence required penetration of some kind. There is no support — none — for the view that penetration of some kind was not required.

(d) *Conclusion on the First Question*

[50] We can conclude that, at least until 1955, the offence of buggery with animals/*la bestialité* continued to have the same elements that it had in the English *1861 Act*, a provision carried forward in virtually identical terms in the Canadian Act of 1869 and into our first *Code* in 1892. Thus, penetration continued to be an element of the offence. We may also conclude that the term "bestiality" was understood to mean buggery with an animal.

[51] That brings us to the next step in the analysis, which is to determine whether Parliament explicitly or by necessary implication changed this well-understood legal meaning.

[49] Le ministère public a en outre fait remarquer qu'il y a peut-être lieu de débattre la question de savoir si la bestialité/*buggery with an animal* vise uniquement la pénétration anale, comme l'a mentionné le juge en chef Bauman dans ses motifs dissidents. Ce point de vue trouve appuie dans au moins un dictionnaire juridique (P. G. Osborn, *A Concise Law Dictionary* (4e éd. 1954), p. 61, « *buggery* », et dans l'ouvrage *Kenny's Outlines of Criminal Law* (19e éd. 1966), p. 205). Toutefois, comme je l'ai déjà signalé, tous les autres auteurs, y compris Sir Fitzjames Stephen lui-même, la Cour d'appel en matière criminelle dans *Bourne*, et des études approfondies des poursuites intentées en Angleterre entre le milieu des années 1500 et la fin des années 1800 étayent l'opinion que la sodomie avec un animal requérait une pénétration, qu'elle soit vaginale ou anale. En tout état de cause, la thèse du ministère a peu à voir avec la question à trancher en l'espèce. Quel que soit l'angle sous lequel on examine le droit applicable, l'infraction canadienne de 1892 exigeait une forme de pénétration. Rien — absolument rien — n'appuie l'opinion selon laquelle une quelconque pénétration n'était pas nécessaire.

d) *Conclusion sur la première question*

[50] Nous pouvons conclure qu'au moins jusqu'en 1955, l'infraction de bestialité/*buggery with an animal* comportait les mêmes éléments que ceux qu'elle avait dans la *Loi de 1861* d'Angleterre, dont la disposition en cause a été reprise pratiquement mot pour mot dans la loi canadienne de 1869 et dans notre premier *Code* en 1892. La pénétration est donc restée un élément de l'infraction. Nous pouvons aussi conclure que le terme « bestialité » s'entendait de la sodomie avec un animal.

[51] Cela nous amène à la deuxième étape de l'analyse, qui consiste à déterminer si le législateur a modifié explicitement ou par déduction nécessaire le sens juridique bien défini du terme « bestialité ».

(3) There Is No Express or Implied Legislative Intent to Depart From the Legal Meaning of the Term "Bestiality"

(a) *The Crown's Position: The Elements of the Offence Changed in 1955 and This Change Was Confirmed by Amendments in 1988*

[52] The Crown points to two legislative changes which it submits show a clear intention to expand the offence of sexual intercourse between a human and an animal to an offence proscribing all human-animal sexual activity. The first occurred in 1955 and the intention to make this change was confirmed by amendments in 1988. However, as I see it, the legislative history, on which the Crown relies, in fact supports the respondent's position that bestiality continued to require penetration as one of its elements.

[53] To explain why I have reached this conclusion, I will first turn to the applicable principles of statutory interpretation and then look at the two amendments in more detail.

(b) *Principles of Interpretation*

(i) Clear Language Is Required to Change the Law, Particularly Where the Change Takes Away Liberty

[54] As Professor Sullivan says, "The stability of law is enhanced by rejecting vague or inadvertent change while certainty and fair notice are promoted by requiring legislatures to be clear and explicit about proposed changes": §15.50. Stability and certainty are particularly important values in the criminal law and significant changes to it must be clearly intended. As the Court put it in *T. (V.)*, "it is open to Parliament to change the law in whatever way it sees fit, [but] the legislation in which it chooses to make these alterations known must be drafted in

(3) Le législateur n'a pas voulu, de manière expresse ou implicite, s'écarter du sens juridique du terme « bestialité »

a) *La thèse du ministère public : les éléments de l'infraction ont été modifiés en 1955, et ce changement a été confirmé par les modifications de 1988*

[52] Le ministère public signale deux modifications législatives qui, selon lui, montrent que le législateur a manifestement voulu élargir l'infraction de rapports sexuels entre un être humain et un animal de manière à ériger en infraction toutes les activités sexuelles entre êtres humains et animaux. La première date de 1955 et l'intention d'apporter ce changement a été confirmée par les modifications de 1988. Or, selon moi, l'historique législatif sur lequel s'appuie le ministère public renforce en fait la thèse de l'intimé selon laquelle la pénétration demeure l'un des éléments de l'infraction de bestialité.

[53] Pour expliquer les raisons qui m'ont amené à tirer cette conclusion, je vais d'abord examiner les principes d'interprétation législative applicables, puis me pencherai plus en détail sur les deux modifications.

b) *Principes d'interprétation*

(i) Il faut s'exprimer en termes clairs pour modifier le droit, surtout lorsque la modification porte atteinte à la liberté

[54] Comme l'affirme la professeure Sullivan, [TRADUCTION] « [l]a stabilité du droit est accrue par le rejet des modifications vagues ou effectuées par inadvertance alors que la certitude et le principe de l'avertissement raisonnable se trouvent renforcés du fait qu'on oblige les législateurs à s'exprimer en termes clairs et exprès sur les modifications proposées » (§15.50). La stabilité et la certitude sont des valeurs qui revêtent une importance particulière en droit criminel et les changements importants qui y sont apportés doivent avoir été clairement voulus.

such a way that its intention is in no way in doubt": p. 764 (emphasis added).

[55] A related principle is that enactments which take away the liberty of the subject should be clear and any ambiguity resolved in favour of the subject. "It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. . . . If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication": *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115.

[56] There is no express statutory provision expanding the scope of the bestiality offence as the Crown asks us to do. And, as we shall see, there is nothing in the legislative evolution and history that supports any parliamentary intent to bring about such a change by implication. The required "clarity and certainty" are entirely lacking.

(ii) Parliament, Not the Judiciary, May Expand Criminal Liability

[57] Parliament, not the judiciary, may expand the scope of criminal liability. As Cartwright J. (as he then was) said in *Frey v. Fedoruk*, [1950] S.C.R. 517:

> . . . if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts. [p. 530]

[58] This was not a new idea when Cartwright J. wrote these words in 1950. The principle was reflected in the English 1879 Draft Code. Its s. 5 provided that there would be no prosecutions for crimes at common law. The Commissioners noted that the

Ainsi que la Cour l'a dit dans *T. (V.)*, « il [. . .] est loisible [au législateur] [. . .] de modifier la loi de la façon qu'il juge appropriée, mais le texte législatif qui comporte ces modifications doit être rédigé de telle sorte que son intention ne fasse aucun doute » (p. 764 (je souligne)).

[55] Selon un principe connexe, les lois qui privent un individu de sa liberté doivent être claires et toute ambiguïté doit être résolue en faveur de ce dernier. « Il n'est pas nécessaire d'insister sur l'importance de la clarté et de la certitude lorsque la liberté est en jeu. [. . .] Si quelqu'un doit être incarcéré, il devrait au moins savoir qu'une loi du Parlement le requiert en des termes explicites, et non pas, tout au plus, par voie de conséquence » (*Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108, p. 115).

[56] Aucune disposition légale n'élargit expressément la portée de l'infraction de bestialité de la manière dont le ministère public nous demande de le faire. Et, comme nous le verrons, l'évolution et l'historique législatifs ne permettent aucunement de conclure que le législateur a voulu faire implicitement une telle modification. La « clarté et la certitude » requises sont totalement absentes.

(ii) Il appartient au législateur et non aux tribunaux d'élargir la responsabilité criminelle

[57] Il appartient au législateur et non aux tribunaux d'élargir la portée de la responsabilité criminelle. Comme le juge Cartwright (plus tard Juge en chef) l'a dit dans *Frey c. Fedoruk*, [1950] R.C.S. 517 :

> [TRADUCTION] . . . la tâche de déclarer criminelle une conduite qui, jusqu'à ce jour, ne l'était pas, revient au Parlement et non aux tribunaux. [p. 530]

[58] L'idée n'était pas nouvelle lorsque le juge Cartwright a tenu ces propos en 1950. Le principe trouvait écho dans le *Draft Code* anglais de 1879. Son article 5 disposait qu'aucune poursuite ne serait engagée pour un crime de common law.

purpose and effect of this provision would be to put an end to the power of judges to create new common law crimes. They added that even if the Draft Code and other statutes overlooked some common law offences, they thought "better to incur the risk of giving a temporary immunity to the offender than to leave any one liable to a prosecution for an act or omission which is not declared to be an offence by the Draft Code itself or some other Act of Parliament": p. 10. The same thinking was explicitly adopted in the 1955 revisions of our *Code*. It provided (in what was then s. 8; now s. 9) that "no person shall be convicted . . . of an offence at common law", subject to the power of judges to punish for contempt of court. The *Report of Royal Commission on the Revision of Criminal Code* (1954) had proposed a similar provision, observing that all of the offences which should be adopted from the common law were incorporated into the 1878 Draft Code: p. 6.

Les commissaires ont souligné que cette disposition aurait pour objet et effet de mettre un terme au pouvoir des juges de créer de nouveaux crimes de common law. Ils ont ajouté que, même si le *Draft Code* et d'autres lois passent sous silence certaines infractions de common law, ils jugeaient [TRADUCTION] « préférable de courir le risque d'offrir une immunité temporaire à l'auteur de l'infraction que d'exposer quiconque à des poursuites pour une omission ou un acte qui n'est pas déclaré criminel dans le *Draft Code* lui-même ou une autre loi du Parlement » (p. 10). Le même raisonnement a été explicitement adopté lors de la révision de notre *Code* en 1955. Il disposait (dans ce qui était alors l'art. 8 et maintenant l'art. 9) que « nul ne peut être déclaré coupable [. . .] d'une infraction en *common law* », sous réserve du pouvoir des juges de sanctionner l'outrage au tribunal. Le *Rapport de la Commission royale pour la revision du Code criminel* (1954) avait proposé l'insertion d'une disposition similaire après avoir fait observer que toutes les infractions qui devraient être tirées de la common law avaient été intégrées au *Draft Code* de 1878 (p. 6).

[59] In accordance with this principle, the courts have refrained from developing the common law meanings of legal terms used in the *Code* so as to extend the scope of criminal liability. Courts will only conclude that a new crime has been created if the words used to do so are certain and definitive: *Marcotte*, at p. 115; *R. v. McLaughlin*, [1980] 2 S.C.R. 331, at p. 335; and *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paras. 38-39. This approach not only reflects the appropriate respective roles of Parliament and the courts, but the fundamental requirement of the criminal law that people must know what constitutes punishable conduct and what does not, especially when their liberty is at stake: see, e.g., *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 14. As McLachlin J. (as she then was) cautioned:

[59] Conformément à ce principe, les tribunaux se sont abstenus de faire évoluer les définitions données en common law aux termes juridiques utilisés dans le *Code* de façon à élargir le champ de la responsabilité criminelle. Les tribunaux ne concluront à la création d'un nouveau crime que si les mots utilisés pour ce faire sont sûrs et définitifs (*Marcotte*, p. 115; *R. c. McLaughlin*, [1980] 2 R.C.S. 331, p. 335; et *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 38-39). Cette approche tient compte non seulement des fonctions revenant à bon droit respectivement au législateur et aux tribunaux, mais également de l'exigence fondamentale en droit criminel que les gens sachent ce qui constitue une conduite punissable et ce qui ne l'est pas, surtout lorsque leur liberté est en jeu (voir, p. ex., *R. c. Mabior*, 2012 CSC 47, [2012] 2 R.C.S. 584, par. 14). Comme l'a précisé la juge McLachlin (maintenant Juge en chef) :

Clear language is required to create crimes. Crimes can be created by defining a new crime, or by redefining the elements of an old crime. When courts approach the definition of elements of old crimes, they must be cautious

La création d'un crime doit être exprimée en termes clairs. Il peut s'agir de la définition d'un nouveau crime ou de la redéfinition des éléments d'un ancien crime. Quand les tribunaux abordent la définition des éléments

not to broaden them in a way that in effect creates a new crime. Only Parliament can create new crimes and turn lawful conduct into criminal conduct. It is permissible for courts to interpret old provisions in ways that reflect social changes, in order to ensure that Parliament's intent is carried out in the modern era. It is not permissible for courts to overrule the common law and create new crimes that Parliament never intended. [Emphasis added.]

(*R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 34)

[60] *R. v. McDonnell*, [1997] 1 S.C.R. 948, is an example of this principle at work. The question was whether an appellate court had erred on a sentence appeal by overturning the sentence imposed at first instance in part on the basis of a judicially created category of offences to which were attached starting point sentences. The majority of this Court found that the appellate court had erred. In reaching that conclusion, the Court relied on the principle that it is not for judges to create criminal offences: by creating a category of offence within a statutory offence for the purposes of sentencing, the appellate court had "effectively created an offence" contrary to the spirit if not the letter of that principle (para. 33).

[61] The same underlying principle is at work in *Perka v. The Queen*, [1984] 2 S.C.R. 232. The Court had to determine whether the definition of the scientific term "*Cannabis sativa* L." should refer to its meaning at the time the statute was passed or at the time the infraction was committed. The Court adopted the former approach. The Court noted that not all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted and words in constitutional documents must be capable of growth and development to meet changing circumstances. However, that interpretative approach is most often taken when the statutory language is broad or open-textured. But where Parliament has used "specific scientific or technical"

d'un ancien crime, ils doivent prendre garde de ne pas les élargir au point de créer un nouveau crime. Seul le législateur peut créer de nouveaux crimes et transformer une conduite légale en une conduite criminelle. Il est permis aux tribunaux de donner à d'anciennes dispositions une interprétation reflétant des changements sociaux, afin d'assurer que l'intention du législateur continue d'être réalisée à l'époque contemporaine. Il est inacceptable qu'ils écartent la common law pour créer de nouveaux crimes que le législateur n'a jamais voulu créer. [Je souligne.]

(*R. c. Cuerrier*, [1998] 2 R.C.S. 371, par. 34)

[60] Ce principe a notamment été appliqué dans l'arrêt *R. c. McDonnell*, [1997] 1 R.C.S. 948. Dans cette affaire, il s'agissait de savoir si la cour d'appel avait commis une erreur dans le cadre d'un appel portant sur la peine en annulant la peine infligée en première instance sur le fondement, entre autres, d'une catégorie d'infractions créée par les tribunaux à laquelle étaient associées des peines servant de point de départ. Notre Cour a conclu à la majorité que la cour d'appel avait fait erreur. Pour tirer cette conclusion, la Cour s'est fondée sur le principe qu'il n'appartient pas aux juges de créer des infractions criminelles : en créant une catégorie d'infractions dans le cadre d'une infraction prévue par la loi aux fins de détermination de la peine, la cour d'appel avait « effectivement créé une infraction » contrairement à l'esprit, voire même à la lettre, de ce principe (par. 33).

[61] Ce même principe fondamental est en cause dans l'arrêt *Perka c. La Reine*, [1984] 2 R.C.S. 232. La Cour devait décider si la définition du terme scientifique « *Cannabis sativa* L. » devait recevoir le sens qu'il avait à l'époque de l'adoption de la loi ou celui qu'il avait lorsque l'infraction a été commise. La Cour a retenu le premier sens. Elle a fait observer que ce ne sont pas tous les termes de toutes les lois qui doivent toujours se limiter à leur sens original. Des catégories générales contenues dans des lois sont souvent considérées comme regroupant des choses inconnues au moment de l'adoption de la loi et les termes des documents constitutionnels doivent pouvoir évoluer pour s'adapter aux changements de circonstances. Cependant, cette méthode d'interprétation est employée le plus souvent dans le cas d'un

terms, it would "do violence to Parliament's intent to give a new meaning to that term": p. 265.

[62] I will refer finally to *Gralewicz v. The Queen*, [1980] 2 S.C.R. 493. One of the issues in the case was what constitutes an "unlawful purpose" as an element of the offence of conspiracy to effect an unlawful purpose. The majority of the Court held that to be an unlawful purpose in this context, the purpose must be prohibited by federal or provincial legislation: p. 509. The majority found no clear basis in Canadian law to support the view that the offence extended to other sorts of unlawful purposes. The Court relied on the principle that it is not open to the courts to create new offences or to widen existing offences as to make punishable conduct of a type not previously subject to punishment: p. 508. Chouinard J. for the majority put it this way:

> It is difficult for me to see how the mere enactment of conspiracy as a statutory offence would have the effect of extending its scope beyond what it had been held to extend to at common law by the Canadian courts prior to its becoming a statutory offence while at the same time Parliament enacted s. 8 [now s. 9] to exclude common law offences from the ambit of the criminal law of Canada. [p. 509]

[63] These kinds of cases must be distinguished from ones in which Parliament had enacted statutory definitions and the question was how much, if at all, the common law should supplement them. No such question arises here. For example, in *Jobidon* and *Cuerrier*, Parliament had legislated quite extensively in relation to the meaning of "consent" and the issue was whether the statutory provisions were exhaustive or should be supplemented by the common law. However, in the present case, there is not, and has never been in Canada, *any* statutory definition — exhaustive or otherwise — of the elements of bestiality.

texte législatif général. Or, lorsque le législateur a utilisé des termes « scientifique[s] ou technique[s] précis », ce serait « faire violence à l'intention du législateur que de donner un sens nouveau à un tel terme » (p. 265).

[62] Je vais parler en dernier lieu de l'arrêt *Gralewicz c. La Reine*, [1980] 2 R.C.S. 493. Dans cette affaire, la Cour était notamment appelée à déterminer ce qui constituait un « dessein illicite » comme élément de l'infraction de complot en vue d'accomplir un dessein illicite. Les juges majoritaires de la Cour ont conclu que, pour qu'il s'agisse d'un dessein illicite dans ce contexte, le dessein devait être interdit par une loi fédérale ou provinciale (p. 509). Ils ont jugé que le droit canadien n'étayait pas clairement le point de vue selon lequel l'infraction visait d'autres types de desseins illicites. La Cour s'est appuyée sur le principe qu'il n'est pas loisible aux tribunaux de créer de nouvelles infractions ou d'élargir les infractions existantes afin de rendre punissable une conduite d'un type qui, jusqu'alors, ne l'était pas (p. 508). Le juge Chouinard a formulé ainsi ce principe au nom de la majorité :

> Je vois mal comment le simple fait de consacrer le complot par un texte de loi peut avoir comme résultat d'élargir sa portée au-delà des limites que les tribunaux canadiens lui ont imposées en *common law* avant sa consécration législative alors que le Parlement a adopté l'art. 8 [maintenant l'art. 9] qui vise à exclure les infractions de *common law* du champ d'application du droit criminel canadien. [p. 509]

[63] Les affaires de ce genre doivent être distinguées de celles où le législateur avait adopté des définitions dans une loi et où la question était de savoir dans quelle mesure l'on doit, si tant est que cela soit possible, recourir à la common law pour les compléter. Cette question ne se pose pas en l'espèce. À titre d'exemple, dans *Jobidon* et *Cuerrier*, le législateur avait légiféré de façon passablement détaillée en ce qui concerne la signification de « consentement » et il s'agissait de savoir si les dispositions de la loi étaient exhaustives ou si la common law devait les compléter. Cependant, en l'espèce, il n'y a au Canada *aucune* définition dans une loi, et il n'y en a jamais eu, — exhaustive ou autre — portant sur les éléments de l'infraction de bestialité.

[64] For the sake of completeness, I should note that the courts have taken a less restrictive approach with respect to developing common law defences, excuses and justifications. In this context, the Court has been willing to allow the common law to evolve and develop rather than treating it as having been frozen in time by statutory adoption. The Court has confirmed the availability of, for example, the common law defences of necessity and duress to further develop them: *Perka*, at p. 245; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3, at paras. 32-34; *Paquette v. The Queen*, [1977] 2 S.C.R. 189; *R. v. Hibbert*, [1995] 2 S.C.R. 973; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at paras. 56-67. This approach is consistent with what Laskin C.J. said in *Kirzner v. The Queen*, [1978] 2 S.C.R. 487, that the *Code* should not be seen "as having frozen the power of the Courts to enlarge the content of the common law by way of recognizing new defences": p. 496.

[65] However, common law defences, excuses and justifications stand on an entirely different footing under the *Code* than does the definition of offences. While prosecution for common law crimes is explicitly prohibited (s. 9), the *Code* expressly preserves common law defences, excuses and justifications: s. 8(3). The approach to the common law in those areas is thus not relevant to the question of how the courts should approach the definition of elements of offences.

[66] The Crown's position in this case directly implicates the principle that it is for Parliament and not the courts to expand the scope of criminal liability. The Crown invites the Court to develop the common law definition of bestiality so as to expand the scope of criminal liability for that offence. If we accept the Crown's position, the offence will fundamentally change from one relating to sexual intercourse between a human and an animal to one proscribing and punishing any touching of a sexual nature between a human and an animal. As I will explain, there is no clear statutory mandate to do

[64] Par souci d'exhaustivité, je souligne que les tribunaux ont adopté une approche moins restrictive en ce qui concerne le développement des moyens de défense, des excuses et des justifications reconnus en common law. Dans ce contexte, la Cour s'est montrée disposée à ce que la common law évolue et se développe plutôt que de juger qu'elle était figée dans le temps par l'adoption d'une loi. La Cour a confirmé la possibilité d'invoquer, par exemple, les moyens de défense de common law fondés sur la nécessité et la contrainte en vue de les faire évoluer davantage (*Perka*, p. 245; *R. c. Latimer*, 2001 CSC 1, [2001] 1 R.C.S. 3, par. 32-34; *Paquette c. La Reine*, [1977] 2 R.C.S. 189; *R. c. Hibbert*, [1995] 2 R.C.S. 973; *R. c. Ruzic*, 2001 CSC 24, [2001] 1 R.C.S. 687, par. 56-67). Cette approche cadre avec ce que le juge en chef Laskin a dit dans *Kirzner c. La Reine*, [1978] 2 R.C.S. 487, à savoir qu'il ne faudrait pas considérer que le *Code* « interdi[t] aux tribunaux d'étendre le contenu de la *common law* en admettant de nouveaux moyens de défense » (p. 496).

[65] Toutefois, le sort réservé par le *Code* aux moyens de défense, excuses et justifications reconnus en common law est tout à fait différent de celui qu'il réserve à la définition des infractions. Alors qu'il est expressément interdit d'engager des poursuites pour des crimes de common law (art. 9), le *Code* préserve explicitement les moyens de défense, les excuses et les justifications reconnus en common law (par. 8(3)). La façon de les aborder n'est donc pas pertinente lorsqu'il s'agit de décider comment les tribunaux devraient aborder la définition des éléments constitutifs d'une infraction.

[66] La position du ministère public dans le présent pourvoi met directement en jeu le principe qu'il revient au législateur et non aux tribunaux d'élargir la portée de la responsabilité criminelle. Le ministère public invite la Cour à faire évoluer la définition de bestialité en common law de façon à élargir la portée de la responsabilité criminelle liée à cette infraction. Si nous acceptons la thèse du ministère public, cela changera fondamentalement l'infraction, en la faisant passer d'une infraction relative à des rapports sexuels entre un être humain et un animal à une infraction interdisant et

so. And, to accept that invitation would be to exceed the proper role of the courts in defining criminal liability.

[67] The trial judge's analysis was flawed because it gave no weight to this principle and did not take into consideration that the French version of the offence in the *Code* has remained substantively unchanged from 1892 to 1988. He reasoned that the courts should interpret the elements of the offence of bestiality so that they would "reflect current views on what constitutes prohibited sexual acts": para. 315. This, respectfully, was a fundamental legal error. Absent clear parliamentary intent to depart from the clear legal definition of the elements of the offence, it is manifestly *not* the role of the courts to expand that definition.

[68] We should bear in mind that there are important questions of policy involved in broadening the offence of bestiality as the Crown urges us to do. That change, as we see from the trial judge's reasons, could turn a person such as the victim in this case into a co-perpetrator. Recall that, if we accept the trial judge's reasoning (an issue that I need not finally decide here), the complainant is the principal offender and the respondent is liable as having aided and abetted her commission of the offence. In other words, a victim became a co-perpetrator. This, in itself, should make us hesitate. Justice Abella is of the view that the Crown would never charge anyone in the position of this complainant and I hope that she is right. But this faith in prosecutorial discretion misses the point. It does not provide any comfort to those who, like me, are concerned that the trial judge's approach, if adopted, would mean that in law this complainant would be an uncharged principal offender. That legal conclusion should give us pause.

sanctionnant tout attouchement de nature sexuelle entre un être humain et un animal. Comme je vais l'expliquer, il ne ressort pas de la loi que le législateur a voulu confier cette tâche aux tribunaux. Et accepter l'invitation du ministère public reviendrait à outrepasser le rôle que doivent jouer les tribunaux lorsque vient le temps de définir la responsabilité criminelle.

[67] L'analyse du juge du procès était erronée parce qu'il n'a attaché aucune importance à ce principe et n'a pas tenu compte du fait que la version française de l'infraction prévue au *Code* était demeurée inchangée sur le fond de 1892 à 1988. Selon lui, les tribunaux doivent interpréter les éléments de l'infraction de bestialité de façon à ce qu'ils [TRADUCTION] « reflètent ce qui est considéré de nos jours comme des actes sexuels prohibés » (par. 315). Avec égards, il s'agit là d'une erreur de droit fondamentale. En l'absence d'une intention claire du législateur de s'écarter de la définition juridique claire des éléments de l'infraction, il *n'*appartient manifestement *pas* aux tribunaux d'élargir cette définition.

[68] Il faut garder à l'esprit qu'étendre l'infraction de bestialité comme le ministère public nous presse de le faire soulèverait d'importantes questions de politique générale. Ainsi qu'il appert des motifs du juge du procès, ce changement pourrait faire d'une personne comme la victime en l'espèce une coauteure de l'infraction. Rappelons que, si nous acceptons le raisonnement du juge du procès (une question que je n'ai pas à trancher de manière définitive en l'espèce), la plaignante est l'auteure principale de l'infraction et l'intimé, quant à lui, est responsable de l'avoir aidée et encouragée à la commettre. Autrement dit, la victime devient une coauteure de l'infraction. Cela devrait suffire en soi à nous faire hésiter. La juge Abella est d'avis que le ministère public n'accuserait jamais une personne se trouvant dans la situation de la plaignante en l'espèce et j'espère qu'elle a raison. Mais cette foi dans le pouvoir discrétionnaire du ministère public passe à côté de la question. Elle ne rassure aucunement ceux qui, comme moi, craignent que l'approche du juge du procès, si elle était retenue, ferait de la plaignante, en droit, une auteure principale non inculpée de l'infraction. Cette conclusion de droit devrait nous donner matière à réflexion.

[69] There are also significant policy debates about what the focus of this sort of offence ought to be. Commentators have suggested that the focus should move away from understanding bestiality as an offence against public morals and towards seeing it as a type of animal abuse. Consistent with this view, the Law Reform Commission of Canada recommended in 1978 that the offence be repealed, being of the view that the offence would still be covered by the various laws for the protection of animals enacted by the provinces or contained in the *Code*: Working Paper 10, *Report on Sexual Offences* (1978), at p. 30. And as the intervener, Animal Justice, submitted in this Court, the fundamental values at stake in this debate include the protection of vulnerable animals from the risks posed by improper human conduct and the wrongfulness of sexual conduct involving the exploitation of non-consenting participants.

[70] My point is not to take sides in the policy debate. The point, as I see it, is that these are important points of penal and social policy. And they are matters for Parliament to consider, if it so chooses. Parliament may wish to consider whether the present provisions adequately protect children and animals. But it is for Parliament, not the courts, to expand the scope of criminal liability for this ancient offence.

[71] With these principles in mind, I turn to examine in more detail the text, legislative evolution and history and contemporary commentary on the 1955 and 1988 revisions.

(c) *The 1955 Revisions*

[72] As discussed, the English version of the *Code* did not use the term "bestiality" until 1955, but the French version did. Immediately before the 1955 revisions, the respective versions provided:

[69] Le point de savoir sous quel angle ce type d'infraction devrait être analysé fait également l'objet d'importants débats en matière de politique générale. Les auteurs ont laissé entendre qu'il faut cesser de considérer la bestialité comme une infraction portant atteinte à la moralité publique et la voir plutôt comme un type de mauvais traitement envers les animaux. Adoptant cet avis, la Commission de réforme du droit du Canada a recommandé en 1978 d'abolir l'infraction de bestialité, étant donné qu'elle continuerait de relever des diverses mesures législatives de protection des animaux adoptées par les provinces ou contenues dans le *Code* (Document de travail 10, *Rapport sur les infractions sexuelles* (1978), p. 32). Et comme l'intervenante Animal Justice l'a fait valoir devant la Cour, les valeurs fondamentales en jeu dans ce débat comprennent la protection d'animaux vulnérables contre les risques que posent une activité humaine inappropriée et le caractère répréhensible des comportements sexuels impliquant l'exploitation de participants non consentants.

[70] Je ne cherche pas à prendre parti dans le débat de politique générale. Il s'agit, selon moi, d'importantes questions de politique pénale et sociale. Or, il revient au législateur de les examiner, s'il le juge à propos. Le législateur peut vouloir se demander si les dispositions actuelles protègent adéquatement les enfants et les animaux. Il appartient cependant au législateur, et non aux tribunaux, d'élargir la portée de la responsabilité criminelle liée à cette vieille infraction.

[71] En gardant ces principes à l'esprit, j'examine maintenant plus en détail le texte, l'évolution et l'historique législatifs ainsi que la doctrine de l'époque sur les révisions de 1955 et de 1988.

c) *La révision de 1955*

[72] Comme je l'ai déjà dit, le terme « *bestiality* » ne figurait pas dans la version anglaise du *Code* avant 1955, mais on retrouvait son équivalent « bestialité » dans la version française. Tout juste avant la révision de 1955, les deux versions étaient rédigées ainsi :

[Buggery]

202. Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature.

202. Est coupable d'un acte criminel et passible d'emprisonnement à perpétuité, celui qui commet la sodomie ou la bestialité.

(R.S.C. 1927, c. 36)

[73] In the 1955 revisions, the word bestiality was first introduced into the English version of the *Code* and the reference to "buggery . . . with any other living creature" was deleted, but with no definition of either the term "buggery" or "bestiality". The new section read:

[Buggery or bestiality]

147. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.

[74] Apart from modifying the sentencing range, the French version of s. 147 in the 1955 *Code* remained the same as before the 1955 revisions. Indeed, the new section read:

147. Est coupable d'un acte criminel et passible d'un emprisonnement de quatorze ans, quiconque commet la sodomie ou bestialité.

[75] As in the *1892 Code*, the elements of the offence are not specified. The Crown says that the introduction of the offence under that name shows a parliamentary intent to differentiate the offence from the old offence of buggery and that the use of the new language was intended to modernize the historical offence of buggery committed with animals. I cannot agree.

[Sodomie]

202. Est coupable d'un acte criminel et passible d'emprisonnement à perpétuité, celui qui commet la sodomie ou la bestialité.

202. Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature.

(S.R.C. 1927, c. 36)

[73] Lors de la révision de 1955, le terme « *bestiality* » a été introduit pour la première fois dans la version anglaise du *Code*, et le passage « *buggery [. . .] with any other living creature* » a été supprimé, mais on n'a défini ni le terme « *buggery* » (sodomie), ni celui de « *bestiality* ». La nouvelle disposition était ainsi libellée :

[Buggery or bestiality]

147. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.

[74] Mis à part la modification apportée à la fourchette des peines, la version française de l'art. 147 dans le *Code* de 1955 est restée la même qu'avant la révision de 1955. En effet, le nouvel article était rédigé en ces termes :

147. Est coupable d'un acte criminel et passible d'un emprisonnement de quatorze ans, quiconque commet la sodomie ou bestialité.

[75] Tout comme dans le *Code de 1892*, les éléments constitutifs de l'infraction ne sont pas précisés. Le ministère public affirme que l'introduction de l'infraction sous cette désignation démontre l'intention du législateur de différencier cette infraction de l'ancienne infraction de sodomie et que l'utilisation de la nouvelle expression visait à moderniser l'ancienne infraction de sodomie commise avec des animaux. Je ne saurais être d'accord.

(i) Text, Legislative Evolution and History

[76] I turn first to the text and the legislative evolution and history of the 1955 provisions.

[77] The text of the 1955 revisions does not suggest that any significant change in the law was intended. In fact, quite the opposite is the case. The word "bestiality" was substituted for the words "buggery . . . with any other living creature" in the English version of the offence, but the French version of the offence remained unchanged. This appears to be simply the substitution of a more precise legal term in the English version for the previous more general expression. The absence of a statutory definition of either term is consistent only with the intent to adopt the accepted legal meanings of both terms. And the absence of change to the French version undermines the Crown's position that any substantive change was intended by the amendment of the English version. Unlike Justice Abella, I cannot see in this amendment that the two offences were "rendered asunder from each other". That reasoning cannot be accepted in the face of the fact that the French version of the *Code* had always used different words for the human buggery and the animal buggery offence in this section. The change to the English version in 1955 to more closely match the French cannot bear the interpretative weight that the Crown and Justice Abella attach to it. And the suggestion that this minor change to the English version is somehow linked to amendments to the animal cruelty offence has no foundation in the principles of statutory interpretation or, as we shall see, in the legislative evolution and history.

[78] We should note that the term "bestiality" was used in the law before it was introduced into the *Code* in 1955. I have already referred to the use of the word in the marginal note to the *1861 Act* and to the case of *Bourne* in which Lord Chief Justice Goddard observed that the offence of buggery with

(i) Le texte ainsi que l'évolution et l'historique législatifs

[76] Je me penche d'abord sur le texte ainsi que sur l'évolution et l'historique des dispositions de 1955.

[77] Le texte de la révision de 1955 ne porte pas à croire que le législateur a voulu changer le droit de façon substantielle. En fait, c'est plutôt le contraire. Dans la version anglaise, le terme « *bestiality* » a remplacé le passage « *buggery [. . .] with any other living creature* », mais la version française de l'infraction est demeurée inchangée. Il semble s'agir là du simple remplacement de l'ancienne expression plus générale dans la version anglaise par un terme juridique plus précis. L'absence de définition de l'un ou l'autre des termes dans la loi ne s'accorde qu'avec l'intention d'adopter le sens juridique reconnu des deux termes. Et l'absence de changement à la version française affaiblit la thèse du ministère public selon laquelle la modification de la version anglaise se voulait un changement de fond. Contrairement à la juge Abella, je ne crois pas que cette modification « scinde » les deux infractions. Le raisonnement de la juge Abella ne saurait être accepté compte tenu du fait que la version française du *Code* a toujours employé à cet article des mots différents pour désigner l'infraction de sodomie avec un être humain et celle de sodomie avec un animal. Le changement apporté à la version anglaise en 1955 pour qu'elle corresponde davantage à la version française ne peut se voir attribuer l'importance que lui accordent le ministère public et la juge Abella au chapitre de l'interprétation. Et la prétention selon laquelle ce changement mineur à la version anglaise a un quelconque rapport avec les modifications à l'infraction de cruauté envers un animal ne repose ni sur les principes d'interprétation des lois ni, comme nous le verrons, sur l'évolution et l'historique législatifs.

[78] Il convient de souligner que le terme « *bestiality* » a été utilisé en droit avant qu'il ne soit introduit dans la version anglaise du *Code* en 1955. J'ai déjà relevé l'utilisation du mot dans la note marginale de la *Loi de 1861* et dans l'arrêt *Bourne*, où le lord juge en chef Goddard a fait remarquer

an animal was "commonly called bestiality": p. 127. There is also the use of the term "bestiality" by Taschereau in relation to his model indictment in relation to buggery with an animal: Taschereau (1874), at p. 345; see also Thomas, at p. 154; and A. K. Gigeroff, *Sexual Deviations in the Criminal Law* (1968), at p. 105. And of course there is the use of the French word "*bestialité*" in the *Code* from 1892 on.

[79] There is nothing in the text of the 1955 revisions to suggest that any change in the elements of the offence was intended. The absence of revision to the text of the French version makes clear that no substantive change was intended. Contrary to the view expressed by Justice Abella, there is no ambiguity in this provision. It is a simple incorporation of a legal term with a meaning that had been well understood for centuries.

[80] If Parliament intended the significant change in the law as the Crown contends, it would surely have been noticed either in parliamentary debates or by commentators. But so far as counsel or I can determine, no notice of the alleged change can be found in either.

[81] The legislative evolution and history of the sexual offences in the 1955 revisions are exhaustively reviewed in Gigeroff, at pp. 69 ff. From the initial introduction of the draft bill in the House of Commons and the Senate in 1952, until Royal Assent in June 1954, there was no change in and no discussion of the bestiality section. An explanatory note added by the Senate Standing Committee on Banking and Commerce, to which the initial bill was referred, indicated that the new s. 147 was *a change in form only* from the previous *Code*'s s. 202: Gigeroff, at p. 76. There is thus nothing in the legislative history and evolution of s. 147 to support the Crown's position that the 1955 revisions brought about a significant change in the elements of the offence. The use of a word with a legal meaning without further definition and the explanatory note that the section was changed in form

que l'infraction de sodomie avec un animal était [TRADUCTION] « communément appelée bestialité » (p. 127). Le terme « *bestiality* » a également été utilisé par H. E. Taschereau relativement à son modèle d'acte d'accusation concernant la sodomie avec un animal (Taschereau (1874), p. 345; voir également Thomas, p. 154; et A. K. Gigeroff, *Sexual Deviations in the Criminal Law* (1968), p. 105). Et, bien sûr, le mot français « bestialité » est employé dans le *Code* depuis 1892.

[79] Rien dans le libellé de la révision de 1955 ne porte à croire qu'un changement aux éléments de l'infraction était souhaité. L'absence de révision du texte de la version française indique clairement qu'aucun changement de fond n'était souhaité. Contrairement à ce qu'affirme la juge Abella, la disposition en cause ne souffre d'aucune ambiguïté. Il s'agit simplement de l'insertion d'un terme juridique dont le sens est bien défini depuis des siècles.

[80] Si le législateur avait voulu modifier le droit de façon substantielle comme le prétend le ministère public, ce changement aurait sûrement été signalé dans les débats parlementaires ou par des auteurs. Or, à ma connaissance et à celle des avocats, le changement allégué n'a été relevé ni dans les débats ni par les auteurs.

[81] L'évolution et l'historique législatifs des infractions d'ordre sexuel dans la révision de 1955 sont examinés en profondeur dans Gigeroff, p. 69 et suiv. Du dépôt initial du projet de loi à la Chambre des communes et au Sénat en 1952 jusqu'à la sanction royale en juin 1954, l'article sur la bestialité n'a fait l'objet d'aucun changement ni d'aucune discussion. Une note explicative ajoutée par le Comité sénatorial permanent des banques et du commerce, auquel le projet de loi initial avait été soumis, indiquait que le nouvel art. 147 *n'*était *qu'une modification de forme* de l'ancien art. 202 du *Code* (Gigeroff, p. 76). Par conséquent, l'évolution et l'historique de l'art. 147 n'appuient d'aucune manière la thèse du ministère public selon laquelle la révision de 1955 a modifié de façon importante les éléments de l'infraction. L'utilisation d'un terme ayant un sens juridique sans être par ailleurs défini et la note explicative

only support the opposite view that no substantive change was intended. As Gigeroff observes:

> In the narrow field of sex offences, the major effort of the commissioners was to bring all of the sexual offences under one part of the code, but the offences themselves remained virtually unchanged, with the single exception of gross indecency, which was expanded in a way which has been open to much criticism. [Emphasis added; p. 81.]

[82] We should not forget that one of the purposes of the 1955 revisions, as I discussed earlier, was to make the *Code* truly exhaustive. The intent was, in a sense, to "freeze" the definition of criminal liability. To read into the use of the English word "bestiality", used without further statutory definition, something other than its widely accepted meaning would be fundamentally at odds with that purpose. This is doubly so when the French word "*bestialité*" remained unchanged.

[83] There is no support for the Crown's position in the text, legislative history and evolution of the 1955 revisions. These in fact only support the opposite view.

(ii) Commentators

[84] The commentators are also uniformly against the Crown's position.

[85] I will start with the work of J. C. Martin. Mr. Martin was the editor of the 1955 *Criminal Code of Canada: With Annotations and Notes* and he served as research counsel to the Royal Commission to Revise the *Criminal Code*, 1947-1952. The Commission's work resulted in the draft bill that led to the 1955 revisions of the *Code*. There is no sign in his comments on the revised *Code* of 1955 that there was any substantive change to the bestiality offence.

[86] In his introduction to the 1955 edition of the *Code*, Mr. Martin lists 52 of the principal changes:

indiquant que l'article a été modifié dans sa forme uniquement appuient le point de vue contraire selon lequel aucun changement de fond n'était souhaité. Comme le fait observer M. Gigeroff :

> [TRADUCTION] Dans le domaine restreint des infractions d'ordre sexuel, les commissaires se sont surtout employés à regrouper toutes ces infractions dans une partie du code, mais les infractions elles-mêmes sont demeurées pratiquement inchangées, à l'exception de l'infraction de grossière indécence, dont la portée a été élargie d'une façon qui prêtait beaucoup le flanc à la critique. [Je souligne; p. 81.]

[82] Comme je l'ai déjà mentionné, il ne faudrait pas oublier que l'un des objectifs de la révision de 1955 était de rendre le *Code* véritablement exhaustif. Dans un sens, on voulait « figer dans le temps » la définition de la responsabilité criminelle. Donner au mot anglais « *bestiality* », utilisé sans être défini dans la loi, un autre sens que celui largement reconnu serait fondamentalement incompatible avec cet objectif. Il en est doublement ainsi car le mot français « bestialité » est resté tel quel.

[83] Le texte ainsi que l'évolution et l'historique de la révision de 1955 n'étayent pas la thèse du ministère public. En fait, ils n'étayent que le point de vue contraire.

(ii) Auteurs

[84] Les auteurs sont aussi tous défavorables à la thèse du ministère public.

[85] Je me pencherai d'abord sur les travaux de J. C. Martin. Il était le rédacteur du *Criminal Code of Canada : With Annotations and Notes* de 1955 et a travaillé comme avocat recherchiste pour la Commission royale pour la révision du *Code criminel* de 1947 à 1952. Les travaux de la Commission ont débouché sur le projet de loi ayant mené à la révision de 1955 du *Code*. Ses commentaires sur le *Code* révisé de 1955 n'indiquent aucunement qu'un changement de fond était apporté à l'infraction de bestialité.

[86] Dans son introduction de l'édition de 1955 du *Code*, M. Martin énumère 52 des principaux

Martin, at pp. 9-15. He makes no mention of the bestiality offence, suggesting that he did not view that provision as one of the principal changes worthy of special mention. He adds in the introduction that this list does not refer to all of the changes made and that others are referred to in the notes to the relevant sections. When we look there, it is clear that Mr. Martin saw no substantive change to the offence. Under the amended section (s. 147), the editor states simply that

> [t]his is the former s. 202. It was s. 174 in the Code of 1892 and s. 144 in the E.D.C. [1879 Draft Code] whence it was taken from the *Offences against the Person Act, 1861*. [p. 248]

The only changes noted are that the maximum punishment has been reduced from life to 14 years and that the offence has been listed in s. 661, opening the way to a sentence of preventive detention upon conviction. In other words, the new provision in the 1955 revisions is the same in substance as the English offence in the *1861 Act*.

[87] Mr. Martin's note refers the reader to s. 3(6) which provides that "sexual intercourse is complete upon penetration to even the slightest degree, notwithstanding that seed is not emitted" and, for the meaning of the terms used, to *R. v. Jacobs* (1817), Russ. & Ry. 331, 168 E.R. 830. That case stands for the proposition that oral sexual activity did not constitute sodomy. All of this, of course, is inconsistent with the Crown's submission that there had been any substantive change in the law or that penetration was not an element of the offence. Otherwise, the references to s. 3(6) and to *Jacobs* would be irrelevant.

[88] I turn to other commentators. In 1957, Irénée Lagarde, in *Nouveau Code Criminel Annoté*, at p. 102, explains that [TRANSLATION] "[b]estiality is unnatural coitus [i.e. sexual intercourse] between a man or a woman and an animal".

changements (Martin, p. 9-15). Il ne mentionne pas l'infraction de bestialité, ce qui donne à penser qu'il ne voyait pas cette disposition comme l'un des principaux changements dignes d'être soulignés. Il ajoute dans son introduction que la liste ne recense pas tous les changements apportés et que d'autres modifications sont relevées dans les notes annexées aux dispositions pertinentes. Un examen de ces notes révèle clairement que M. Martin n'a vu aucun changement de fond à l'infraction. Sous la disposition modifiée (l'art. 147), le rédacteur affirme simplement ce qui suit :

> [TRADUCTION] Il s'agit de l'ancien art. 202. C'était l'art. 174 du Code de 1892 et l'art. 144 du E.D.C. [*Draft Code* de 1879], tiré de la *Offences against the Person Act, 1861*. [p. 248]

Les seuls changements relevés sont les suivants : la peine maximale est passée de l'emprisonnement à perpétuité à 14 ans d'emprisonnement et il a été fait mention de l'infraction à l'art. 661, ce qui ouvrait la voie à une peine de détention préventive sur déclaration de culpabilité. Autrement dit, la nouvelle disposition prévue par la révision de 1955 correspond essentiellement à l'infraction anglaise prévue dans la *Loi de 1861*.

[87] La note de M. Martin renvoie le lecteur au par. 3(6), qui prévoit que « les rapports sexuels sont complets s'il y a pénétration même au moindre degré et bien qu'il n'y ait pas émission de semence » et, pour le sens des termes utilisés, à *R. c. Jacobs* (1817), Russ. & Ry. 331, 168 E.R. 830. Cette décision permet d'affirmer que les activités sexuelles orales ne constituaient pas de la sodomie. Bien entendu, tout cela ne cadre pas avec l'argument du ministère public selon lequel un changement de fond a été apporté à la loi ou que la pénétration n'était pas un élément de l'infraction. Sinon, les renvois au par. 3(6) et à la décision *Jacobs* n'auraient aucune raison d'être.

[88] Je me penche maintenant sur les propos d'autres auteurs. En 1957, Irénée Lagarde explique à la p. 102 du *Nouveau Code Criminel Annoté* que la « bestialité est le coït contre nature entre un homme ou une femme et un animal ».

[89] In *Droit pénal canadien* (1962), at p. 34, the same author stated:

[TRANSLATION] . . . bestiality may occur between a male person (active agent) and a female animal or between a female person (passive agent) and a male animal. Bestiality may be coital or anal. But in each of these cases, there must be "penetration" by the male organ to the degree indicated above. [Emphasis added.]

[90] Similarly, the 1959 edition of *Crankshaw's Criminal Code of Canada* (7th ed.), at p. 208, provides the following definition of buggery:

Buggery, also called sodomy, is the carnal copulation against nature by human beings with each other or with a beast . . . [C]arnal knowledge in any manner by a man or woman with a beast is bestiality. The word "buggery" comprehends both. . . .

. . .

Carnal knowledge is complete upon penetration to any, even the slightest degree . . . .

[91] The 1964 edition of *Tremeear's Annotated Criminal Code: Canada* (6th ed.) also provides a definition of bestiality under which penetration — vaginal or anal — is required:

This offence, also called sodomy, is defined in 1 Bishop, Cr. Law, p. 380, as carnal copulation against nature by human beings with each other or with a beast. Since it is a form of carnal knowledge, there must, under s. 3(6), as well as at common law, be penetration to some degree, and, where the offence is committed between humans, the penetration must be *per anum*; a penetration of the mouth is not sodomy: *R. v. Jacobs* (1817) R. & R. 331, 168 E.R. 830 (C.A.) . . . . [p. 216]

[92] This understanding of bestiality was also shared by the Law Reform Commission of Canada in its Working Paper 22, *Criminal Law: Sexual Offences* (1978). Bestiality is said to refer to "sexual intercourse between a human and an animal": p. 35. Notably, the Commission did not believe that elements of bestiality had been changed in 1955. It also did not recommend to extend these elements. It

[89] Dans le *Droit pénal canadien* (1962), le même auteur a dit ce qui suit à la p. 34 :

. . . il peut y avoir bestialité entre une personne du sexe masculin (agent actif) et un animal femelle ou entre une personne du sexe féminin (agent passif) et un animal mâle. La bestialité peut se pratiquer par un coït ou par l'anus. Mais dans chacun de ces cas, il doit y avoir « pénétration » par l'organe mâle au degré ci-dessus indiqué. [Je souligne.]

[90] De même, l'édition de 1959 du *Crankshaw's Criminal Code of Canada* (7e éd.), p. 208, donne la définition suivante de la sodomie :

[TRADUCTION] La sodomie est une copulation contre nature entre des êtres humains ou entre un être humain et un animal [. . .] [T]oute connaissance charnelle entre un homme ou une femme et un animal s'appelle la bestialité. Le terme « sodomie » englobe les deux. . .

. . .

La connaissance charnelle est complète s'il y a pénétration même au moindre degré . . .

[91] L'édition de 1964 du *Tremeear's Annotated Criminal Code : Canada* (6e éd.) donne également une définition de la bestialité selon laquelle il doit y avoir pénétration, vaginale ou anale :

[TRADUCTION] Cette infraction, appelée également sodomie, est définie dans 1 Bishop, Cr. Law, p. 380, comme une copulation contre nature entre des êtres humains ou entre un humain et un animal. Comme il s'agit d'une forme de connaissance charnelle, il doit y avoir, selon le par. 3(6) ainsi que la common law, pénétration à un certain degré et, lorsque l'infraction est commise entre des humains, la pénétration doit être anale; une pénétration orale n'est pas de la sodomie : *R. c. Jacobs* (1817), R. & R. 331, 168 E.R. 830 (C.A.) . . . [p. 216]

[92] La Commission de réforme du droit du Canada a également fait sienne cette conception de la bestialité dans son Document de travail 22, *Droit pénal : infractions sexuelles* (1978). Il est indiqué que la bestialité désigne « les rapports sexuels entre un être humain et un animal » (p. 37). Fait à signaler, la Commission ne croyait pas que les éléments de la bestialité avaient été modifiés en 1955.

rather proposed, as I mentioned earlier, that the offence be repealed, with animal cruelty offences and provincial animal welfare legislation addressing any public policy concerns: *Report on Sexual Offences*, at p. 30.

[93] To sum up on this point, the work of the commentators on the revised *Code* does not support the Crown's position. Their comments overwhelmingly support the view that the 1955 revisions did not bring about any substantive change in the elements of the offence.

(iii) The Crown's Position Is Not Supported by the Principles of Interpretation on Which It Relies

[94] The Crown relies on the interpretative principles that Parliament does not speak in vain and that every word in an enactment must be given a meaning. But this reliance is misplaced.

[95] The Crown says that the amendment using the word bestiality must be understood as having some purpose. But, as Professor Sullivan points out, the presumption that amendments are purposeful is much less strong in relation to the question of whether they change the substantive law. She notes that making formal improvements to the Canadian statute book is a "minor industry" and that the purpose of amendments may be to clarify the meaning or to correct a mistake rather than to change the law: §23.23. She also notes that s. 45(2) of the *Interpretation Act*, which provides that an amendment should not be taken as a declaration that Parliament considered that the amendment changed the law, should serve as a reminder to the courts that amendments do not necessarily intend to bring about substantive change: §23.24. And, as Doherty J.A. noted in *R. v. L.B.*, 2011 ONCA 153, 274 O.A.C. 365, at para. 94, while there is a presumption that when Parliament changes legislation it does so for a purpose, that purpose may be simply to give effect to "benign housekeeping concerns". Adopting a comment from the 5th edition of

Elle n'a pas non plus recommandé d'élargir ces éléments. Comme je l'ai déjà dit, elle a plutôt proposé d'abolir l'infraction puisque les infractions de cruauté envers les animaux et la législation provinciale en matière de protection des animaux répondaient à toute préoccupation de politique générale (*Rapport sur les infractions sexuelles*, p. 32).

[93] Pour résumer ce point, les travaux des auteurs sur le *Code* révisé n'appuient pas la thèse du ministère public. Leurs commentaires étayent en très grande majorité l'opinion selon laquelle la révision de 1955 n'a pas modifié sur le fond les éléments de l'infraction.

(iii) La thèse du ministère public n'est pas étayée par les principes d'interprétation sur lesquels il s'appuie

[94] Le ministère public se fonde sur les principes d'interprétation voulant que le législateur ne parle pas pour ne rien dire et qu'il faille donner un sens à chaque mot d'un texte législatif. Or, c'est à tort qu'il invoque ces principes.

[95] Selon le ministère public, il faut considérer que l'ajout du mot « *bestiality* » dans la version anglaise avait une raison d'être. Mais comme le souligne la professeure Sullivan, la présomption que les modifications ont une raison d'être est beaucoup moins solide lorsqu'il s'agit de savoir si elles ont eu pour effet de modifier le droit substantiel. Elle signale que les améliorations de forme des recueils de lois canadiennes sont [TRADUCTION] « légion » et que les modifications peuvent viser à clarifier le sens ou à corriger une erreur plutôt qu'à modifier le droit (§23.23). Elle indique également que le par. 45(2) de la *Loi d'interprétation*, selon lequel une modification ne constitue pas une déclaration portant que le législateur considérait que la modification a changé les règles de droit, devrait rappeler aux tribunaux que les modifications ne visent pas forcément à apporter un changement de fond (§23.24). De plus, comme le juge Doherty l'a indiqué dans l'arrêt *R. c. L.B.*, 2011 ONCA 153, 274 O.A.C. 365, par. 94, bien que le législateur soit présumé modifier la loi pour une raison, son objectif est peut-être simplement de donner effet à des [TRADUCTION] « préoccupations mineures

Sullivan on the Construction of Statutes (2008), at p. 585, he adds that when an older statute is given a major overhaul as the *Code* was in 1955, "it may be clear that even dramatic changes in wording are meant to simplify or otherwise modernize the style rather than to change the substance of the provision": para. 94.

[96] Here, there is no evidence that any substantive change was intended; quite the opposite. The fact that no substantive change occurred in the French version of the offence leads us to conclude almost inevitably that the change in terminology in the English version was simply intended to give the offence a clearer, more modern wording which would be more consistent with its French equivalent.

[97] Moreover, after the substitution of the word "bestiality" for the words "buggery . . . with any other living creature" every word in the new enactment has meaning. No words are used in vain. Justice Abella reasons that the addition of the offence of bestiality must have been intended to mean something different from buggery. But the offence of bestiality was not added; the word "bestiality" was substituted for the words "buggery . . . with any other living creature". And of course, as Justice Abella writes, bestiality meant something different than buggery in the amended provision. Given the simple substitution of the word "bestiality" for the former words "buggery . . . with any other living creature", buggery in the amended version referred to the offence in relation to human beings. It may be that the amendment made it more clear in the English version that the offence in relation to animals was not limited to anal penetration but included vaginal penetration as well. In any event, there is nothing in this tweak to the English version of the *Code* to support the view that any substantive change to the elements of the offence was intended.

[98] The Crown also relies on the reasoning of the dissenting judge in the Court of Appeal that interpreting bestiality as a subset of buggery gives the

d'ordre administratif ». Souscrivant à un commentaire tiré de la cinquième édition de *Sullivan on the Construction of Statutes* (2008), p. 585, il ajoute que, lorsqu'une loi plus ancienne fait l'objet d'une refonte majeure, comme le *Code* en 1955, « il est parfois évident que même les modifications de libellé les plus draconiennes visent à simplifier ou à moderniser autrement le style plutôt qu'à modifier le contenu de la disposition » (par. 94).

[96] En l'espèce, rien ne prouve qu'un changement de fond était souhaité, bien au contraire. L'absence de modification de fond à la version française de l'infraction nous amène à conclure presque inévitablement que le changement de terminologie dans la version anglaise ne visait qu'à donner à l'infraction une formulation plus claire et plus moderne qui concorderait mieux avec son équivalent français.

[97] De plus, après le remplacement du passage « *buggery [. . .] with any other living creature* » par le mot « *bestiality* », chacun des mots du nouveau texte de loi a un sens. Aucun mot n'est utilisé pour rien. Selon la juge Abella, l'infraction de *bestiality* ajoutée devait sûrement vouloir dire autre chose que celle de *buggery*. Or, l'infraction de *bestiality* n'a pas été ajoutée; le mot « *bestiality* » a été substitué à l'expression « *buggery [. . .] with any other living creature* ». Et bien sûr, comme l'écrit la juge Abella, la *bestiality* avait un sens différent de celui du terme « *buggery* » dans la disposition modifiée. Vu le simple remplacement de l'ancienne expression « *buggery [. . .] with any other living creature* » par le mot « *bestiality* », le terme « *buggery* » figurant dans la version modifiée désigne l'infraction commise avec un être humain. Il se peut que la modification ait précisé dans la version anglaise que l'infraction commise avec des animaux visait non seulement la pénétration anale, mais aussi la pénétration vaginale. Quoi qu'il en soit, cette modification mineure de la version anglaise du *Code* ne permet aucunement d'affirmer qu'un changement de fond des éléments de l'infraction était souhaité.

[98] Le ministère public se fonde aussi sur le raisonnement du juge dissident de la Cour d'appel selon lequel considérer la bestialité comme une

offence an illogical scope because it would restrict it to anal penetration of or by animals: para. 53. However, for the reasons set out earlier, I reject the factual premise of this argument: bestiality was not restricted to anal penetration with animals but included sexual intercourse between humans and animals.

(iv) Conclusion

[99] The text, read in both of its official versions, the legislative history and evolution, all of the commentators and the applicable principles of statutory interpretation provide no support for the Crown's position. They in fact support the opposite view. I conclude that the 1955 revisions to the *Code* did not expand the elements of the bestiality offence and that penetration between a human and an animal was the essence of the offence.

(d) *The 1988 Revisions*

[100] The Crown also relies on the 1988 revisions to the *Code* as "confirming" Parliament's intent to change the scope of the bestiality offence in 1955 so that it included all sexual activity between humans and animals. For the reasons that I have just set out at length, I reject the premise of this submission. There is *nothing* in the 1955 revisions to support the view that Parliament intended any change in the scope of the bestiality offence. *All* the indications are to the opposite effect.

[101] I will nonetheless examine the 1988 revisions to see if they shed additional light on Parliament's intention. Although I will refer to these as the 1988 revisions, the legislative history is somewhat more complicated. What is often referred to as Bill C-15 was enacted as *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, which came into force on January 1, 1988. The sections that are most relevant to this case were renumbered in *An Act to amend the Criminal Code*

sous-catégorie de la sodomie donne à l'infraction une portée illogique puisque cela limiterait cette infraction à la pénétration anale d'un animal ou par un animal (par. 53). Toutefois, pour les motifs exposés précédemment, je rejette la prémisse factuelle de cet argument : la bestialité ne visait pas uniquement la pénétration anale avec un animal; elle englobait aussi les rapports sexuels entre humains et animaux.

(iv) Conclusion

[99] Le texte, lu dans ses deux versions officielles, l'évolution et l'historique législatifs, les propos de tous les auteurs ainsi que les principes applicables en matière d'interprétation législative n'étayent aucunement la thèse du ministère public. En fait, ils étayent le point de vue contraire. Je conclus que la révision de 1955 du *Code* n'a pas élargi les éléments de l'infraction de bestialité et que la pénétration impliquant un être humain et un animal était l'essence même de l'infraction.

d) *La révision de 1988*

[100] Toujours selon le ministère public, la révision de 1988 du *Code* « confirme » l'intention du législateur de changer la portée de l'infraction de bestialité en 1955 de façon à ce que cette infraction englobe toutes les activités sexuelles entre humains et animaux. Pour les motifs que je viens tout juste d'exposer en détail, je rejette la prémisse de cet argument. *Rien* dans la révision de 1955 n'étaye l'opinion selon laquelle le législateur a voulu modifier de quelque façon que ce soit la portée de l'infraction de bestialité. *Tout* indique le contraire.

[101] J'examinerai néanmoins la révision de 1988 pour voir si elle jette un éclairage additionnel sur l'intention du législateur. Bien que j'appelle ces modifications la révision de 1988, l'historique législatif est un peu plus complexe. Ce qui est souvent appelé le projet de loi C-15 a été adopté sous le nom de *Loi modifiant le Code criminel et la Loi sur la preuve au Canada*, L.C. 1987, c. 24, entrée en vigueur le 1er janvier 1988. Les dispositions les plus pertinentes en l'espèce ont été renumérotées dans la *Loi*

and the Canada Evidence Act, R.S.C. 1985, c. 19 (3rd Supp.).

[102] Among other things, Bill C-15 repealed the former buggery offence and replaced it with the new offence of anal intercourse: s. 3, rep. & sub. s. 154, *Criminal Code*, R.S.C. 1970, c. C-34, now s. 159. The new anal intercourse offence did not apply to acts in private between husband and wife or between any two people each of whom was 18 years of age or more and who consented to the act: s. 154(2), now s. 159(2). Importantly, the elements of the new offence of anal intercourse were virtually identical to the former offence of buggery with a human: see *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, at pp. 187-88. The use of the word "intercourse" in the offence meant that penetration was an essential element of the renamed anal intercourse offence as it had been with the buggery offence.

[103] A second change was that bestiality was given its own section (s. 155, now s. 160) and three new bestiality offences were created: compelling another person to commit bestiality, committing bestiality in the presence of a person under the age of 14 and inciting a person under the age of 14 to commit bestiality (s. 155(2) and (3), now s. 160(2) and (3)). The term "bestiality" was not defined. The s. 160(3) offence (committing bestiality in the presence of a child or inciting a child to commit bestiality) has been amended three times since its initial enactment: by increasing the relevant age from 14 to 16, by imposing mandatory minimum sentences and by increasing the maximum sentence for the offence: see *Tackling Violent Crime Act*, S.C. 2008, c. 6, s. 54; *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 15, and *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23, s. 5. No definition of the elements of the offence has ever been enacted. The relevant *Code* provision now reads as follows:

modifiant le Code criminel et la Loi sur la preuve au Canada, L.R.C. 1985, c. 19 (3e suppl.).

[102] Entre autres, le projet de loi C-15 a aboli l'ancienne infraction de sodomie et l'a remplacée par la nouvelle infraction de relations sexuelles anales (art. 3, qui a remplacé l'art. 154, *Code criminel*, S.R.C. 1970, c. C-34, par l'actuel art. 159). La nouvelle infraction de relations sexuelles anales ne s'appliquait pas aux actes commis, avec leur consentement respectif, dans l'intimité par les époux ou par deux personnes âgées d'au moins 18 ans (par. 154(2), maintenant le par. 159(2)). Fait important, les éléments de la nouvelle infraction de relations sexuelles anales étaient pratiquement identiques à ceux de l'ancienne infraction de sodomie entre humains (voir *R. c. E. (A.W.)*, [1993] 3 R.C.S. 155, p. 187-188). L'utilisation de l'expression « relations sexuelles » dans le texte créant l'infraction signifiait que la pénétration était un élément essentiel de l'infraction de relations sexuelles anales comme cela l'était pour l'infraction de sodomie.

[103] Une deuxième modification a fait en sorte que la bestialité a fait l'objet d'une disposition distincte (l'art. 155, maintenant l'art. 160) et que trois nouvelles infractions de bestialité ont été créées : forcer une autre personne à commettre un acte de bestialité, commettre un acte de bestialité en présence d'une personne âgée de moins de 14 ans et inciter une personne âgée de moins de 14 ans à commettre un acte de bestialité (par. 155(2) et (3), maintenant les par. 160(2) et (3)). Le terme « bestialité » n'a pas été défini. L'infraction prévue au par. 160(3) (commettre un acte de bestialité en présence d'un enfant ou inciter un enfant à commettre un acte de bestialité) a été modifiée trois fois depuis son adoption initiale : en augmentant l'âge applicable de 14 à 16 ans, en imposant une peine minimale obligatoire et en augmentant la peine maximale (voir la *Loi sur la lutte contre les crimes violents*, L.C. 2008, c. 6, art. 54; la *Loi sur la sécurité des rues et des communautés*, L.C. 2012, c. 1, art. 15, et la *Loi sur le renforcement des peines pour les prédateurs d'enfants*, L.C. 2015, c. 23, art. 5). Les éléments de l'infraction n'ont jamais été définis. La disposition applicable du *Code* est maintenant rédigée comme suit :

Bestiality

160. (1) Every person who commits bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Compelling the commission of bestiality

(2) Every person who compels another to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Bestiality in presence of or by child

(3) Despite subsection (1), every person who commits bestiality in the presence of a person under the age of 16 years, or who incites a person under the age of 16 years to commit bestiality,

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

[104] The Crown submits that the 1988 revisions confirm that not only did Parliament intend, in 1955, to give the term "bestiality" a separate meaning apart from "buggery", but it also meant to give bestiality a broad interpretation not restricted to penetrative conduct. Otherwise, the Crown argues, the changes brought about by the 1988 revisions, as part of a legislative package to protect children from the harm caused by all forms of sexual abuse, would not give full effect to the underlying purpose of the legislation. I cannot accept these submissions.

(i) Context

[105] It will be helpful to begin the analysis by placing the 1988 revisions in the context of the very significant reform of the sexual offences that unfolded in Canada in the 1980s.

Bestialité

160. (1) Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, quiconque commet un acte de bestialité.

Usage de la force

(2) Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, toute personne qui en force une autre à commettre un acte de bestialité.

Bestialité en présence d'un enfant ou incitation de celui-ci

(3) Malgré le paragraphe (1), toute personne qui commet un acte de bestialité en présence d'une personne âgée de moins de seize ans ou qui l'incite à en commettre un est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de quatorze ans, la peine minimale étant de un an;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de deux ans moins un jour, la peine minimale étant de six mois.

[104] D'après le ministère public, la révision de 1988 confirme que non seulement le législateur a voulu, en 1955, donner au terme « *bestiality* » un sens distinct de celui de « *buggery* », mais qu'il a également voulu lui donner une interprétation large qui ne se limite pas à la pénétration. Sinon, affirme le ministère public, les modifications apportées en 1988 dans le cadre d'un dispositif législatif visant à protéger les enfants contre le tort causé par toute forme d'abus sexuel n'auraient pas donné plein effet à l'objectif sous-jacent de la loi. Je ne saurais accepter ces arguments.

(i) Contexte

[105] Il est utile de commencer l'analyse en situant la révision de 1988 dans le contexte de la réforme très importante des infractions d'ordre sexuel qui a eu lieu au Canada dans les années 1980.

[106] There was a virtually complete overhaul of sexual offences against the person in 1983: *Criminal Law Amendment Act*, S.C. 1980-81-82-83, c. 125, in force January 1983 (often referred to as Bill C-127). These changes were followed by the 1988 revisions which were focused on enhancing the protection of children against sexual abuse. Through all of these many changes, changes which included fundamental revision of the definition of several sexual offences and the repeal of others, the *Code* continued to make bestiality an offence without further defining it. The fact that Parliament made no change to the definition of bestiality in the midst of this comprehensive revision of the sexual offences supports only the conclusion that it intended to retain its well-understood legal meaning.

(ii) The 1983 Revisions

[107] To return to Bill C-127, one of its main purposes was to make a clear statement that a sexual offence is primarily an act of violence, although it has a sexual component: statement by the Honourable Flora MacDonald during the debates on Bill C-127, *House of Commons Debates*, vol. XVII, 1st Sess., 32nd Parl., August 4, 1982, at p. 20041. As a result, a number of sexual offences were taken out of Part IV of the *Code*, dealing with sexual offences, public morals and disorderly conduct, and new offences were created and added to Part VI, dealing with offences against the person and reputation.

[108] Three of the most significant changes made to the structure of sexual offences were these. Penetration was not an element of the new sexual assault offences. Sexual assaults became gender neutral and could be committed by a person of either sex against another person of either sex. Finally, spousal immunity, which had previously protected husbands from being charged with raping their wives, was removed: C. L. M. Boyle, *Sexual Assault* (1984), at pp. 46-47.

[106] Les infractions sexuelles contre la personne ont fait l'objet d'une refonte pratiquement complète en 1983 (*Loi modifiant le droit criminel*, S.C. 1980-81-82-83, c. 125; en vigueur en janvier 1983 (souvent appelée le projet de loi C-127)). La révision de 1988, qui visait à mieux protéger les enfants contre l'abus sexuel, a suivi. Tout au long de ces nombreuses modifications, qui comprenaient une révision de fond en comble de la définition de plusieurs infractions d'ordre sexuel et l'abrogation de certaines autres, le *Code* a continué de criminaliser la bestialité sans la définir. Le fait que le législateur n'a pas modifié la définition de la bestialité au milieu de cette révision exhaustive des infractions d'ordre sexuel étaye uniquement la conclusion selon laquelle il a voulu que le terme « bestialité » conserve son sens juridique bien défini.

(ii) La révision de 1983

[107] Revenons au projet de loi C-127. L'un de ses principaux objectifs était de déclarer clairement qu'une infraction d'ordre sexuel est avant tout un acte de violence, même si elle a une composante sexuelle (déclaration de l'honorable Flora MacDonald durant les débats sur le projet de loi C-127, *Débats de la Chambre des communes*, vol. XVII, 1re sess., 32e lég., 4 août 1982, p. 20041). Par conséquent, bon nombre d'infractions d'ordre sexuel ont été retirées de la partie IV du *Code*, qui portait sur les infractions de ce genre, les actes contraires à la moralité publique et l'inconduite, et de nouvelles infractions ont été créées et ajoutées à la partie VI, qui portait sur les infractions contre la personne et la réputation.

[108] Trois des plus importantes modifications apportées à la structure des infractions d'ordre sexuel étaient les suivantes. La pénétration n'était pas un élément des nouvelles infractions d'agression sexuelle. Les agressions sexuelles pouvaient désormais être commises par un homme ou une femme contre une autre personne du même sexe ou du sexe opposé. Enfin, l'immunité des époux, qui empêchait auparavant les maris d'être accusés de viol envers leur femme, a été supprimée (C. L. M. Boyle, *Sexual Assault* (1984), p. 46-47).

[109] A number of other changes were also made, such as the repeal of certain sexual offences, including rape and sexual intercourse with the "feeble-minded", and a number of evidentiary changes, including repeal of the statutory requirement for corroboration for certain offences and abrogation of the rule concerning recent complaint: Boyle, at pp. 49-51.

[110] However, a number of the pre-existing sexual offences remained in force after the enactment of Bill C-127: sexual intercourse with females under the age of 14; sexual intercourse with females of previous chaste character; incest; seduction offences; sexual intercourse with children, wards and employees; gross indecency; and, most relevant to our case, buggery and bestiality (see D. Watt, *The New Offences Against the Person* (1984), at pp. 87-91). It is worth noting that although the offence of rape was abolished and the new sexual assault offence provisions did not have penetration as one of their essential elements, the remaining offences, apart from gross indecency, expressly provide that "sexual intercourse" is an element. Sexual intercourse was defined in s. 3(6) as being "complete upon penetration to even the slightest degree, notwithstanding that seed is not emitted": now s. 4(5); see Watt, at p. 91. This, of course, is the definition of penetration (or "carnal knowledge") that had been settled for centuries. Thus, the notion remained that penetration was an essential element of several of the retained offences.

[111] Also noteworthy is that the offences of buggery and bestiality remained undefined. As Mr. (now Justice) Watt noted in his text, these offences, "also known as sodomy, may be described as carnal copulation against nature by human beings with each other or with a beast. Some degree of penetration is required and, in the event that both participants are human, the penetration must be *per anum*": pp. 90-91 (footnotes omitted).

[109] Plusieurs autres modifications ont été apportées, telle l'abolition de certaines infractions d'ordre sexuel, notamment le viol et les rapports sexuels avec une personne « faible d'esprit », et de certaines règles de preuve, dont l'abrogation de l'exigence législative de corroboration pour certaines infractions et l'abrogation de la règle concernant la plainte immédiate (Boyle, p. 49-51).

[110] Toutefois, plusieurs infractions d'ordre sexuel qui existaient déjà sont demeurées en vigueur après l'adoption du projet de loi C-127 : les rapports sexuels avec une personne de sexe féminin âgée de moins de 14 ans, les rapports sexuels avec une personne de sexe féminin de mœurs antérieurement chastes, l'inceste, les infractions de séduction, les rapports sexuels avec un enfant, un pupille ou un employé, la grossière indécence et, les plus pertinentes en l'espèce, la sodomie et la bestialité (voir D. Watt, *The New Offences Against the Person* (1984), p. 87-91). Il vaut la peine de souligner que, bien que l'infraction de viol ait été abolie et que les nouvelles dispositions relatives à l'infraction d'agression sexuelle ne prévoyaient pas que la pénétration était un élément essentiel de celle-ci, les autres infractions, à l'exception de la grossière indécence, comportaient expressément les « rapports sexuels » en tant qu'élément. Les rapports sexuels étaient définis au par. 3(6) comme étant « complets s'il y a pénétration même au moindre degré et bien qu'il n'y ait pas émission de semence » (actuel par. 4(5); voir Watt, p. 91). Bien entendu, il s'agit là de la définition de pénétration (ou de « connaissance charnelle ») qui est établie depuis des siècles. Ainsi, l'idée voulant que la pénétration soit un élément essentiel de plusieurs des infractions conservées a subsisté.

[111] Il importe également de souligner que les infractions de sodomie et de bestialité sont demeurées indéfinies. Comme D. Watt (maintenant juge) l'a fait observer dans son texte, ces infractions [TRADUCTION] « peuvent être décrites comme une copulation contre nature entre humains ou avec un animal. Une certaine pénétration est requise et, dans l'éventualité où les deux participants sont des humains, la pénétration doit être anale » (p. 90-91 (notes de bas de page omises)).

[112] In short, the move away from penetration as an element of the new sexual assault offences did not signal an end to penetration as an element of several other sexual offences retained by Bill C-127. And there is nothing in that legislation to suggest that the long-settled legal definition of bestiality had in any way changed.

(iii) The 1988 Revisions

[113] That brings us to the 1988 revisions. These amendments are found in a larger package of changes to the sexual offences in the *Code* in relation to children. It changed the law of consent in relation to young persons; introduced new, child-specific and gender-neutral offences not dependent on proof of penile penetration: sexual interference, invitation to sexual touching and sexual exploitation; and brought significant change to the rules of evidence applying at trials of sexual offences against children.

[114] Although the focus of the 1988 revisions was the protection of children, they also had features and objectives in common with the amendments of 1983. They intended to give equal protection to victims of sexual abuse, without regard to their sex: House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15: An Act to amend the Criminal Code and the Canada Evidence Act*, No. 1, 2nd Sess., 33rd Parl., November 27, 1986, at pp. 18-19 (Hon. Ramon John Hnatyshyn). They further modified the applicable evidentiary rules, so victims could more easily testify in court, by allowing a child to testify in court if he or she could be sworn or if the judge would determine that he or she could be heard on promising to tell the truth. They also created a broader range of sexual abuse offences, adding such offences as sexual interference, invitation to sexual touching and sexual exploitation.

[115] What does this legislative activity tell us about whether there was a parliamentary intent to expand the scope of criminal liability for bestiality? Before these amendments, as I have discussed

[112] Bref, le fait que la pénétration ne soit pas un élément des nouvelles infractions d'agression sexuelle ne signifie pas qu'elle n'est plus un élément de plusieurs autres infractions d'ordre sexuel maintenues par le projet de loi C-127. Et rien dans cette loi ne porte à croire que la définition juridique établie depuis longtemps de la bestialité avait changé de quelque façon que ce soit.

(iii) La révision de 1988

[113] Cela nous amène à la révision de 1988. Ces modifications s'inscrivent dans une réforme plus large des infractions d'ordre sexuel prévues au *Code* à l'égard des enfants. Cette révision a modifié le droit du consentement dans le cas des adolescents, a introduit de nouvelles infractions visant précisément les enfants et non fondées sur le sexe, qui ne dépendent pas d'une preuve de pénétration du pénis — contacts sexuels, incitation à des contacts sexuels et exploitation sexuelle — et a apporté des modifications importantes aux règles de preuve applicables dans les procès pour infractions sexuelles contre des enfants.

[114] La révision de 1988 était axée sur la protection des enfants, mais elle partageait aussi des caractéristiques et des objectifs avec les modifications de 1983. Elle visait à offrir une protection égale aux victimes d'abus sexuel, sans égard à leur sexe (Chambre des communes, *Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-15 : Loi modifiant le Code criminel et la Loi sur la preuve au Canada*, nº 1, 2e sess., 33e lég., 27 novembre 1986, p. 18-19 (l'honorable Ramon John Hnatyshyn)). Elle a également modifié les règles de preuve applicables afin que les victimes puissent témoigner plus facilement en cour, en permettant à un enfant de témoigner s'il pouvait être assermenté ou si le juge décidait qu'il pouvait être entendu sur promesse de dire la vérité. Elle a également créé un éventail plus large d'infractions d'abus sexuel en ajoutant des infractions comme les contacts sexuels, l'incitation à des contacts sexuels et l'exploitation sexuelle.

[115] Que nous enseigne cette activité législative au sujet du point de savoir si le législateur voulait élargir la portée de la responsabilité criminelle en ce qui concerne la bestialité? Avant ces modifications,

in detail earlier, the offence of bestiality had a legal meaning as requiring penetration. That meaning was well known in 1985, as the commentary following the 1955 revisions shows: *Tremeear's Annotated Criminal Code: Canada*, at p. 216; Lagarde, *Nouveau Code Criminel Annoté*, at p. 102; Watt, at pp. 90-91. Parliament continued to use the term "bestiality", without further definition. The element of penetration was explicitly retained in the offence replacing buggery, namely anal intercourse. It is worth noting that with the exception of the offence of sexual intercourse with females under the age of 14, all of the sexual offences that still required penetration following the 1983 revisions and which were not repealed by the 1988 revisions (incest, anal intercourse) continued to require penetration after the 1988 revisions.

[116] It defies logic to think that Parliament would rename, redefine and create new sexual offences in a virtually complete overhaul of these provisions in 1983 and 1988 and yet would continue to use an ancient legal term with a well-understood meaning — bestiality — without further definition in order to bring about a substantive difference in the law. The new bestiality offences added in the 1988 revisions, while not changing the definition of the underlying offence, added protections for children in relation to that offence. There is nothing inconsistent with the purpose of these new provisions in the conclusion that the elements of bestiality remained unchanged. There is nothing "absurd" about protecting children from compulsion or exposure to this sort of sexual conduct. And, contrary to what Justice Abella writes, it does not follow that all sexually exploitative acts with animals that do not involve penetration are "perfectly legal": para. 142. Section 160 is not the only protective provision. There were (and still are) other provisions in the *Code* which may serve to protect children (and others) from sexual activity that does not necessarily involve penetration: see, e.g., the current ss. 151, 153, 172 and 173.

comme je l'ai déjà expliqué en détail, l'infraction de bestialité exigeait, suivant son sens juridique, une pénétration. Ce sens était bien connu en 1985, comme le montrent les commentaires suivant la révision de 1955 (*Tremeear's Annotated Criminal Code : Canada*, p. 216; Lagarde, *Nouveau Code Criminel Annoté*, p. 102; Watt, p. 90-91). Le législateur a continué d'utiliser le terme « bestialité », sans le définir. La pénétration est explicitement demeurée un élément de l'infraction qui a remplacé la sodomie, à savoir les relations sexuelles anales. Il vaut la peine de signaler qu'à l'exception de l'infraction consistant à avoir des rapports sexuels avec des filles âgées de moins de 14 ans, toutes les infractions d'ordre sexuel qui requéraient toujours la pénétration après la révision de 1983 et qui n'ont pas été abrogées par la révision de 1988 (l'inceste, les relations sexuelles anales) ont continué d'exiger la pénétration après cette dernière révision.

[116] Il est illogique de penser que le législateur renommerait ou redéfinirait des infractions existantes et créerait de nouvelles infractions d'ordre sexuel à l'occasion d'une refonte pratiquement complète des dispositions en cause en 1983 et 1988 et qu'il continuerait malgré tout d'utiliser un terme juridique ancien ayant un sens bien défini — bestialité — sans le définir afin de modifier substantiellement le droit. Bien qu'elles n'aient pas modifié la définition de l'infraction sous-jacente, les nouvelles infractions de bestialité ajoutées à la révision de 1988 ont prévu des mesures de protection supplémentaires pour les enfants relativement à cette infraction. Conclure que les éléments de la bestialité sont demeurés inchangés n'a rien d'incompatible avec l'objectif de ces nouvelles dispositions. Il n'y a rien d'« absurde » à protéger les enfants contre l'usage de la force ou l'exposition à ce type de comportement sexuel. Et, contrairement à ce qu'écrit la juge Abella, cela ne signifie pas que tous les actes d'exploitation sexuelle avec des animaux qui n'impliquent pas de pénétration sont « tout à fait légaux » (par. 142). L'article 160 n'est pas la seule disposition protectrice. Le *Code* contenait (et contient toujours) d'autres dispositions qui peuvent servir à protéger les enfants (et d'autres personnes) d'une activité sexuelle qui n'implique pas nécessairement de pénétration (voir, p. ex., les art. 151, 153, 172 et 173 actuels).

[117] The Crown relies on testimony in February 1987 by Richard Mosley, then Senior General Counsel, Criminal Law Policy Section before the Legislative Committee studying Bill C-15 which became *An Act to amend the Criminal Code and the Canada Evidence Act* (1987). He was asked a question about the punishment for inciting a young person to commit bestiality if bestiality were not actually committed after having been asked whether the compelling and inciting bestiality provisions were in fact duplicative of the law relating to parties to offences. He responded that inciting was covered and that the compulsion aspect was most likely covered by the party provisions but that there was some doubt. He then added that this doubt, combined with the question of what punishment should apply, were considerations in creating the new bestiality offences. They were not however, the complete reason. He continued:

The reason had more to do with modifying the offence of bestiality to conform more closely to the approach of the bill. It was concerned more with offences against children, primarily to bring in the notion of the offence of bestiality in the presence of or by a child. The compulsion and sighting [*sic*, read "inciting"] aspect of it was felt to round the application of that offence to any form of conduct involving sex with animals.

(*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15: An Act to amend the Criminal Code and the Canada Evidence Act*, No. 9, 2nd Sess., 33rd Parl., February 17, 1987, at pp. 66-67)

[118] According to the Crown, this answer reveals Parliament's intention to criminalize any type of sexual conduct with an animal, not only sexual acts involving penetration. But this is reading far too much into this isolated comment. The question being answered did not relate to the elements of the offence of bestiality, but was part of a series of questions about why the new compelling and inciting offences

[117] Le ministère public se fonde sur le témoignage livré en février 1987 par Richard Mosley, alors avocat général principal de la Section de la politique du droit en matière pénale, devant le comité législatif qui s'est penché sur le projet de loi C-15, devenu la *Loi modifiant le Code criminel et la Loi sur la preuve au Canada* (1987). On lui a posé une question au sujet de la peine prévue pour incitation d'une jeune personne à commettre un acte de bestialité lorsque cet acte n'a pas été réellement commis, après qu'on lui ait demandé si les dispositions sur l'usage de la force et l'incitation à la bestialité faisaient en réalité double emploi avec les dispositions visant les participants aux infractions. Il a répondu que l'incitation était couverte et que l'usage de la force était fort probablement couvert par les dispositions visant les participants, mais qu'il y avait un doute à cet égard. Il a ensuite ajouté que ce doute, combiné à la question de la peine applicable, était un des facteurs dont on a tenu compte au moment de créer les nouvelles infractions de bestialité. Mais ce n'était pas là la seule et unique raison. Il a poursuivi en ces termes :

À la vérité, nous avons surtout tenu à ce que les articles concernant les actes de bestialité cadrent avec l'approche que nous avons suivie pour le reste du projet de loi. L'on vise surtout ici les infractions dont sont victimes les enfants, et c'est pourquoi l'on dit en marge « bestialité en présence d'enfants ou incitation de ceux-ci ». En parlant du fait d'être témoin et du fait d'être forcé de commettre un acte de bestialité, nous avons pensé étendre la définition et couvrir toutes les formes d'actes sexuels entrepris avec des animaux.

(*Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-15 : Loi modifiant le Code criminel et la Loi sur la preuve au Canada*, nº 9, 2e sess., 33e lég., 17 février 1987, p. 66-67)

[118] Selon le ministère public, cette réponse révèle l'intention du législateur de criminaliser tout type de contact sexuel avec un animal, et pas seulement les actes sexuels impliquant la pénétration. Or, cela revient à interpréter beaucoup trop largement ce commentaire isolé. La question à laquelle il a répondu n'avait aucun lien avec les éléments de l'infraction de bestialité; elle faisait plutôt partie

were needed at all. The thrust of the answer is that the legislative package was concerned with sexual offences against children and therefore making it an offence to compel or incite children to commit the offence of bestiality was an appropriate addition. There is no hint in any of the parliamentary record that any substantive change to the elements of the offence of bestiality was intended.

[119] The Crown suggests that the French version of s. 160 supports a broader interpretation of bestiality because it uses the words "*un acte de bestialité*" for the English word "bestiality". The Crown submits that this shows an intent to expand the offence beyond requiring penetration. However, this reads too much into the French version of the provision. If bestiality requires penetration, so does "*un acte de bestialité*" just as the English offence of "vagrancy" is not expanded by its French language equivalent "*un acte de vagabondage*": see s. 179(1) and (2) of the *Code*. There is no difference between the meaning of the French and the English versions of these offences.

[120] I also note that authors remain of the view that penetration is an element of bestiality. In *The 2015 Annotated Tremeear's Criminal Code* (2014), at p. 337, the elements of s. 160(1) are described as follows:

> In general, bestiality is committed where D, a human being, carries out intercourse, in any way, with a beast or bird. This form of unnatural sexual indulgence, as well as sodomy, is comprised under the general description "buggery". [Emphasis deleted.]

[121] Similarly, the 2009 edition of *Manning, Mewett & Sankoff: Criminal Law* (4th ed.) repeats the traditional legal definition of bestiality as intercourse *per anum* or *per vaginam* by a man or a woman with an animal: p. 931.

d'une série de questions visant à savoir pourquoi les nouvelles infractions d'usage de la force et d'incitation étaient nécessaires. La réponse indique essentiellement que le dispositif législatif portait sur les infractions d'ordre sexuel contre des enfants et que, par conséquent, criminaliser l'usage de la force ou l'incitation d'un enfant à commettre l'infraction de bestialité était un ajout opportun. Rien n'indique dans l'un des procès-verbaux parlementaires qu'un changement de fond des éléments de l'infraction de bestialité était souhaité.

[119] Le ministère public fait valoir que la version française de l'art. 160 étaye une interprétation plus large de la bestialité parce qu'on y utilise l'expression « un acte de bestialité » pour rendre le mot anglais « *bestiality* ». Toujours selon le ministère public, cela révèle l'intention d'élargir l'infraction au-delà de l'exigence qu'il y ait pénétration. Toutefois, le ministère public interprète ainsi trop largement la version française de la disposition. Si la bestialité exige la pénétration, il en va de même pour l'« acte de bestialité », tout comme la portée de l'infraction anglaise de « *vagrancy* » (vagabondage) n'est pas étendue par son équivalent français « un acte de vagabondage » (voir les par. 179(1) et (2) du *Code*). Il n'y a aucune différence de sens entre les versions anglaise et française de ces infractions.

[120] Je relève en outre que les auteurs demeurent d'avis que la pénétration est un élément de la bestialité. Dans *The 2015 Annotated Tremeear's Criminal Code* (2014), p. 337, les éléments du par. 160(1) sont décrits comme suit :

> [TRADUCTION] En général, la bestialité est commise lorsque D, un être humain, a des rapports sexuels, de quelque façon que ce soit, avec une bête ou un oiseau. Cette forme de plaisir sexuel contre nature, tout comme la sodomie, est visée par le terme général « sodomie ». [Caractères gras omis.]

[121] De même, l'édition de 2009 de *Manning, Mewett & Sankoff : Criminal Law* (4e éd.) réitère que la bestialité est traditionnellement définie en droit comme des relations sexuelles anales ou vaginales entre un homme ou une femme et un animal (p. 931).

[122] The Crown brings our attention to guilty pleas that have been entered in provincial courts on counts of bestiality, when no penetration had been established. This does not affect the above analysis as none of these cases provides any reasoning to support the view that bestiality does not require penetration. The view that penetration *is* required, has also equally been expressed in provincial courts: see *R. v. Ruvinsky*, [1998] O.J. No. 3621 (QL) (C.J.), at paras. 21-40; *R. v. Poirier*, C.Q. Chicoutimi, Nos. 150-01-001993-923 and 150-01-002026-921, February 2, 1993, cited in *M.G.*, at para. 42 (fn. 35). The Crown also cites *M.G.*, a case relied on by the trial judge in this case in support of his view that the courts should interpret the elements of offences to "reflect current views on what constitute prohibited sexual acts": para. 315. For the reasons which I have set out at length earlier, this conclusion is wrong in law and the *M.G.* case should not be followed on this point.

D. *Conclusion*

[123] I respectfully agree with the conclusion of the majority of the Court of Appeal: the offence of bestiality under s. 160(1) of the *Code* requires sexual intercourse between a human and an animal.

IV. Disposition

[124] I would dismiss the appeal.

The following are the reasons delivered by

[125] Abella J. (dissenting) — This case is about statutory interpretation, a fertile field where deductions are routinely harvested from words and intentions planted by legislatures. But when, as in this case, the roots are old, deep, and gnarled, it is much harder to know what was planted.

[122] Le ministère public attire notre attention sur des plaidoyers de culpabilité enregistrés devant des tribunaux provinciaux relativement à des accusations de bestialité, alors que la pénétration n'avait pas été établie. Cela n'a aucune incidence sur l'analyse qui précède puisqu'aucun de ces cas ne fournit un raisonnement pour étayer l'opinion selon laquelle la bestialité n'exige pas de pénétration. L'avis suivant lequel il *doit* y avoir pénétration a également été exprimé par des tribunaux provinciaux (voir *R. c. Ruvinsky*, [1998] O.J. No. 3621 (QL) (C.J.), par. 21-40; *R. c. Poirier*, C.Q. Chicoutimi, nos 150-01-001993-923 et 150-01-002026-921, 2 février 1993, citée dans *M.G.*, par. 42 (note de bas de page 35)). Le ministère public cite également *M.G.*, une décision sur laquelle s'est fondé le juge du procès en l'espèce pour affirmer que les tribunaux devraient interpréter les éléments des infractions de façon à ce qu'ils [TRADUCTION] « reflètent ce qui est considéré de nos jours comme des actes sexuels prohibés » (par. 315). Pour les motifs que j'ai précédemment exposés en détail, cette conclusion est erronée en droit et la décision *M.G.* ne doit pas être suivie sur ce point.

D. *Conclusion*

[123] Je souscris à la conclusion de la majorité de la Cour d'appel : l'infraction de bestialité prévue au par. 160(1) du *Code* exige qu'il y ait eu des rapports sexuels entre un être humain et un animal.

IV. Dispositif

[124] Je suis d'avis de rejeter le pourvoi.

Version française des motifs rendus par

[125] La juge Abella (dissidente) — Le présent pourvoi porte sur l'interprétation législative, un terreau fertile où des déductions sont récoltées de façon routinière des mots, et des intentions plantées par les législatures. Mais lorsque, comme en l'espèce, les racines sont anciennes, profondes et noueuses, il est beaucoup plus difficile de savoir ce qui a été planté.

[126] We are dealing here with an offence that is centuries old. I have a great deal of difficulty accepting that in its modernizing amendments to the *Criminal Code*, Parliament forgot to bring the offence out of the Middle Ages. There is no doubt that a good case can be made, as the majority has carefully done, that retaining penetration as an element of bestiality was in fact Parliament's intention.

[127] But I think a good case can also be made that by 1988, Parliament intended, or at the very least assumed, that penetration was irrelevant. This, in my respectful view, is a deduction easily justified by the language, history, and evolving social landscape of the bestiality provision.

Analysis

[128] When "buggery" first appeared as a statutorily prohibited act in 1869,[1] the provision stated that anyone convicted of the "abominable crime of buggery committed either with mankind or with any animal", was liable to be imprisoned for life and for no less than two years.

[129] The next iteration was in 1886[2] when a conviction for buggery "either with a human being or with any other living creature", attracted a penalty of life imprisonment.

[130] In 1892, in the first *Criminal Code*, the same language appeared, namely, everyone who committed "buggery, either with a human being or with any other living creature", was liable to be imprisoned for life. The 1927 *Code* amendments retained this language, and with it the invidious equilateral combining of buggery with a person or with an animal.

[126] Nous sommes saisis d'une infraction vieille de plusieurs siècles. J'ai beaucoup de difficulté à accepter que, dans les modifications modernisatrices qu'il a apportées au *Code criminel*, le Parlement a oublié de sortir l'infraction du Moyen Âge. On peut sans doute bien démontrer, comme l'a fait avec soin la majorité, que le Parlement voulait effectivement que la pénétration demeure un élément de la bestialité.

[127] Mais je crois que l'on peut tout aussi bien démontrer qu'en 1988, le Parlement voulait, ou supposait à tout le moins, que la pénétration ne soit pas pertinente. Cette déduction, avec égards, se justifie aisément par le libellé et l'historique de la disposition sur la bestialité ainsi que par l'évolution de sa réalité sociale.

Analyse

[128] Lorsque le terme « *buggery* » est apparu la première fois en tant qu'acte proscrit par la loi en 1869[1], la disposition prévoyait que toute personne reconnue coupable du « crime abominable de ["*buggery*"], commis soit avec un être humain, soit avec un animal », était passible de l'emprisonnement à perpétuité ou d'au moins deux ans d'emprisonnement.

[129] L'occurrence suivante apparaît en 1886[2], alors qu'une déclaration de culpabilité pour acte de *buggery*, soit avec un être humain, soit avec un animal, était punissable de l'emprisonnement à perpétuité.

[130] En 1892, on retrouvait dans le premier *Code criminel* la même formulation, à savoir que celui qui commet un acte de « *buggery* », soit avec un être humain, soit avec un animal, était passible de l'emprisonnement à perpétuité. Les modifications apportées au *Code* en 1927 ont conservé cette expression de même que l'appariement odieux, sur un même pied, entre l'acte de *buggery* commis avec un être humain et celui commis avec un animal.

1 Section 63 of *An Act respecting Offences against the Person*, S.C. 1869, c. 20.

2 *An Act respecting Offences against Public Morals and Public Convenience*, R.S.C. 1886, c. 157, s. 1.

1 Article 63 de l'*Acte concernant les offenses contre la Personne*, S.C. 1869, c. 20.

2 *Acte concernant les crimes et délits contre les mœurs et la tranquillité publiques*, S.R.C. 1886, c. 157, art. 1.

[131] At no time was the offence of buggery defined, so we are left with the common law definition: *R. v. Summers*, [2014] 1 S.C.R. 575, at para. 55.

[132] The common law origins of the offence were ecclesiastical, and emerged in full moral force from the Church's hegemonic jurisdiction over sexual offences and its abhorrence for non-procreative sexual acts, which were condemned as being "unnatural".

[133] The Church's jurisdiction over sexual offences ended in 1533, but censorious attitudes did not, and death remained the penalty for "the detestable and abominable vice of Buggery committed with mankind or beast": John M. Murrin, "'Things Fearful to Name': Bestiality in Colonial America" (1998), 65:Supp. *Pennsylvania History* 8, at pp. 8-9; William N. Eskridge, Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003* (2008), at p. 16; Doron S. Ben-Atar and Richard D. Brown, *Taming Lust: Crimes Against Nature in the Early Republic* (2014), at p. 17.

[134] The question whether these acts were criminal only when there was penetration is, however, far from clear: Graham Parker, "Is A Duck An Animal? An Exploration of Bestiality as a Crime", in Louis A. Knafla, ed., *Crime, Police and the Courts in British History* (1990), 285, at pp. 291-92. There are scarcely any cases dealing with the offence, let alone whether it required penetration. This may be because, as Prof. Parker observed:

> . . . the courts seem remarkably reticent about describing sexual matters with any legal precision. Instead, they prefer to follow the example of James Fitzjames Stephen and decide cases on the basis of moral revulsion. For instance, in a gross indecency case Lord Chief Justice Goddard decided that actual touching did not have to be proved, and any reasonable person would decide that a criminally culpable and grossly indecent exhibition was going on . . . . [Footnotes omitted; p. 297.]

[131] Puisque l'infraction de *buggery* n'a jamais été définie, il ne nous reste que la définition établie en common law (*R. c. Summers*, [2014] 1 R.C.S. 575, par. 55).

[132] Les origines de l'infraction en common law sont ecclésiastiques et elles ont émergé, avec tout leur poids moral, de l'hégémonie qu'exerçait l'Église sur les infractions d'ordre sexuel et de l'aversion de celle-ci envers les actes sexuels non procréateurs, qui étaient jugés « contre nature ».

[133] La juridiction de l'Église sur les infractions d'ordre sexuel a pris fin en 1533, mais non ses attitudes critiques, et la peine capitale est demeurée la peine prévue pour [TRADUCTION] « le vice détestable et abominable de *buggery* commis avec un être humain ou un animal » (John M. Murrin, « "Things Fearful to Name" : Bestiality in Colonial America » (1998), 65:Supp. *Pennsylvania History* 8, p. 8-9; William N. Eskridge, Jr., *Dishonorable Passions : Sodomy Laws in America, 1861-2003* (2008), p. 16; Doron S. Ben-Atar et Richard D. Brown, *Taming Lust : Crimes Against Nature in the Early Republic* (2014), p. 17).

[134] Pour ce qui est de savoir si ces actes étaient criminels seulement quand il y avait pénétration, cela n'est, cependant, pas du tout clair (Graham Parker, « Is A Duck An Animal? An Exploration of Bestiality as a Crime », dans Louis A. Knafla, dir., *Crime, Police and the Courts in British History* (1990), 285, p. 291-292). Il n'y a pratiquement aucune décision portant sur l'infraction, encore moins sur le point de savoir si celle-ci exigeait une pénétration. Il en est peut-être ainsi parce que, comme l'a fait remarquer le professeur Parker :

> [TRADUCTION] . . . les tribunaux semblent remarquablement réticents à décrire les actes de nature sexuelle avec une quelconque précision juridique. Ils préfèrent plutôt suivre l'exemple de James Fitzjames Stephen et trancher ces causes sous l'angle du dégoût moral. Par exemple, dans une affaire de grossière indécence, le lord juge en chef Goddard a décidé qu'il n'était pas nécessaire de prouver les attouchements en tant que tels et que toute personne raisonnable déciderait qu'il y avait eu exhibitionnisme grossièrement indécent de nature à engager la responsabilité criminelle . . . [Notes de bas de page omises; p. 297.]

[135] It is true that in the only two Canadian appellate cases where the offence was referred to — both involving dogs — penetration was found to have occurred: *Henry v. Henry*, [1953] O.J. No. 347 (QL) (C.A.), and *R. v. Wishart* (1954), 110 C.C.C. 129 (B.C.C.A.). But this begs the question of whether penetration was *required* as an element of the offence. And this is especially pertinent if one considers that these two decisions were decided before the *Code* was amended in 1955.

[136] The new provision in the 1955 *Code*, s. 147, marked the beginning of a departure from the earlier offence of "buggery with any animal". Section 147 was the first time the offence of "bestiality" was expressly named as such in the English version of the *Code*. Notably, unlike in the previous provisions, buggery and bestiality were now designated as two separate offences:

147. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(*Criminal Code*, S.C. 1953-54, c. 51)

Having been rendered asunder from each other, these two offences were now free to consist of different constituent elements that more realistically reflected who or what was involved in the sexual conduct.

[137] What then did Parliament intend the constituent elements of bestiality to be in 1955, and did they include penetration?

[138] At the outset, it is self-evident that the provision is ambiguous, and that genuine ambiguities in enactments which have an impact on liberty should, where possible, be resolved in favour of the accused: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115; Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §§15.24 and 15.25. But as this Court said in *R. v. Paré*, [1987] 2 S.C.R. 618, this "does not end the question": p. 631. An interpretation more favourable

[135] Certes, dans les deux seules décisions d'appel canadiennes où il était question de l'infraction — les deux concernant des chiens —, les tribunaux concernés ont conclu qu'il y avait eu pénétration (*Henry c. Henry*, [1953] O.J. No. 347 (QL) (C.A.), et *R. c. Wishart* (1954), 110 C.C.C. 129 (C.A. C.-B.)). Mais cela ne répond pas à la question de savoir si la pénétration était *requise* comme élément de l'infraction. Et cela est particulièrement pertinent si l'on considère que ces deux décisions ont été rendues avant que le *Code* ne soit modifié en 1955.

[136] La nouvelle disposition du *Code* de 1955, l'art. 147, marque le début de l'abandon de l'ancienne infraction anglaise de « *buggery with any animal* ». L'article 147 est la première disposition où l'infraction de « *bestiality* » a été expressément nommée telle quelle dans la version anglaise du *Code*. Signalons que, contrairement à ce que prévoyaient les anciennes dispositions, l'acte de *buggery* et l'acte de *bestiality* constituaient désormais deux infractions distinctes :

147. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(*Code criminel*, S.C. 1953-54, c. 51)

Scindées, ces deux infractions pouvaient maintenant se composer d'éléments constitutifs différents indiquant de manière plus réaliste qui ou quoi était impliqué dans l'acte sexuel.

[137] Quels étaient donc les éléments constitutifs de la *bestiality* recherchés par le législateur en 1955, et la pénétration figurait-elle parmi eux?

[138] D'entrée de jeu, il va de soi que la disposition en litige est ambiguë et que les véritables ambiguïtés des textes de loi qui portent atteinte à la liberté devraient, dans la mesure du possible, être résolues en faveur de l'accusé (*Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108, p. 115; Ruth Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), §15.24 et 15.25). Or, comme l'a affirmé la Cour dans *R. c. Paré*, [1987] 2 R.C.S. 618, cela « ne règle [. . .] pas

to the accused should not be adopted if it is unreasonable "given the scheme and purpose of the legislation": p. 631. This was explained in *R. v. Jaw*, [2009] 3 S.C.R. 26, by LeBel J. as follows:

> . . . I have reservations about the proposition that any uncertainty in a charge *must*, as a matter of course, be resolved in favour of the accused. This proposition seems to be based on the strict constructionist approach to interpreting penal legislation that developed in the eighteenth century, when criminal law sanctions were especially severe. By the mid-1980s, however, the presumption of a restrictive interpretation of penal statutes had started to wear thin (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 472-74). A restrictive interpretation *may* be warranted where an ambiguity cannot be resolved by means of the usual principles of interpretation. But it is a principle of last resort that does not supersede a purposive and contextual approach to interpretation . . . . [Underlining added; para. 38.]

(See also *R. v. White*, [2011] 1 S.C.R. 433, at paras. 83-84.)

[139] Applying those "usual principles of interpretation" requires reviewing related *Code* provisions and the context in which the bestiality provision was first introduced in 1955 (Sullivan, at §§13.6 and 13.7; *R. v. Chartrand*, [1994] 2 S.C.R. 864, at pp. 874-75).

[140] As the intervener, Animal Justice, pointed out in its factum, 1955 was also the year amendments were made to the *Code*'s animal cruelty offence — s. 387(1)(*a*).[3] Before s. 387(1)(*a*) was amended, the offence applied to "cattle, poultry, dog, domestic animal or bird, or wild animal or bird in captivity". It also required proof that the accused caused harm "wantonly, cruelly or unnecessarily".[4] Parliament broadened the offence by expanding its scope to cover *all* species of birds and animals, and by lowering the threshold of cruelty to apply to anyone who "wilfully causes . . . unnecessary pain,

la question » (p. 631). Il ne convient pas de retenir une interprétation plus favorable à l'accusé si elle est déraisonnable « compte tenu du régime établi par le texte législatif en question et du but qu'il vise » (p. 631). Le juge LeBel l'a expliqué en ces termes dans *R. c. Jaw*, [2009] 3 R.C.S. 26 :

> . . . j'ai des réserves à l'égard de l'affirmation selon laquelle toute incertitude que peut comporter un exposé *doit*, systématiquement, être résolue en faveur de l'accusé. Cette affirmation semble reposer sur le principe de l'interprétation stricte de la législation pénale qui a été élaboré au dix-huitième siècle, soit à une époque où les sanctions pénales étaient particulièrement sévères. Or, vers le milieu des années 1980, la présomption d'interprétation restrictive des lois pénales a commencé à s'effriter (R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 472-474). L'interprétation restrictive *peut* être justifiée advenant une ambiguïté qui n'est pas susceptible d'être résolue par les principes d'interprétation habituels. Cependant, ce principe ne s'applique qu'en dernier ressort et il ne prévaut pas sur une interprétation fondée sur l'objet et le contexte . . . [Je souligne; par. 38.]

(Voir aussi *R. c. White*, [2011] 1 R.C.S. 433, par. 83-84.)

[139] Pour appliquer ces « principes d'interprétation habituels », il faut examiner les dispositions connexes du *Code* et le contexte dans lequel la disposition sur la *bestiality* a vu le jour en 1955 (Sullivan, §13.6 et 13.7; *R. c. Chartrand*, [1994] 2 R.C.S. 864, p. 874-875).

[140] Comme l'a signalé l'intervenante Animal Justice dans son mémoire, c'est aussi en 1955 que le législateur a modifié l'infraction de cruauté envers les animaux prévue à l'al. 387(1)*a*) du *Code*[3]. Avant la modification de cet alinéa, l'infraction visait les « bestiaux, [l]es volailles, [le] chien, [l']animal ou [l']oiseau domestique, ou [l']animal ou [l']oiseau sauvage en captivité ». De plus, elle exigeait la preuve que l'accusé avait causé un préjudice « [p]ar malice, par cruauté ou sans nécessité »[4]. Le législateur a élargi l'infraction en étendant sa portée à *toutes* les espèces d'oiseaux et d'animaux et en abaissant

[3] Now s. 445.1(1)(a).
[4] 1927 *Criminal Code*, s. 542(*a*).

[3] Actuel al. 445.1(1)a).
[4] *Code criminel* de 1927, al. 542*a*).

suffering or injury". These changes reflected an increased recognition of the importance of protecting animal welfare. As Fraser C.J.A. noted in her dissenting reasons in *Reece v. Edmonton (City)* (2011), 513 A.R. 199 (C.A.), we moved "from a highly exploitive era in which humans had the right to do with animals as they saw fit", to one "where some protection is accorded . . . based on an animal welfare model": para. 54.

[141] It is in this transformed legal environment consisting of more protection for animals, that the offence of "bestiality" first appeared. Whatever the common law meaning of "buggery" with animals had been, the creation of a distinct offence of bestiality in the same year the animal cruelty provisions were expanded to protect more animals from more exploitative conduct reflected, in my respectful view, Parliament's intention to approach the offence differently.

[142] It is hard to attribute to Parliament the inconsistent purpose that animal cruelty protection in the *Code* would now cover *all* birds and animals, but the sexual conduct with animals provision, bestiality, would be limited to those animals whose anatomy permitted penetration. Continuing to impose the penetrative component of buggery on bestiality technically leaves as perfectly legal all sexually exploitative acts with animals that do not involve penetration. And this, in turn, completely undermines the concurrent legislative protections from cruelty and abuse for animals.

[143] Moreover, if the elements of bestiality and buggery were the same, the addition of "bestiality" to the language of s. 147 was redundant and there was no need to change the provision from one prohibiting buggery, as it had for hundreds of years, to one prohibiting buggery *and* bestiality. No legislative

la norme de cruauté pour qu'elle s'applique à quiconque « volontairement cause [. . .] une douleur, souffrance ou blessure, sans nécessité ». Ces changements reflètent une reconnaissance accrue de l'importance d'assurer le bien-être des animaux. Comme l'a fait remarquer la juge en chef Fraser dans les motifs dissidents qu'elle a rédigés dans *Reece c. Edmonton (City)* (2011), 513 A.R. 199 (C.A.), nous sommes passés [TRADUCTION] « d'une époque de grands abus où les humains pouvaient faire des animaux ce qu'ils voulaient » à une ère « où une certaine protection est offerte [. . .] sur le fondement d'un modèle de bien-être des animaux » (par. 54).

[141] C'est dans cet environnement juridique transformé offrant une plus grande protection aux animaux que l'infraction de « *bestiality* » a vu le jour. Quel qu'ait été le sens de « *buggery* » avec un animal en common law, la création d'une infraction distincte de *bestiality* la même année que les dispositions relatives à la cruauté envers les animaux ont été étendues pour protéger plus d'animaux de l'exploitation montre, à mon humble avis, que le législateur voulait aborder l'infraction sous un autre angle.

[142] Il est difficile d'attribuer au Parlement les objectifs incompatibles que la protection offerte par le *Code* aux animaux contre la cruauté s'étende désormais à *tous* les oiseaux et animaux, mais que la disposition relative aux rapports sexuels avec des animaux, soit la *bestiality*, se limite aux animaux dont l'anatomie est susceptible de pénétration. Continuer d'exiger que l'infraction de *bestiality* comporte le même élément de « pénétration » que l'infraction de *buggery* rend, d'un point de vue technique, tout à fait légaux l'ensemble des actes d'exploitation sexuelle commis avec des animaux sans qu'il n'y ait de pénétration. Et cela sape entièrement les dispositions législatives concurrentes qui protègent les animaux contre la cruauté et l'abus.

[143] Qui plus est, si l'acte de *bestiality* et l'acte de *buggery* partageaient les mêmes éléments, l'ajout de la « *bestiality* » à la version anglaise de l'art. 147 était redondant et point n'était besoin de remplacer la disposition interdisant les actes de *buggery* depuis des centaines d'années par une disposition

provision should be interpreted "to render it mere surplusage": *R. v. Proulx*, [2000] 1 S.C.R. 61, at para. 28; see also *R. v. Kelly*, [1992] 2 S.C.R. 170, at p. 188; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838. The addition of the offence of "bestiality", therefore, must have been intended to mean something different from "buggery".

[144] But if there was any doubt about what Parliament envisioned the scope of bestiality to be in 1955, its intention, it seems to me, is even clearer in light of the 1988 Amendments to the *Code*[5] when buggery and bestiality were fully released from their Janus-like relationship into two separate provisions: ss. 159 and 160. This, to me, confirmed Parliament's intent to see them as two separate offences.

[145] In s. 159, the term buggery was not used, and a new offence was set out:

Anal intercourse

159. (1) Every person who engages in an act of anal intercourse is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Exception

(2) Subsection (1) does not apply to any act engaged in, in private, between

(*a*) husband and wife, or

(*b*) any two persons, each of whom is eighteen years of age or more, both of whom consent to the act.

Idem

(3) For the purposes of subsection (2),

[5] *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985, c. 19 (3rd Supp.), s. 3; *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, s. 3.

interdisant ces actes *et* la *bestiality*. Aucune disposition législative ne devrait être interprétée « de façon telle qu'elle devienne superfétatoire » (*R. c. Proulx*, [2000] 1 R.C.S. 61, par. 28; voir aussi *R. c. Kelly*, [1992] 2 R.C.S. 170, p. 188; *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838). L'infraction de « *bestiality* » ajoutée devait donc avoir une signification différente de celle de « *buggery* ».

[144] Mais s'il persistait quelque doute que ce soit à propos de la manière dont le législateur envisageait la portée de l'infraction de *bestiality* en 1955, son intention me paraît encore plus claire à la lumière des modifications de 1988 au *Code*[5], lorsqu'il a mis fin entièrement au lien antinomique entre la notion de *buggery* et celle de *bestiality* pour leur consacrer deux dispositions distinctes : les art. 159 et 160. Selon moi, cela confirme l'intention du législateur de les voir comme deux infractions distinctes.

[145] À l'article 159, le mot « *buggery* » n'était pas utilisé et une nouvelle infraction était édictée :

Relations sexuelles anales

159. (1) Quiconque a des relations sexuelles anales avec une autre personne est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux actes commis, avec leur consentement respectif, dans l'intimité par les époux ou par deux personnes âgées d'au moins dix-huit ans.

Idem

(3) Les règles suivantes s'appliquent au paragraphe (2) :

[5] *Loi modifiant le Code criminel et la Loi sur la preuve au Canada*, L.R.C. 1985, c. 19 (3e suppl.), art. 3; *Loi modifiant le Code criminel et la Loi sur la preuve au Canada*, L.C. 1987, c. 24, art. 3.

(*a*) an act shall be deemed not to have been engaged in in private if it is engaged in in a public place or if more than two persons take part or are present; and

(*b*) a person shall be deemed not to consent to an act

(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations respecting the nature and quality of the act, or

(ii) if the court is satisfied beyond a reasonable doubt that the person could not have consented to the act by reason of mental disability.

[146] In s. 160, bestiality was still undefined. Its reach was extended, however, to include those who compelled its commission or who committed it in the presence of a child:

Bestiality

160. (1) Every person who commits bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Compelling the commission of bestiality

(2) Every person who compels another to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Bestiality in presence of or by child

(3) Notwithstanding subsection (1), every person who, in the presence of a person under the age of fourteen years, commits bestiality or who incites a person under the age of fourteen years to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

[147] Section 160(3) is, in my respectful view, inarguably a reflection of Parliament's purpose to protect children from witnessing, or being compelled

a) un acte est réputé ne pas avoir été commis dans l'intimité s'il est commis dans un endroit public ou si plus de deux personnes y prennent part ou y assistent;

b) une personne est réputée ne pas consentir à commettre un acte dans les cas suivants :

(i) le consentement est extorqué par la force, la menace ou la crainte de lésions corporelles, ou est obtenu au moyen de déclarations fausses ou trompeuses quant à la nature ou à la qualité de l'acte,

(ii) le tribunal est convaincu hors de tout doute raisonnable qu'il ne pouvait y avoir consentement de la part de cette personne du fait de son incapacité mentale.

[146] À l'article 160, l'infraction de *bestiality* (bestialité) n'était toujours pas définie. Elle a cependant été étendue aux personnes qui ont forcé quelqu'un d'autre à la commettre ou qui l'ont commise en présence d'un enfant :

Bestialité

160. (1) Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, quiconque commet un acte de bestialité.

Usage de la force

(2) Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, toute personne qui en force une autre à commettre un acte de bestialité.

Bestialité en présence d'enfants ou incitation de ceux-ci

(3) Par dérogation au paragraphe (1), est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, toute personne qui commet un acte de bestialité en présence d'un enfant âgé de moins de quatorze ans ou qui incite celui-ci à en commettre un.

[147] Avec égards, le par. 160(3) témoigne sans aucun doute de l'objectif du Parlement d'empêcher que des enfants soient témoins d'un acte de bestialité

to commit, bestiality. If all Parliament intended was that children be protected from seeing or being made to engage in acts of *penetration* with animals, one could reasonably wonder what the point was of such an unduly restricted preoccupation. Since it is a "well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 27), surely what Parliament must have intended was protection for children from witnessing or being forced to participate in *any* sexual activity with animals, period.

[148] Parliament's goal of protecting children from sexual conduct with animals in the new bestiality provision can also be inferred from the other changes to the *Code* in the 1988 Amendments. Parliament introduced the offences of sexual interference, sexual exploitation, and invitation to sexual touching, all of which protected minors and none which required penetration. It would be anomalous if no penetration was required for these offences, which focused on protecting children from sexual exploitation generally, but remained an essential element of s. 160(3), which protected children from sexual exploitation with animals.

[149] I do not see the absence of a requirement of penetration as broadening the scope of bestiality. I see it more as a reflection of Parliament's common sense assumption that since penetration is physically impossible with most animals and for half the population, requiring it as an element of the offence eliminates from censure most sexually exploitative conduct with animals. Acts with animals that have a sexual purpose are inherently exploitative whether or not penetration occurs, and the prevention of sexual exploitation is what the 1988 Amendments were all about.

ou forcés d'en commettre un. Si tout ce que le Parlement souhaitait, c'était d'empêcher que des enfants voient des actes de *pénétration* commis avec des animaux ou soient forcés d'en commettre, l'on peut raisonnablement se demander quelle était l'utilité d'une préoccupation aussi indûment restrictive. Puisque selon un « principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes » (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 27), le Parlement devait certainement vouloir empêcher que des enfants soient témoins de *quelque* activité sexuelle *que ce soit* avec des animaux ou forcés d'y prendre part, point à la ligne.

[148] Le but du Parlement de mettre les enfants à l'abri de rapports sexuels avec des animaux dans la nouvelle disposition sur la bestialité peut également s'inférer des autres modifications de 1988 au *Code*. Le législateur a créé les infractions de contacts sexuels, d'exploitation sexuelle et d'incitation à des contacts sexuels, lesquelles visaient toutes à protéger les mineurs et aucune d'entre elles n'exigeait de pénétration. Il serait anormal que la pénétration ne soit pas exigée dans le cas de ces infractions, qui étaient axées sur la protection des enfants contre l'exploitation sexuelle en général, mais qu'elle demeure un élément essentiel du par. 160(3), qui protégeait les enfants de l'exploitation sexuelle avec des animaux.

[149] Je ne crois pas que l'absence d'exigence de pénétration élargit la portée de la bestialité. J'y vois plutôt un reflet de la supposition logique du Parlement que, comme il est physiquement impossible de pénétrer la plupart des animaux et comme la pénétration est un acte qui est physiquement impossible à accomplir par la moitié de la population, en faire un élément constitutif de l'infraction soustrait à la censure la plupart des actes d'exploitation sexuelle commis avec des animaux. Les actes de nature sexuelle commis avec des animaux relèvent intrinsèquement de l'exploitation, qu'il y ait ou non pénétration, et la prévention de l'exploitation sexuelle était la raison d'être des modifications de 1988.

[150] In fact, and unsurprisingly, after the 1988 Amendments, the elimination of the requirement of penetration appears to have been accepted: *R. v. K.D.H.* (2012), 546 A.R. 248 (Q.B.); *R. v. J.J.B.B.*, 2007 BCPC 426; and *R. v. Black* (2007), 296 Sask. R. 289 (Prov. Ct.)

[151] The majority expressed concerns that an interpretation of "bestiality" that does not require penetration could mean that the stepdaughter, who was not charged, was the principal offender and D.L.W. was a party to the offence. With respect, the fact that the trial judge was not satisfied beyond a reasonable doubt that D.L.W. had "compelled" bestiality, does not mean that interpreting the offence as including conduct that has a sexual purpose, regardless of whether there is penetration, leads to charges against a victim like the stepdaughter.

[152] She testified that these events began when she was only 15 or 16 years old, that she did not want to participate in sexual conduct with the dog or with her stepfather, and that there were reprisals whenever she refused or hesitated to engage in sexual activity with her stepfather. Her younger sister testified to receiving beatings with a two-by-four after refusing to participate in sexual acts with D.L.W. The trial judge found both sisters credible. Given these circumstances, it is inconceivable that bestiality charges would ever be laid against someone in D.L.W.'s stepdaughter's circumstances.

[153] I would allow the appeal, set aside the decision of the Court of Appeal, and restore the conviction.

Appeal dismissed, Abella J. *dissenting.*

Solicitor for the appellant: Attorney General of British Columbia, Vancouver.

[150] En fait, et ce qui n'est guère surprenant, la suppression de l'exigence de pénétration semble avoir été reconnue après les modifications de 1988 (*R. c. K.D.H.* (2012), 546 A.R. 248 (B.R.); *R. c. J.J.B.B.*, 2007 BCPC 426, et *R. c. Black* (2007), 296 Sask. R. 289 (C. prov.)).

[151] Les juges majoritaires ont dit craindre qu'interpréter la « bestialité » comme n'exigeant pas de pénétration signifie que la belle-fille, non inculpée, était l'auteure principale de l'infraction et que D.L.W. était un participant à l'infraction. Avec égards, le fait que le juge du procès n'était pas convaincu hors de tout doute raisonnable que D.L.W. avait « forcé » sa belle-fille à commettre un acte de bestialité ne veut pas dire qu'interpréter l'infraction comme visant une conduite qui a une fin d'ordre sexuel, peu importe qu'il y ait eu ou non pénétration, entraîne le dépôt d'accusations contre une victime comme la belle-fille.

[152] La belle-fille a affirmé que ces événements avaient commencé quand elle n'avait que 15 ou 16 ans, qu'elle ne voulait pas participer à des actes sexuels avec le chien ou avec son beau-père et qu'elle était victime de représailles chaque fois qu'elle refusait de se livrer à une activité sexuelle avec son beau-père ou hésitait à le faire. Sa sœur cadette a dit avoir été battue avec un deux par quatre après avoir refusé de participer à des actes sexuels avec D.L.W. Le juge du procès a jugé les deux sœurs crédibles. Dans ces circonstances, il est inconcevable que des accusations de bestialité soient un jour déposées contre une personne se trouvant dans la situation de la belle-fille de D.L.W.

[153] Je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir la déclaration de culpabilité.

Pourvoi rejeté, la juge Abella *est dissidente.*

Procureur de l'appelante : Procureur général de la Colombie-Britannique, Vancouver.

Solicitors for the respondent: Eric Purtzki, Vancouver; Garth Barriere, Vancouver.

Solicitor for the intervener: Animal Justice, Toronto.

Procureurs de l'intimé : Eric Purtzki, Vancouver; Garth Barriere, Vancouver.

Procureur de l'intervenante : Animal Justice, Toronto.

SUPREME COURT OF CANADA

CITATION: R. *v.* Basque, 2023 SCC 18

APPEAL HEARD: November 8, 2022
JUDGMENT RENDERED: June 30, 2023
DOCKET: 39997

BETWEEN:

Jennifer Basque
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Alberta
Intervener

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 78)

Kasirer J. (Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

[*] Brown J. did not participate in the final disposition of the judgment.

Jennifer Basque *Appellant*

v.

His Majesty The King *Respondent*

and

Attorney General of Alberta *Intervener*

Indexed as: R. *v.* Basque

2023 SCC 18

File No.: 39997.

2022: November 8; 2023: June 30.

Present: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

* Brown J. did not participate in the final disposition of the judgment.

Criminal law — Sentencing — Mandatory minimums — Credit for pre-sentence driving prohibition — Offender charged with impaired driving released on undertaking not to operate motor vehicle while awaiting trial — Offence carrying mandatory prohibition against operating motor vehicle during period of not less than one year — Whether sentencing judge could grant credit for driving prohibition period already served by offender while awaiting trial — Criminal Code, R.S.C. 1985, c. C-46, ss. 259(1)(a), 719(1).

After being charged with a summary conviction impaired driving offence, the offender was released on an undertaking not to operate a motor vehicle while awaiting trial. She remained subject to that prohibition until she was sentenced 21 months later. At the time of the offence, s. 259(1)(a) of the *Criminal Code* ("*Cr. C.*") required the court to make an order prohibiting an offender charged with a first impaired driving offence from operating a motor vehicle during a period of not less than one year. The sentencing judge imposed a one-year driving prohibition on the offender and chose to backdate the order to the first day of the pre-sentence prohibition, which meant that the period prescribed by law had been completed in full by the date of his decision.

The summary conviction appeal judge dismissed the Crown's appeal. While noting that the sentencing judge had erred in backdating the prohibition, he found that the sentencing judge could nevertheless give credit for a pre-sentence driving prohibition as long as such a prohibition was a condition of release and also

part of the sentence later imposed. However, a majority of the Court of Appeal allowed the Crown's subsequent appeal, holding that there is no authority for giving credit so as to depart from a mandatory minimum provided for by statute.

Held: The appeal should be allowed.

It was open to the sentencing judge to take into account the period of 21 months already served by the offender, as this would not undermine Parliament's intent in enacting the mandatory minimum. No conflict arises from the concurrent application of s. 259(1)(a) *Cr. C.* and the common law rule that allows credit to be granted. At the time of sentencing, the court is required to impose the one-year mandatory minimum, but there is nothing in the statute that prevents it from then granting credit. Similarly, granting credit is not contrary to the rule set out in s. 719(1) *Cr. C.* requiring that a sentence commence when it is imposed. Only the sentence has to commence when it is imposed, not the one-year mandatory minimum served under s. 259(1)(a). These statutory provisions therefore do not displace the common law discretion of sentencing judges, recognized in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, to grant credit for a pre-sentence driving prohibition.

Canadian criminal law is made up of both statute law and common law principles. This coexistence of statute and common law is a feature of the law of sentencing. While the *Criminal Code* codifies the fundamental principles of sentencing, courts can also take account of other principles and factors arising from the common law. Although legislation may prevail over the common law, the latter remains

applicable insofar as it has not been displaced expressly or by necessary implication, a principle justified by the importance of stability in the law. The two-step framework used to analyze the interaction between legislation and the common law is well settled. The first step is analyzing, identifying and setting out the applicable common law; and then, at the second step, the statute law's effect on the common law must be specified.

With regard to the first step of the analysis, the common law allows courts to grant credit for a pre-sentence driving prohibition imposed on an offender. This common law discretion is a natural extension of an analogous principle that applies in the context of pre-sentence custody. Courts have long recognized that they can take into consideration, in imposing a sentence, any period of incarceration that the offender has already undergone between the date of arrest and the date of sentencing. Giving credit for the time an offender is subject to pre-sentence custody is part of the central principles of sentencing, although it is not statutorily expressed. The principle that credit can be granted for pre-sentence custody serves to mitigate certain injustices arising from the application of the principle that a sentence may not be backdated, now codified in s. 719(1). While Canadian law does not permit courts to backdate a sentence in order to reduce it, they may nevertheless consider the time spent in pre-sentence custody in determining the period that must be served prospectively by an offender. The application of this common law rule allowing credit to be granted is therefore not equivalent to backdating a sentence.

Furthermore, the absence of a statutory provision for pre-sentence driving prohibitions that is equivalent to s. 719(3) *Cr. C.*, which codifies the granting of credit in the case of pre-sentence custody, does not have the effect of displacing or limiting the common law rule allowing credit to be granted. Absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law. Section 719(3) was enacted in the specific context of pre-sentence custody, and the legislative debates suggest that Parliament's intention was to ensure that credit could still be granted when a mandatory minimum term of imprisonment was imposed. There is no indication that Parliament considered whether credit could be given for a pre-sentence driving prohibition. There is also nothing in the legislative debates to support the position that Parliament sought to displace, whether expressly or by necessary implication, the common law rule applicable to such prohibitions. This is not a situation in which Parliament made clear its intention to displace or limit the applicable common law.

With regard to the second step in the analysis, s. 259(1)(a) does not limit the scope of the common law rule that allows credit to be granted for a pre-sentence driving prohibition. The discretionary authority to grant credit under the common law can coexist harmoniously with judicial adherence to a mandatory minimum established by statute. This coexistence rests on the well-known distinction between the concepts of "punishment", understood as a deprivation, and of "sentence", understood as a judicial decision (in French, the distinction between "*punition*" and "*sentence*", where the term "*peine*" can also be used to convey both meanings). While the French term

"*peine*" used in the sense of "punishment" refers to the total punishment imposed on an offender, the same word when used to mean "sentence" refers to the decision rendered by the court, which is always prospective in order to prevent the judicial practice of backdating sentences.

In accordance with the modern approach to statutory interpretation, the reach of s. 259(1)(a) *Cr. C.* must be determined by considering its text, context and purpose. Properly interpreted, s. 259(1)(a) provides for a minimum punishment, not a minimum sentence. Interpreting s. 259(1)(a) *Cr. C.* as providing for the imposition of a one-year global punishment is perfectly in keeping with the objectives of deterrence and punishment that underlie the provision. Parliament's intention is respected whether the punishment is served before or after the offender is sentenced, because the effect on the offender is the same in either case. Though silent with respect to credit, the provision is not ambiguous: it can be read in only one way, that is, as providing for the imposition of a mandatory minimum punishment. If s. 259(1)(a) *Cr. C.* required that a minimum sentence be handed down, the appropriate difference between the punishments imposed on the most dangerous offenders and those imposed on the least dangerous offenders could be unduly eroded, and the precise gradation of minimum prohibition periods established by Parliament in s. 259(1) would be undermined. Absent a clear intention to this effect, it must be presumed that Parliament did not intend to produce such absurd results. In addition to leaving room for the exercise of the court's discretion to grant credit, this interpretation of s. 259(1)(a) *Cr. C.* is

consistent with general principles of sentencing and does not offend the integrity of the criminal justice system.

In this case, the imposition of an additional one-year punishment would amount to a kind of double punishment, contrary to the most fundamental requirements of justice and fairness. By the time the sentencing decision was rendered, it had been 21 months since the offender had essentially begun serving her sentence. Conscious of this fact, the sentencing judge ordered a one-year driving prohibition but found that the offender had already satisfied this condition. However, he backdated the offender's sentence to achieve this result, which was an error. He could quite properly have imposed the one-year mandatory minimum punishment required by s. 259(1)(a) *Cr. C.*, stated that a sentence commences when it is imposed under s. 719(1) *Cr. C.*, and then granted credit for the pre-sentence driving prohibition period by exercising his common law discretion, which has not been displaced by the *Criminal Code*.

Cases Cited

Applied: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; **considered:** *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455; **referred to:** *R. v. McDonald* (1998), 40 O.R. (3d) 641; *R. v. Sharma*, [1992] 1 S.C.R. 814; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521; *R. v. Bland*, 2016 YKSC 61, 3 M.V.R. (7th) 112; *R. v. Edwards* (2016), 382 Nfld. & P.E.I.R. 225; *R. v. Hilbach*, 2023 SCC 3; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *R. v. Tim*, 2022 SCC 12; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Gladue*,

[1999] 1 S.C.R. 688; *R. v. Skolnick*, [1982] 2 S.C.R. 47; *R. v. Pham*, 2013 ONCJ 635, 296 C.R.R. (2d) 178; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Zaidan Group Ltd. v. London (City)*, [1991] 3 S.C.R. 593; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Urban Mechanical Contracting Ltd. v. Zurich Insurance Co.*, 2022 ONCA 589, 163 O.R. (3d) 652; *R. v. Goulding* (1987), 81 N.S.R. (2d) 158; *R. v. Pellicore*, [1997] O.J. No. 226 (QL), 1997 CarswellOnt 246 (WL); *R. v. Williams*, 2009 NBPC 16, 346 N.B.R. (2d) 164; *Bilodeau v. R.*, 2013 QCCA 980; *R. v. Sloan* (1947), 87 C.C.C. 198; *R. v. Patterson* (1946), 87 C.C.C. 86; *R. v. Wells* (1969), 4 C.C.C. 25; *McClurg v. Canada*, [1990] 3 S.C.R. 1020; *Turgeon v. Dominion Bank*, [1930] S.C.R. 67; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Mathieu*, 2008 SCC 21, [2008] 1 S.C.R. 723; *R. v. Fice*, 2005 SCC 32, [2005] 1 S.C.R. 742; *R. v. Walker*, 2017 ONCA 39, 345 C.C.C. (3d) 497; *R. v. Severight*, 2014 ABCA 25, 566 A.R. 344; *R. v. LeBlanc*, 2005 NBCA 6, 279 N.B.R. (2d) 121; *R. v. Hills*, 2023 SCC 2; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *R. v. Sohal*, 2019 ABCA 293, 91 Alta. L.R. (6th) 48; *R. v. Fox*, 2022 ABQB 132, 89 M.V.R. (7th) 23; *R. v. Froese*, 2020 MBQB 11, 461 C.R.R. (2d) 1; *R. v. Osnach*, 2019 MBPC 1, 38 M.V.R. (7th) 257; *R. v. Bryden*, 2007 NBQB 316, 323 N.B.R. (2d) 119; *R. v. Panday*, 2007 ONCA 598, 87 O.R. (3d) 1; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, [2019] 3 S.C.R. 418; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743.

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APPEAL from a judgment of the New Brunswick Court of Appeal (Richard C.J. and Baird and French JJ.A.), 2021 NBCA 50, 410 C.C.C. (3d) 228, 84 M.V.R. (7th) 1, [2021] N.B.J. No. 288 (QL), 2021 CarswellNB 564 (WL), setting aside a decision of Dysart J., 2020 NBQB 130, 65 M.V.R. (7th) 208, [2020] N.B.J. No. 194 (QL), 2020 CarswellNB 385 (WL), affirming the sentence imposed on the offender by McCarroll Prov. Ct. J. Appeal allowed.

Robert K. McKee, for the appellant.

Patrick McGuinty and *Pierre Gionet*, for the respondent.

Elisa Frank, for the intervener.

English version of the judgment of the Court delivered by

KASIRER J. —

I. Overview

[1] After being charged with a summary conviction impaired driving offence in 2017, the appellant, Jennifer Basque, was released on an undertaking not to operate a motor vehicle while awaiting trial. She remained subject to that prohibition until she was sentenced 21 months later. At the time of the offence, s. 259(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"), required the court to make an "order prohibiting the offender from operating a motor vehicle . . . during a period of . . . not less than one year".[1]

[2] Could the sentencing judge credit Ms. Basque for the driving prohibition period already served, notwithstanding the combined effect of that one-year mandatory minimum prohibition and the direction — codified in s. 719(1) *Cr. C.* — that except where otherwise provided, a sentence commences when it is imposed?

[3] If not for the requirement in s. 259(1)(a), granting credit would undoubtedly be possible. Indeed, in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 — a case that did not concern a mandatory minimum prohibition — this Court

[1] This provision was repealed and replaced by s. 320.24(2)(a) *Cr. C.* (S.C. 2018, c. 21), which is "almost identical" to s. 259(1)(a), as the majority of the Court of Appeal noted (2021 NBCA 50, 84 M.V.R. (7th) 1, at para. 13).

confirmed that there is a common law judicial discretion to grant credit for a pre-sentence driving prohibition. This discretion is a natural extension of the longstanding practice of crediting offenders for periods of pre-sentence custody.

[4] Provided that Parliament respects the relevant constitutional constraints, it can, of course, enact legislation that displaces the common law rule allowing credit to be granted for a pre-sentence driving prohibition. Ms. Basque does not challenge the constitutionality of s. 259(1)(a) but argues that her request for credit is not limited in any way by the imposition of the mandatory minimum prohibition. The respondent Crown, relying on the majority reasons of the Court of Appeal, argues instead that granting credit in this case would conflict with the application of the one-year minimum prohibition, even though the relevant statutory provision is silent on crediting.

[5] Respectfully, I believe that the respondent is mistaken. In my view, granting credit based on the common law discretion recognized in *Lacasse* is perfectly consistent with the application of the minimum prohibition in s. 259(1)(a) *Cr. C.* and with the rule requiring that a sentence commence when it is imposed in s. 719(1) *Cr. C.* It was therefore open to the sentencing judge to take into account the period of 21 months already served by Ms. Basque, as this would not undermine Parliament's intent.

[6] The discretionary authority to grant credit under the common law can coexist harmoniously with judicial adherence to a mandatory minimum established by statute. This coexistence rests on the well-known distinction between the concepts of

"punishment", understood as a deprivation, and of "sentence", understood as a judicial decision (in French, the distinction between "*punition*" and "*sentence*", where the term "*peine*" can also be used to convey both meanings). This distinction, considered by Rosenberg J.A. in the context of credit for pre-sentence custody in *R. v. McDonald* (1998), 40 O.R. (3d) 641 (C.A.), was taken up by Arbour J. of this Court in *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at paras. 35-37, with particular attention to the multiple meanings of the French term "*peine*". From this perspective, Arbour J. explained that while the term "*peine*" used in the sense of "punishment" refers to the total punishment imposed on an offender, the same word when used to mean "sentence" refers to the decision rendered by the court. It bears noting that a sentence is always prospective in order to prevent the judicial practice of backdating sentences (see s. 719(1) *Cr. C.*).

[7] As a general rule, the purpose of a mandatory minimum is to impose on an offender an effective *punishment* of a specified minimum length. This is so because the objectives underlying a minimum punishment are achieved equally well whether the punishment is served before or after the offender is sentenced. In the instant case, the mandatory minimum provided for in s. 259(1)(a) is no exception to this rule.

[8] Properly interpreted, s. 259(1)(a) requires the court to impose a total *punishment* of one year to be served by the offender, not to hand down a *sentence* imposing a one-year prohibition that must necessarily be served prospectively. As Rosenberg J.A. noted in *McDonald*, Parliament's intention is respected whether the

punishment is served before or after the offender is sentenced, because the effect on the offender is the same in either case. Interpreted in this way, s. 259(1)(a) did not prohibit the sentencing judge from "reducing" the *sentence* by granting credit for the pre-sentence driving prohibition period, as long as the total *punishment* remained consistent with the minimum prescribed by Parliament.

[9] By the time the trial judgment was rendered in this case, it had been 21 months since Ms. Basque had essentially "begun serving [her] sentence" (see *R. v. Sharma*, [1992] 1 S.C.R. 814, at p. 818, cited with approval by Wagner J., as he then was, in *Lacasse*, at para. 113). When considered from this perspective, the objectives of the minimum punishment set out in s. 259(1)(a) had already been met — and even surpassed. In such a context, granting credit to "reduce" the length of the prohibition imposed on Ms. Basque does not conflict with s. 259(1)(a) because she has already served a driving prohibition period exceeding the one-year minimum required by that provision. Crediting also addresses the considerations of fairness and justice touched on in *Wust*, including what Paciocco J.A. usefully described in an academic paper as "the aversion to double punishment" (D. M. Paciocco, "The Law of Minimum Sentences: Judicial Responses and Responsibility" (2015), 19 *Can. Crim. L.R.* 173, at p. 211).

[10] In short, no conflict arises from the concurrent application of s. 259(1)(a) and the common law rule that allows credit to be granted. At the time of sentencing, the court is required to impose the one-year mandatory minimum punishment, but there

is nothing in the statute that prevents it from then granting credit. Similarly, granting credit is not contrary to the requirement set out in s. 719(1) *Cr. C.* because only the sentence has to commence when it is imposed, not the one-year minimum punishment served under s. 259(1)(a). These statutory provisions therefore do not displace the discretion of sentencing judges that was recognized in *Lacasse*. Of course, Parliament remains free, within the constraints imposed by the Constitution, to limit this discretion, but it must do so through a "clear provision to that effect" (*Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521, at para. 56). There is no such provision here, as s. 259(1)(a) is silent regarding the granting of credit.

[11] Furthermore, the codification of the discretion to give credit for pre-sentence custody in s. 719(3) *Cr. C.* has no impact on this appeal. Like s. 259(1)(a), s. 719(3) is unambiguous, and it is also silent with respect to driving prohibitions. Here, the absence of an analogous provision for driving prohibitions does not signify a positive intention by Parliament to eliminate the discretion recognized in *Lacasse*, a case which, I should add, was decided after s. 719(3) was enacted.

[12] In light of the foregoing, and given that Ms. Basque has already been prohibited from driving for 21 months, the imposition of an additional one-year prohibition period would amount to a kind of double punishment, contrary to the most fundamental requirements of justice and fairness. Conscious of this fact, the sentencing judge ordered a one-year driving prohibition but found that Ms. Basque had already satisfied this condition. However, he backdated Ms. Basque's sentence to achieve this

result. With respect, this was an error. He could quite properly have imposed the one-year mandatory minimum punishment required by s. 259(1)(a) *Cr. C.*, stated that a sentence commences when it is imposed under s. 719(1) *Cr. C.*, and then granted credit for the pre-sentence driving prohibition period by exercising his common law discretion, which has not been displaced by the *Criminal Code*.

[13] For the reasons that follow, I would allow the appeal and set aside the judgment of the New Brunswick Court of Appeal. I would restore the judgment of the summary conviction appeal court and reinstate the sentencing judge's conclusions in part, for different reasons. I would specify that the appellant has already served the mandatory minimum prohibition provided for in s. 259(1)(a) *Cr. C.*

II. Facts

[14] On the night of October 7, 2017, the appellant was driving her vehicle in downtown Moncton, New Brunswick. Constable Richard, who was patrolling the area, noticed that the vehicle was being driven erratically and stopped it. The interaction between the appellant and the police officer took place in French in keeping with the preference expressed by Ms. Basque. The constable had her take a breathalyzer test, which showed a blood alcohol level above the legal limit. Ms. Basque was then arrested for operating a motor vehicle with a blood alcohol level exceeding 80 mg of alcohol in 100 ml of blood.

[15] On November 30, Ms. Basque was released on an undertaking not to operate a motor vehicle. She was later charged with impaired driving under the former s. 253(1)(b) *Cr. C.*

[16] Ms. Basque initially pleaded not guilty to the charge brought against her. The trial was scheduled for June 2018 but was later adjourned at her request. In October of that year, Ms. Basque pleaded guilty and stated that she intended to apply for a conditional discharge under s. 255(5) *Cr. C.* (now repealed).

[17] At the sentencing hearing in the Provincial Court — delayed by adjournments — Ms. Basque waived her right to proceed in French and abandoned her application for a conditional discharge. Following discussion of her criminal history, it was determined that a prohibition applicable to a first offence was to be imposed on her under s. 259(1)(a). The Crown did not seek a term of imprisonment, and the parties reached an agreement on the amount of the fine to be set in her case.

[18] Between her initial appearance and the date she was sentenced, Ms. Basque was subject to a driving prohibition for 21 months.

III. Judicial History

A. *New Brunswick Provincial Court (McCarroll Prov. Ct. J.)*

[19] The sentencing judge acknowledged Ms. Basque's difficult past, which included a very abusive childhood. He also noted that driving her vehicle was important to her. She had to travel to Fredericton to take part in hearings concerning the custody of her children, and the use of public transportation for that purpose placed her in a financially precarious position. Mindful of this reality, and taking account of the fact that Ms. Basque had been subject to a pre-sentence driving prohibition for 21 months, the judge granted her uncontested request that he not impose any further prohibition.

[20] At the hearing, the judge commented as follows on the possible terms of the order he had to make: ". . . I'm not sure of whether to word it, driving prohibition one year which has been completed because of her two years of – of prohibited driving [as a result of the pre-sentence prohibition], or simply say, no driving prohibition. I'm inclined to take the first approach because the law obliges me to – to order [the prohibition] – but I think it might be safer to back – to order it and then back-date it and say, you know, she's already been without the licence by a court order for – for over two years" (A.R., vol. I, at p. 16). In the end, the judge chose to backdate the order prohibiting Ms. Basque from operating a vehicle to November 30, 2017 — the first day of the pre-sentence prohibition — which meant that the prohibition had been completed in full by the date of the decision. He also imposed the minimum fine of $1,000.

B. *New Brunswick Court of Queen's Bench, 2020 NBQB 130, 65 M.V.R. (7th) 208 (Dysart J.)*

[21] The summary conviction appeal judge heard an appeal by the Crown, which argued that the sentencing judge had erred in law in backdating the sentence. Relying on the principles laid down by this Court in *Lacasse* and *Wust*, the appeal judge dismissed the appeal, finding that the sentencing judge could give credit for a pre-sentence driving prohibition as long as such a prohibition was a condition of release and also part of the sentence later imposed (para. 28).

[22] Illustrating his point using two decisions that relied on *Lacasse* — *R. v. Bland*, 2016 YKSC 61, 3 M.V.R. (7th) 112, and *R. v. Edwards* (2016), 382 Nfld. & P.E.I.R. 225 (N.L. Prov. Ct.) — the appeal judge noted that the sentencing judge had not imposed a prohibition period that was less than the minimum provided for in the *Criminal Code*. Through his decision, the sentencing judge had imposed a driving prohibition on Ms. Basque for a total of one year, in accordance with s. 259(1)(a) *Cr. C.*, and then credited her for the pre-sentence prohibition to which she had been subject (para. 29). It was not an error of law to do so. Finally, the appeal judge noted that the error of backdating the sentence had not affected the decision rendered, as no further driving prohibition was indicated in this case (para. 30).

C. *New Brunswick Court of Appeal, 2021 NBCA 50, 84 M.V.R. (7th) 1 (Richard C.J., Baird J.A. concurring; French J.A., dissenting)*

[23] The issue before the Court of Appeal was framed as follows: "Did the summary appeal court judge err by affirming the Provincial Court Judge's jurisdiction to reduce the s. 259(1)[(a)] (now s. 320.24(2)(a)) mandatory driving prohibition below

its one year minimum by giving credit for the time during which a pre-sentence prohibition was served by the Respondent ('Basque') as a release undertaking?" (para. 10). Richard C.J. stated that the question was not whether the pre-sentence prohibition period could reduce the post-trial prohibition period, "but rather whether it may *reduce this period below the one-year minimum*" (para. 12 (emphasis in original)).

[24] The Court of Appeal was divided on this question. The majority, in reasons written by the Chief Justice, granted the Crown's application for leave to appeal and allowed the appeal. While it is indeed possible to give credit for a pre-sentence driving prohibition in certain circumstances, the majority wrote, there is no authority for giving such credit so as to depart from a mandatory minimum provided for by statute. The majority stated that *Lacasse* could not offer guidance in this case because it dealt with a "discretionary" driving prohibition that was not subject to a mandatory minimum (paras. 18-19). The purpose of a mandatory minimum is precisely to limit judicial discretion. The appeal before the Court of Appeal was also fundamentally different from *Wust*, which concerned the possibility of granting credit for pre-sentence custody under s. 719(3). However, there is no equivalent to s. 719(3) for driving prohibitions.

[25] Section 259(1)(a) is not ambiguous when interpreted in accordance with the modern approach to statutory interpretation, the majority stated, and no credit can be granted to make the prohibition imposed less than the minimum period provided for by that provision. Moreover, the interpretation proposed by Ms. Basque would render s. 719(3) meaningless because the exception it creates would then apply to all

mandatory minimums and no longer solely to custodial sanctions as stated in the provision (para. 27). The majority rejected the argument that the unavailability of credit would lead to absurd results, noting that "[w]hile mandatory minimums are sometimes unfair, it is not for this Court to call them absurd" (para. 31). Since a sentence begins on the day it is imposed, such credit cannot be granted "[b]arring a successful constitutional challenge or clear direction from the Supreme Court" (para. 39). In the circumstances, the summary conviction appeal judge had erred in crediting Ms. Basque for the length of her pre-sentence driving prohibition, thereby failing to impose the mandatory minimum.

[26] French J.A., dissenting, wrote that there is no doubt that the law requires a driving prohibition to be imposed for not less than the applicable minimum period. However, he was of the view that the prohibition may be reduced "to less than the applicable minimum" by granting credit for a pre-sentence prohibition period, as long as the total driving prohibition still exceeds the mandatory minimum (para. 58).

[27] The dissenting judge found that while the language of s. 259(1)(a) is generally clear, it is ambiguous with respect to the possibility of granting credit. Quoting *McDonald*, and drawing an analogy with *Wust*, he noted that absurd results would flow from interpreting s. 259(1)(a) as preventing credit from being granted. Moreover, the absence of a provision equivalent to s. 719(3) *Cr. C.* for driving prohibitions does not mean that Parliament intended to prohibit the granting of such credit. In fact, this Court in *Lacasse* expressly recognized that it is possible to grant

such credit in the context of a pre-sentence driving prohibition and that this principle "applies generally" (para. 121).

[28] Finally, both the majority and the dissenting judge agreed that the execution of the order pertaining to Ms. Basque should be stayed. The release conditions in this case were unreasonable, even if she had not initially challenged them. The result of the pre-sentence prohibition was that Ms. Basque had actually been treated more harshly before being sentenced than after. In the particular circumstances of this case, and in order to avoid committing an injustice and "disproportionately punish[ing]" Ms. Basque, the Court of Appeal held that the execution of any further prohibition should be stayed (majority reasons, at para. 54; see also the dissenting judge's reasons, at para. 132).

IV. Issue

[29] Ms. Basque raises a number of issues in this Court. They can be summarized in the following manner: Can the appellant be granted credit for the time she spent subject to a pre-sentence driving prohibition notwithstanding the one-year mandatory minimum prohibition period set forth in s. 259(1)(a) *Cr. C.*?

V. Analysis

A. *Key Statutory Provisions*

[30] At the time of the events, the former s. 259(1) *Cr. C.* made a driving prohibition order mandatory for certain impaired driving offences, including the summary conviction offence relevant to this case (similarly, see the current s. 320.24(2) *Cr. C.*, enacted by S.C. 2018, c. 21). Paragraphs (a), (b) and (c) of s. 259(1) established a gradation of mandatory minimum prohibition periods that took into account the offender's previous convictions for such offences:

Mandatory order of prohibition **259 (1)** When an offender is convicted of an offence committed under section 253 or 254 . . ., the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel or an aircraft or railway equipment, as the case may be,	**Ordonnance d'interdiction obligatoire** **259 (1)** Lorsqu'un contrevenant est déclaré coupable d'une infraction prévue aux articles 253 ou 254 . . ., le tribunal qui lui inflige une peine doit, en plus de toute autre peine applicable à cette infraction, rendre une ordonnance lui interdisant de conduire un véhicule à moteur dans une rue, sur un chemin ou une grande route ou dans tout autre lieu public, un bateau, un aéronef ou du matériel ferroviaire :
(a) for a first offence, during a period of not more than three years plus any period to which the offender is sentenced to imprisonment, and not less than one year;	**a)** pour une première infraction, durant une période minimale d'un an et maximale de trois ans, en plus de la période d'emprisonnement à laquelle il est condamné;
(b) for a second offence, during a period of not more than five years plus any period to which the offender is sentenced to imprisonment, and not less than two years; and	**b)** pour une deuxième infraction, durant une période minimale de deux ans et maximale de cinq ans, en plus de la période d'emprisonnement à laquelle il est condamné;

(c) for each subsequent offence, during a period of not less than three years plus any period to which the offender is sentenced to imprisonment.	**c)** pour chaque infraction subséquente, durant une période minimale de trois ans, en plus de la période d'emprisonnement à laquelle il est condamné.

[31] Section 718.3(2), which is in the division of the *Criminal Code* dealing with "Punishment Generally", provides that the punishment to be imposed ("*peine à infliger*" in French) is in the court's discretion, subject to the limitations set out in the enactment prescribing the punishment in question:

Discretion respecting punishment **[718.3](2)** Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.	**Appréciation du tribunal** **[718.3](2)** Lorsqu'une disposition prescrit une peine à l'égard d'une infraction, la peine à infliger est, sous réserve des restrictions contenues dans la disposition, laissée à l'appréciation du tribunal qui condamne l'auteur de l'infraction, mais nulle peine n'est une peine minimale à moins qu'elle ne soit déclarée telle.

[32] The parties also focused attention on s. 719. Its first subsection is entitled "Commencement of sentence" (in French, the word "*peine*" is used as the parallel term to "sentence" in this context). Section 719(3) is entitled "Determination of sentence" ("*Infliction de la peine*" in French). These provisions read as follows:

Commencement of sentence **719 (1)** A sentence commences when it is imposed, except where a relevant enactment otherwise provides.	**Début de la peine** **719 (1)** La peine commence au moment où elle est infligée, sauf lorsque le texte législatif applicable y pourvoit de façon différente.
. . .	. . .
Determination of sentence **(3)** In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.	**Infliction de la peine** **(3)** Pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que la personne a passée sous garde par suite de l'infraction; il doit, le cas échéant, restreindre le temps alloué pour cette période à un maximum d'un jour pour chaque jour passé sous garde.

[33] It is appropriate at the outset to recognize that linguistic usage in this area of sentencing is often uneven, be it in legislation, jurisprudence or scholarship. In the title for s. 259(1) *Cr. C.*, Parliament spoke of a "mandatory order of prohibition" / "*ordonnance d'interdiction obligatoire*". In the English-language reasons of the Court of Appeal in this case, the terms "mandatory minimum", "mandatory minimum sentence" and "mandatory driving prohibition" are used. In the French-language version of the reasons, "*peine minimale obligatoire*" and "*période minimale d'interdiction*" predominate. In the *Criminal Code* more broadly, the terms "minimum punishment" / "*peine minimale*" are frequently used as equivalents (see, e.g., *R. v. Hilbach*, 2023 SCC 3, at paras. 2 and 12, interpreting s. 344(1) *Cr. C.* and using both "mandatory minimum sentence" / "*peine minimale obligatoire*" and "mandatory

minimum punishment" / "*peine minimale obligatoire*"). That said, as Arbour J. wrote in *Wust*, "[w]hat is fundamental is less the words chosen, in the French or English version, but the concepts that they carry" (para. 36).

B. *Grounds of Appeal*

[34] In this Court, the appellant concedes that the sentencing judge erred in backdating her sentence; she acknowledges that he should have made the sentence commence when it was imposed in accordance with s. 719(1) *Cr. C.* She also acknowledges that s. 259(1)(a) provides that a driving prohibition must be imposed for a period of not less than one year. However, she submits — essentially adopting the summary conviction appeal judge's position — that the prohibition imposed by the sentencing judge was not below the mandatory minimum. Based on the principles laid down by this Court in *Lacasse*, the appellant takes the view that credit for the prohibition period served prior to sentencing could be granted in this case.

[35] The appellant's main argument is one of statutory interpretation. She submits that s. 259(1)(a) is silent about the possibility of granting credit for a pre-sentence driving prohibition period. Further, the common law judicial discretion to apply such credit has not been displaced by the relevant statutory provisions. Moreover, she says, the interpretation espoused by the majority of the Court of Appeal produces absurd results, including the imposition of prohibition periods that do not take account of the gradation established in s. 259(1), which could not be what Parliament had intended.

[36] The respondent Crown, relying in particular on *R. v. McIntosh*, [1995] 1 S.C.R. 686, argues that courts must carry out the clear intent of Parliament even if this leads to "uncomfortable or absurd result[s]" (respondent's condensed book, at p. 1). In its view, there is no ambiguity in ss. 259(1)(a) and 719(1): Parliament has told judges that they must impose a one-year minimum prohibition period that must commence when the offender is sentenced. Absent a constitutional challenge to the applicable provisions, courts must give effect to Parliament's intent.

[37] The respondent also points out that Parliament is presumed to know the necessary context for the implementation of its legislation. Here, it should be presumed that Parliament was aware that some accused persons are subject to pre-sentence driving prohibitions. According to the respondent, there is every indication that Parliament, in enacting s. 259(1)(a), chose not to adopt a provision equivalent to s. 719(3) for driving prohibitions. In this context, the respondent adds, the argument that Parliament's silence implies that the common law discretion remains intact should be rejected. It is clear from reading ss. 259(1)(a), 718.3(2), 719(1) and 719(3) that this common law discretion has been displaced through the combined effect of the mandatory minimum and the rule that a sentence commences when it is imposed.

[38] Without taking a position on the outcome of the appeal, the Attorney General of Alberta intervenes in support of the interpretation advanced by the respondent. The intervener submits that Parliament's silence with respect to the possibility of granting credit cannot negate its clear intent to impose a mandatory

minimum commencing on the day the offender is sentenced. The Attorney General says that *Lacasse* is of no assistance in this case because it did not concern a mandatory minimum.

C. *Analytical Framework: Coexistence of the Common Law and Legislation in Matters of Sentencing*

[39] Both parties agree that sentencing judges have a discretion to grant credit for a pre-sentence driving prohibition period. However, contrary to the appellant, the Crown argues that Parliament limited or displaced this common law discretion when it enacted the mandatory minimum set out in s. 259(1)(a) *Cr. C.* This appeal therefore raises the question of whether, as the appellant maintains, the common law rule can coexist in harmony with the mandatory minimum laid down by the *Criminal Code*.

[40] This question requires the Court to consider the sometimes complex interactions that characterize the relationship between the common law and legislation. While legislation may prevail over the common law, the latter remains applicable insofar as it has not been displaced expressly or by necessary implication, a principle often justified by the importance of "stability in the law" (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 21, per Cromwell J.). In *Lizotte*, Gascon J., writing for a unanimous Court, reiterated the general principle that applies to legislative departures from common law rules: "This Court has held that it must be presumed that a legislature does not intend to change existing common law rules in the absence of a clear provision to that effect . . ." (para. 56). Professor Ruth Sullivan has written that this presumption

"permits courts to insist on precise and explicit direction from the legislature before accepting any change. The common law is thus shielded from unclear or inadvertent legislative encroachment" (*The Construction of Statutes* (7th ed. 2022), at § 17.01.Pt1[2]; see also P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at Nos. 180-92).

[41] Canadian criminal law is made up of both statute law and common law principles (M. Vauclair and T. Desjardins, in collaboration with P. Lachance, *Traité général de preuve et de procédure pénales 2022* (29th ed. 2022), at Nos. 1.17-1.24, citing, among others, *D.L.W.*, at paras. 3, 15 and 57-59). The enactment of a criminal code in this country in 1892 did not have the effect of systematically displacing the common law as a source of law (D. H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (1989), at p. 126; G. H. Crouse, "A Critique of Canadian Criminal Legislation: Part One" (1934), 12 *Can. Bar Rev.* 545, at p. 565: "One fundamental principle of the Canadian Codification is that the common law is not superseded."). Today, the *Criminal Code* provides that, as a general rule, the common law is no longer a source of offences in Canada (s. 9(a)). It states, however, that common law defences continue in force except insofar as they are altered by statute (s. 8(3); *R. v. Tim*, 2022 SCC 12, at para. 27; see also J. Fortin and L. Viau, *Traité de droit pénal général* (1982), at p. 18). As Vauclair and Desjardins explain, reference may be made to the common law to interpret a criminal provision codifying a common law offence (No. 3.20, citing *R. v. Jobidon*, [1991] 2 S.C.R. 714).

[42] This coexistence of statute and common law is a feature of the law of sentencing (see Canadian Sentencing Commission, *Sentencing Structure in Canada: Historical Perspectives* (1988), at p. 35). While Part XXIII of the *Criminal Code* codifies "the fundamental . . . principles of sentencing" (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 1), courts can also take account of "other principles and factors arising from the common law" (D. Rose, *Quigley's Criminal Procedure in Canada* (loose-leaf), at § 23:6). Legislation also prevails over the common law in this area if Parliament displaces it expressly or by necessary implication (see, e.g., *R. v. Skolnick*, [1982] 2 S.C.R. 47, at p. 58).

[43] In *Lacasse*, this Court reiterated that courts must take account of a pre-sentence driving prohibition period in exercising their discretion to give credit (paras. 111-14, per Wagner J.; see also paras. 176-78, per Gascon J., dissenting, but not on this point). It is true that *Lacasse* did not concern a mandatory minimum and that, under s. 259(2)(a.1) *Cr. C.*, the sentence had begun at the end of the offender's incarceration. However, the judgment can guide us in this case, with the necessary modifications.

[44] The granting of such credit is anchored in the common law; it is one example, in the context of a driving prohibition, of what Arbour J. called the "well-established practice of sentencing judges [giving] credit for time served" (*Wust*, at para. 31). In the words of Paciocco J., as he then was, this rule is part of the "central principles of sentencing not statutorily expressed but still vibrant as 'general principles

of sentencing'" (*R. v. Pham*, 2013 ONCJ 635, 296 C.R.R. (2d) 178, at para. 18). As Wagner J. later noted in *Lacasse*, this principle has not been codified. Although s. 719(3) *Cr. C.* does codify the principle that credit can be granted in the case of pre-sentence custody, that provision has no statutory equivalent relating to pre-sentence driving prohibitions. The respondent takes the position here that the principle to which the Court referred in *Lacasse* was displaced by Parliament's enactment of the mandatory minimum, a consideration that did not arise on the facts of that case.

[45] The interaction between legislation and the common law in matters of sentencing and punishment is therefore at the heart of this appeal. The two-step framework used to analyze this interaction is well settled. The first step is "analysing, identifying and setting out the applicable common law"; and then, at the second step, "the statute law's effect on the common law must be specified" (*2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 97, per L'Heureux-Dubé J., citing *Zaidan Group Ltd. v. London (City)*, [1991] 3 S.C.R. 593, and *Frame v. Smith*, [1987] 2 S.C.R. 99; see also *Urban Mechanical Contracting Ltd. v. Zurich Insurance Co.*, 2022 ONCA 589, 163 O.R. (3d) 652, at para. 45). I therefore begin by determining the content of the common law rule that allows credit to be granted for a pre-sentence driving prohibition. I then turn to interpreting s. 259(1)(a) *Cr. C.*, taking s. 719(3) into account, in order to determine whether s. 259(1)(a) either expressly or by necessary implication has the effect of limiting or displacing the common law rule.

(1) The Common Law Allows Credit To Be Granted for a Pre-sentence Driving Prohibition

[46] It is well settled that the common law allows courts to grant credit for a pre-sentence driving prohibition imposed on an offender (see, e.g., *R. v. Goulding* (1987), 81 N.S.R. (2d) 158 (S.C. (App. Div.)); *R. v. Pellicore*, [1997] O.J. No. 226 (QL), 1997 CarswellOnt 246 (WL) (C.A.); *R. v. Williams*, 2009 NBPC 16, 346 N.B.R. (2d) 164; *Bilodeau v. R.*, 2013 QCCA 980; *Lacasse*). This common law discretion is a natural extension of an analogous principle that applies in the context of pre-sentence custody. Courts have long recognized that they can "take into consideration, in imposing sentence, any period of incarceration which the accused has already undergone between the date of his arrest and the date of the sentence" (*R. v. Sloan* (1947), 87 C.C.C. 198 (Ont. C.A.), at pp. 198-99, citing *R. v. Patterson* (1946), 87 C.C.C. 86 (Ont. C.A.)).

[47] The principle that credit can be granted for pre-sentence custody serves to mitigate certain injustices arising from the application of the principle that a sentence may not be backdated, now codified in s. 719(1). While Canadian law does not permit courts to backdate a sentence in order to reduce it, courts may nevertheless consider the time spent in pre-sentence custody in determining the period that must be served prospectively by an offender (*Sloan*, at pp. 198-99; see also *Patterson*; *R. v. Wells* (1969), 4 C.C.C. 25 (B.C.C.A.), at pp. 36-37, per Bull J.A., dissenting; A. Manson, "Pre-Sentence Custody and the Determination of a Sentence (Or How to Make a Mole

Hill out of a Mountain)" (2004), 49 *C.L.Q.* 292). The application of this common law rule allowing credit to be granted is therefore not equivalent to backdating a sentence.

[48] While it is true that the rule allowing credit for pre-sentence custody has now been codified, there is no statutory provision equivalent to s. 719(3) for pre-sentence driving prohibitions. The respondent argues that the fact that Parliament did not enact a provision equivalent to s. 719(3) for pre-sentence driving prohibitions was deliberate and reflects its intention to displace the common law rule allowing for credit in this context. Specifically, the respondent submits that Parliament "turned [its] mind" to the possibility of recognizing an analogous exception for driving and implicitly rejected it (transcript, at p. 28). With respect, I do not share the respondent's view. The absence of a statutory provision equivalent to s. 719(3) for pre-sentence prohibitions does not have the effect of displacing or limiting the common law rule allowing credit to be granted in such a context.

[49] The view that Parliament may codify one common law rule in order to implicitly exclude another calls to mind the maxim of interpretation *expressio unius est exclusio alterius*, that is, "to express one thing is to exclude another" (Sullivan (2022), at § 8.09; see also A. Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit* (4th ed. 2007), at p. 170; *McClurg v. Canada*, [1990] 3 S.C.R. 1020). However, courts are cautious about accepting such arguments based on Parliament's intention to implicitly exclude a common law rule since the context does not always permit assumptions to be made about a legislature's unexpressed thinking (Sullivan (2022), at

§ 17.01.Pt1[2]). In *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, Newcombe J. warned that if this rule is considered to be a principle of general application, it may be "a dangerous master to follow" because its usefulness depends on the context and it "is not always in the mind of a draughtsman" (p. 71). Accordingly, Cromwell J. wrote that "[a]bsent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law" (*D.L.W.*, at para. 21). This recalls the principle stated by Professor C. K. Allen: ". . . the Courts will not, if they can help it, allow any enactment to overrule existing Common Law *by inference* merely", but "[i]t is quite otherwise when the provision of the statute is express, or when there is a general clear intention to change the law" (*Law in the Making* (1992), at pp. 258-59 (emphasis in original)).

[50] Here, s. 719(3) was enacted in the specific context of pre-sentence custody. The legislative debates suggest that Parliament's intention in enacting this provision was to ensure that credit could still be granted when a mandatory minimum term of imprisonment was imposed (*Wust*, at para. 31, quoting *House of Commons Debates*, vol. 3, 3rd Sess., 28th Parl., February 5, 1971, at p. 3118). There is no indication that Parliament considered whether credit could be given for a pre-sentence driving prohibition. There is also nothing in the legislative debates to support the position that Parliament sought to displace, whether expressly or by necessary implication, the common law rule applicable to such prohibitions. In short, this is not a situation in which Parliament made clear its intention to displace or limit the applicable common law.

[51] In light of the foregoing, I am of the view that the enactment of s. 719(3) *Cr. C.* did not have the effect of limiting the common law rule that allows credit to be granted for a pre-sentence driving prohibition. This rule thus continues to be part of the positive law of sentencing. This being so, what remains to be determined is whether the rule has been displaced or limited by s. 259(1) *Cr. C.*, which, as the respondent points out, establishes mandatory maximum and minimum prohibition periods.

(2) Section 259(1)(a) *Cr. C.* Does Not Limit the Scope of the Common Law Rule That Allows Credit To Be Granted for a Pre-sentence Driving Prohibition

[52] Once the common law rule has been identified, the second step in the analysis is to consider the effect of the relevant statutory provision on that rule (*2747-3174 Québec Inc.*, at para. 97). For this purpose, the reach of s. 259(1)(a) *Cr. C.* must be understood using the modern approach to statutory interpretation (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559). Then it must be determined whether this provision has the effect of limiting or displacing the common law rule.

[53] Before undertaking this analysis, it is important to have a clear understanding of the distinction, first accepted by this Court in *Wust*, between the concepts of punishment and sentence. This distinction, which is at the heart of this appeal, is essential to a proper interpretation of the reach of s. 259(1)(a).

(a) *Distinction Between the Concepts of Punishment and Sentence*

[54] The question before the Court in *Wust* was whether an offender could be credited for pre-sentence custody if doing so meant that the sentence imposed would be shorter in length than the mandatory minimum provided for in the former s. 344(a) (now s. 344(1)(a)). Writing for a unanimous Court, Arbour J. answered that question in the affirmative. She noted at the outset that s. 719(3) had been enacted for the specific purpose of authorizing such credit in the context of a mandatory minimum. In addition, and importantly, she stated that no conflict resulted from the concurrent application of ss. 719(3) and 344(a). She explained that this absence of conflict flowed from the conceptual distinction between a punishment and a sentence.

[55] This distinction was considered from the perspective of the English-language terms "punishment" and "sentence" in *McDonald* by Rosenberg J.A., who relied on the work of the Canadian Sentencing Commission. The Commission clarified that the term "punishment" refers to "the imposition of severe deprivation on a person guilty of wrongdoing" (*Sentencing Reform: A Canadian Approach* (1987), at p. 109). It then stated that the word "sentence" — which comes from the Latin *sententia*, meaning "opinion or the expression of an opinion" — refers to a judicial statement ordering the imposition of a sanction and determining what it should be (p. 111).

[56] It can therefore be said that the concept of punishment is fundamentally different from that of sentence, since the former reflects the global punishment imposed on an offender whereas the latter concerns only the portion of the punishment that the

offender must serve after judgment is rendered. Nothing in the jurisprudence precludes this distinction from being applied in this case. I note that in *R. v. Mathieu*, 2008 SCC 21, [2008] 1 S.C.R. 723, a case concerning parole eligibility following time spent in pre-sentence custody, the Court held that only the period after sentencing is to be considered in determining such eligibility, although it acknowledged that it had dealt with the question differently in *Wust* (para. 7). For the purposes of a conditional sentence, on the other hand, what must be considered is the global punishment imposed on the offender, including the pre-sentence period (*R. v. Fice*, 2005 SCC 32, [2005] 1 S.C.R. 742). Similarly, where courts have had to determine the effect of a period of pre-sentence custody in cases involving a statutory maximum term of imprisonment, some provincial appellate courts have found, like this Court in *Wust* and *Fice*, that the relevant consideration is the global punishment, not the sentence imposed (*R. v. Walker*, 2017 ONCA 39, 345 C.C.C. (3d) 497, at paras. 20-26; *R. v. Severight*, 2014 ABCA 25, 566 A.R. 344, at para. 32; *R. v. LeBlanc*, 2005 NBCA 6, 279 N.B.R. (2d) 121, at para. 63).

[57] The distinction between "*peine*" in the sense of punishment and "*peine*" in the sense of a sentence is recognized in the French lexicon of Canadian law, taking into account the polysemy of the term "*peine*" (Canadian Sentencing Commission (1987), at pp. 108 and 111). Indeed, depending on the context, this term may refer either to the global punishment imposed on an offender or to the sentence handed down to an offender (see the Quebec Court of Appeal's *Lexique en droit pénal* (online)). This prompted the Commission to observe the fundamental difference between "*peine*", in

the sense of punishment, and sentence. The *Juridictionnaire*, a Canadian jurilinguistic study published by the Centre de traduction et de terminologie juridiques of the Université de Moncton, also draws this distinction, noting that [TRANSLATION] "[t]he *peine* [in the sense of "punishment"] is the sanction *incurred*, whereas the *sentence* is the judicial decision *imposing a punishment*" (J. Picotte, *Juridictionnaire: Recueil des difficultés et des ressources du français juridique*, October 15, 2018 (online), at p. 2035, para. 24 (emphasis in original)). In other words, whereas a sentence commences when it is handed down by a court, punishment encompasses [TRANSLATION] "[a]ny sanction imposed by a judicial authority in the application of a criminal statute" (H. Dumont, *Pénologie: Le droit canadien relatif aux peines et aux sentences* (1993), at p. 47).

[58] The double meaning of the French term "*peine*" is illustrated in several places in the *Criminal Code*. For example, s. 718.3(2), which limits judicial discretion where a mandatory minimum punishment exists, uses the term "*peine*" as the equivalent of the English "punishment". In contrast, s. 719(1), which states that "[a] sentence commences when it is imposed", also uses the term "*peine*" in French, but this time as the parallel to the English term "sentence". The identification of the exact English equivalent of the term "*peine*" (be it "punishment" or "sentence") depends on the context; this doublet may therefore give rise to interpretative difficulties in Canadian criminal law, where the rules for interpreting the bilingual legislative lexicon give each language version of an enactment an equal role in stating the law. Of course, this is not to say that the English word "sentence" is exclusively used to refer to the

judicial decision imposing a punishment. By way of example, the phrase "fit sentence" (often stated in French as "*peine juste*") typically refers to the idea of an appropriate global punishment (see, e.g., *R. v. Hills*, 2023 SCC 2, at para. 45).

[59] In light of this reality, and beyond the terminology used, particular attention should be paid to the purpose and context of the relevant provisions (*Wust*, at para. 36). It is true that, as a general rule, Parliament can be expected to exercise [TRANSLATION] "discipline" in legislative expression by not giving the same word different meanings in the same statute (G. Cornu, *Linguistique juridique* (3rd ed. 2005), at p. 105). In this vein, Professors Côté and Devinat refer to the [TRANSLATION] "principle of uniformity of expression" with which Parliament strives to comply and which, in statutory interpretation, justifies a presumption that "a word has the same meaning throughout" a statute (Nos. 1142-43). They recognize, however, that this presumption [TRANSLATION] "must give way when circumstances demonstrate that such was not the intention pursued by Parliament" (No. 1146, quoting *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 61). In my view, this is such a case. The word "*peine*" is used in different ways in the *Criminal Code*, sometimes to refer to a sentence, that is, a judicial decision, and sometimes to refer to a punishment. I note that most cases not involving pre-sentence prohibition orders or custody do not hinge on the conceptual distinction between "sentence" and "punishment".

[60] With this distinction in mind, I observe that the appellant's position as set out in her factum could be a source of confusion. She suggests that granting credit

results in the imposition of a prohibition period that is less than the statutory minimum. This approach reflects a line of cases, exemplified by *R. v. Sohal*, 2019 ABCA 293, 91 Alta. L.R. (6th) 48, in which courts appear not to distinguish between the concepts of punishment and sentence. This approach suggests, mistakenly in my respectful view, that the enactment of a mandatory minimum by Parliament requires a court to hand down a minimum *sentence* (see also *R. v. Fox*, 2022 ABQB 132, 89 M.V.R. (7th) 23; *R. v. Froese*, 2020 MBQB 11, 461 C.R.R. (2d) 1; *R. v. Osnach*, 2019 MBPC 1, 38 M.V.R. (7th) 257; *R. v. Bryden*, 2007 NBQB 316, 323 N.B.R. (2d) 119). According to this approach, there is no legal basis for reducing a mandatory minimum sentence because "[t]he inherent discretion of the court must yield to statutory language" (*Sohal*, at para. 15).

[61] However, when the appellant clarified her position at the hearing, she rightly recognized — as did the dissenting judge in this case — that a court has no choice but to impose the mandatory minimum prohibition expressly provided for in s. 259(1)(a). But the imposition of that minimum does not prevent the court, under the common law rule, from taking into account the pre-sentence prohibition period. Depending on the circumstances and at the sentencing judge's discretion, this period may form part of the punishment if the effect of the prohibition is "the same" before and after the offender is sentenced (*Lacasse*, at para. 113). Otherwise, if the effect is not the same, the court may consider it only as a mitigating factor, not as a period that can be credited pursuant to the common law discretion (see MacPherson J.A.'s

reasoning on this point in *R. v. Panday*, 2007 ONCA 598, 87 O.R. (3d) 1, at paras. 32-35).

[62] In this appeal, in light of the distinction reiterated by Arbour J. in *Wust*, it is therefore important to determine whether s. 259(1)(a) requires that a minimum *punishment* be imposed or that a minimum *sentence* be handed down. This interpretative exercise is what will decide the outcome of the appeal. If the minimum driving prohibition in s. 259(1)(a) is a minimum punishment, this section will not affect the applicability of the common law rule. Ms. Basque's pre-sentence driving prohibition can then "reduce" the ultimate length of her sentence in a manner consistent with Parliament's direction that the minimum punishment must be for one year. Conversely, if s. 259(1)(a) provides for a one-year minimum sentence, Ms. Basque will have to serve an additional one-year driving prohibition since this mandatory sentence will necessarily be prospective (s. 719(1) *Cr. C.*).

(b) *Section 259(1)(a) Provides for a Minimum Punishment, Not a Minimum Sentence*

[63] In accordance with the modern approach to statutory interpretation, the meaning of s. 259(1)(a) *Cr. C.* must be determined by considering its text, context and purpose (*Rizzo*, at para. 21; *Bell ExpressVu*, at para. 26; Côté and Devinat, at Nos. 165-70; E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). I propose to proceed as the Court did in *Bell ExpressVu*, that is, by looking first at the

grammatical and ordinary meaning of the words used in s. 259(1)(a) and then considering the provision's context and purpose.

[64] First of all, the text of s. 259(1)(a) is silent about whether a pre-sentence driving prohibition period can be taken into account (*Bland*, at para. 22). It also does not clearly indicate whether the minimum driving prohibition it provides for is a punishment or a sentence. In this regard, I note that the word "order" used in s. 259(1) is defined as a "decision of a court or judge" (*Oxford English Dictionary* (online)). *A priori*, this distinction may seem to link the word "order" to the concept of "sentence" (*Pham*, at para. 9).

[65] However, I would point out that the word "punishment" appears in s. 259(1), which provides that "the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle". It may be noted that the French version uses the word "*peine*" as the parallel term for "punishment" in this context. The wording of the provision in both languages thus suggests the view that the order to be made under s. 259(1)(a) is a punishment and not a sentence.

[66] In any event, the modern approach to interpretation cannot be focused solely on the words of the provision (*Rizzo*, at para. 21; *Bell ExpressVu*, at para. 26). As Professors Côté and Devinat say, the text [TRANSLATION] "must be construed in the light of the other indicia relevant to interpretation" (No. 167). I now turn to an analysis of the context and purpose of s. 259(1)(a).

[67] With regard to the context of this provision, I note that Parliament used different language in s. 109(2)(a) *Cr. C.*, which deals with a prohibition against the possession of firearms. This latter provision states that "[a]n order made under subsection (1) shall . . . prohibit the person from possessing . . . any firearm . . . during the period that (i) begins on the day on which the order is made, and (ii) ends not earlier than ten years after the person's release from imprisonment after conviction for the offence or, if the person is not then imprisoned or subject to imprisonment, after the person's conviction for or discharge from the offence" (emphasis added). In enacting s. 109(2)(a), Parliament chose to specify the date on which the order ends in the plainest of terms, thereby limiting the court's discretion to "reduce" the prohibition period going forward to less than the minimum period referred to in s. 109(2)(a). Moreover, the underlined passage shows that when Parliament wishes to impose a prospective prohibition for a specific length of time, it expresses this intention in clear language. However, there is nothing of the sort in s. 259(1)(a), which sets out neither a start date nor an end date for the one-year minimum driving prohibition.

[68] The purpose of s. 259(1)(a) *Cr. C.* also reinforces the idea that this provision establishes a minimum *punishment* and not a minimum *sentence*. Generally speaking, Parliament enacts mandatory minimums principally in order to deter and punish (see H. Parent and J. Desrosiers, *Traité de droit criminel*, t. III, *La peine* (3rd ed. 2020), at pp. 507-8; see also Paciocco, at p. 177). After setting out a detailed typology of punishments in Canadian criminal law, Professor Dumont states that [TRANSLATION] "any coercive measure that affects a person's life, integrity, security,

liberty or reputation or that interferes with the person's property and rights . . . is capable of being [a punishment] in the criminal law system" (p. 489). As was stated in *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, for a coercive measure to constitute punishment, it must, among other things, have "a significant impact on an offender's liberty or security interests" and be "a consequence of conviction" (para. 41). This typology includes measures such as [TRANSLATION] "victim compensation for certain crimes, a prohibition against driving or possessing a firearm [and] an inability to hold office or enter into a contract with the state" (Dumont, at p. 489 (emphasis added)). I agree with the view expressed by Paciocco J. in this regard in *Pham*: a driving prohibition is a form of punishment because it "is one of the arsenal of sanctions to which the accused may be liable upon conviction for a particular offence" (para. 22, referring to *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 62-63).

[69] While pre-sentence custody or a pre-sentence driving prohibition may initially be based on a desire to protect the public, post-conviction, this sanction can nevertheless ultimately have a punitive and deterrent effect on the offender and thus form part of the offender's punishment. On this point, Arbour J. wrote in *Wust* that "[t]o maintain that pre-sentencing custody can never be deemed punishment following conviction because the legal system does not punish innocent people is an exercise in semantics that does not acknowledge the reality of pre-sentencing custody" (para. 41 (emphasis in original)). She found that "while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction" (para. 41).

[70] These observations echo what Lamer C.J. said in *Sharma*, namely that the pre-sentence driving prohibition imposed on the offender had interfered with his liberty, such that he had essentially already begun serving his sentence (pp. 817-18; see also *Lacasse*, at para. 113). In reality, in Ms. Basque's case, the pre-sentence driving prohibition had the same punitive and deterrent effects as if it had been served after she was sentenced. Accordingly, viewing s. 259(1)(a) *Cr. C.* as requiring the imposition of a one-year punishment — that is, a global punishment, including the pre-sentence period — is perfectly in keeping with the objectives of deterrence and punishment that underlie this provision (on this point, see *Pham*, at paras. 10 and 28). I note, moreover, that Parliament uses the word "punishment" in s. 718.3(2) *Cr. C.* in delineating the court's discretion.

[71] If s. 259(1)(a) *Cr. C.* required that a minimum sentence be handed down, the results could well be counterintuitive, if not absurd. For example, the imposition of an additional driving prohibition for a minimum of one year would amount to double punishment for an offender who had already served all or part of the minimum driving prohibition period while awaiting trial. Such a result would be contrary to the most fundamental interests of justice, raising the spectre of double punishment "without the clearest of evidence to show that Parliament wanted to achieve such an outcome" (*Pham*, at para. 10).

[72] In addition, by analogy to what Arbour J. said in *Wust*, the appropriate difference between the punishments imposed on the most dangerous offenders and

those imposed on the least dangerous offenders could be unduly eroded. A hardened offender "whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first time offender whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing detention" (para. 42). Drawing on Arbour J.'s comments, I am of the view that any interpretation "that would reward the worst offender and penalize the least offender" (para. 42) must be avoided in this case. Finally, if s. 259(1)(a) *Cr. C.* required a minimum *sentence* to be handed down, it would undermine the precise gradation of minimum prohibition periods established by Parliament in s. 259(1)(a), (b) and (c), which French J.A., dissenting, noted (see C.A. reasons, at paras. 93-94 and 129). Indeed, an offender who merited only the one-year minimum punishment imposed for a first offence could, like Ms. Basque, be subject to the same deprivation of liberty as a chronic offender who was not prohibited from driving while awaiting trial.

[73] In keeping with the principles established by this Court, absent a clear intention to this effect, it must be presumed that Parliament did not intend to produce such absurd results (*Rizzo*, at para. 27, citing R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 88; *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, [2019] 3 S.C.R. 418, at para. 96, per Côté and Brown JJ., concurring).

(c) *Section 259(1)(a) Does Not Limit the Common Law Rule That Allows Credit To Be Granted for a Pre-Sentence Driving Prohibition*

[74] There is every indication that s. 259(1)(a) provides for a minimum punishment, not a minimum sentence. There is no ambiguity in this provision, which is silent with respect to credit. In *Bell ExpressVu*, this Court reiterated that an ambiguity must be "real", in the sense that the provision must be reasonably capable of more than one meaning (para. 29, quoting *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115). Reaching this conclusion requires a consideration of the entire context of the provision to ascertain whether there are "two or more plausible readings, each equally in accordance with the intentions of the statute" (*CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14). In this case, s. 259(1)(a) can be read in only one way: it provides for the imposition of a mandatory minimum *punishment* (in French "*peine*", used in this latter sense).

[75] Not only does this interpretation of s. 259(1)(a) *Cr. C.* leave room for the exercise of the court's discretion to grant credit, but it is also in line with the recommendation made by Arbour J. in *Wust* that "it is important to interpret legislation which deals . . . with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system" (para. 22).

[76] Because s. 259(1)(a) requires that an order be made prohibiting the offender from driving during a period of not less than one year, the sentencing judge was able to satisfy this requirement by making an order imposing a punishment for a total of one year. Granting credit does not negate the imposition of the minimum

punishment required by this provision. In this case, since the punishment had already been served in its entirety at the time of sentencing, no further prohibition was required.

D. *Court of Appeal's Stay of Execution of the Sentence*

[77] While not necessary in order to decide this appeal, I take note of the Crown's concession that it was inappropriate to ask that Ms. Basque's release be accompanied by a driving prohibition. The Court of Appeal was correct in its unanimous view that the release conditions imposed on Ms. Basque were unreasonable. She was ultimately prohibited from driving for 21 months and was thus treated more harshly than another offender not subject to a pre-sentence driving prohibition in otherwise similar, or more serious, circumstances. It is therefore understandable that the Court of Appeal was concerned about justice and fairness when it stayed the execution of the sentence imposed on Ms. Basque. The same preoccupation finds expression in the lower courts' judgments, even though they decided the case differently. The unanimous concern of the Court of Appeal aligns, in substance if not in law, with the solution proposed here. But with all due respect for the contrary view, reaching this solution does not require staying the execution of Ms. Basque's sentence. From a legal standpoint, she has served the mandatory minimum punishment provided for in s. 259(1)(a).

VI. Disposition

[78] I would allow the appeal and set aside the judgment of the Court of Appeal. I would restore the judgment of the summary conviction appeal court and reinstate the Provincial Court's conclusions in part, while specifying that Ms. Basque's sentence should not be backdated. By the time she was sentenced, she had already served, on a pre-sentence basis, the minimum driving prohibition set out in s. 259(1)(a). As a result, no further prohibition is needed in this case.

Appeal allowed.

Solicitors for the appellant: Fowler Law P.C. Inc., Moncton.

Solicitor for the respondent: Public Prosecution Service of New Brunswick, Office of the Attorney General, Fredericton.

Solicitor for the intervener: Alberta Crown Prosecution Service, Appeals and Specialized Prosecutions Office, Calgary.

Her Majesty The Queen in Right of Ontario *Appellant*

v.

974649 Ontario Inc. c.o.b. as Dunedin Construction (1992) and Bob Hoy *Respondents*

and

The Attorney General of Canada, the Attorney General of British Columbia, the Attorney General for Alberta and the Criminal Lawyers' Association of Ontario *Interveners*

Sa Majesté la Reine du chef de l'Ontario *Appelante*

c.

974649 Ontario Inc. faisant affaire sous le nom de Dunedin Construction (1992) et Bob Hoy *Intimés*

et

Le procureur général du Canada, le procureur général de la Colombie-Britannique, le procureur général de l'Alberta et la Criminal Lawyers' Association of Ontario *Intervenants*

INDEXED AS: R. *v.* 974649 ONTARIO INC.

Neutral citation: 2001 SCC 81.

File No.: 27084.

2000: December 6; 2001: December 6.

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

RÉPERTORIÉ : R. *c.* 974649 ONTARIO INC.

Référence neutre : 2001 CSC 81.

N° du greffe : 27084.

2000 : 6 décembre; 2001 : 6 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Constitutional law — Charter of Rights — Court of competent jurisdiction — Provincial offences courts — Whether justice of the peace acting under provincial offences legislation has power to order costs against Crown for Charter breach — Canadian Charter of Rights and Freedoms, s. 24(1) — Provincial Offences Act, R.S.O. 1990, c. P.33.

Droit constitutionnel — Charte des droits — Tribunal compétent — Tribunal des infractions provinciales — Le juge de paix agissant en vertu de la Loi sur les infractions provinciales a-t-il le pouvoir de condamner la Couronne aux dépens en cas de violation de la Charte? — Charte canadienne des droits et libertés, art. 24(1) — Loi sur les infractions provinciales, L.R.O. 1990, ch. P.33.

The respondents were charged under the Ontario *Occupational Health and Safety Act* with failing to comply with safety requirements on a construction project. The respondents requested that the appellant Crown disclose, among other items, a copy of the Prosecution Approval Form. The Crown twice refused to disclose the form on the ground that it was protected by solicitor-client privilege. A justice of the peace acting as a trial justice under the *Provincial Offences Act* ("*POA*") held that the Crown's failure to disclose this form amounted to a violation of the respondents' rights under the *Canadian Charter of Rights and Freedoms*. The justice of the peace

Les intimés ont été accusés, en vertu de la *Loi sur la santé et la sécurité au travail* de l'Ontario, de ne pas avoir respecté les règles de sécurité sur un chantier de construction. Ils ont demandé à la Couronne de leur communiquer, entre autres choses, une copie du formulaire autorisant l'engagement de poursuites. La Couronne a, à deux reprises, refusé de communiquer ce document, invoquant le secret professionnel de l'avocat. Le juge de paix qui a présidé le procès en vertu de la *Loi sur les infractions provinciales* (« *LIP* ») a conclu que le défaut de la Couronne de communiquer le formulaire en question constituait une atteinte aux droits garantis aux

ordered the Crown to disclose the form and to pay the costs of the respondents' disclosure motion. The Crown disclosed the form, but successfully applied to the Ontario Court (General Division) to have the order for costs quashed on the basis that a provincial offences court is not a "court of competent jurisdiction" to direct such an order under s. 24(1) of the *Charter*. The Court of Appeal held that a justice operating under the *POA* does have the power to issue such an order and allowed the appeal. It remanded the case to the General Division to determine whether in the circumstances of the case he erred in granting costs.

Held: The appeal should be dismissed. A justice of the peace presiding at a trial under the *POA* has power to order legal costs against the Crown for a *Charter* breach.

If a government action is inconsistent with the *Charter*, s. 24 provides remedies for the inconsistency. Section 24(1) permits a "court of competent jurisdiction" to provide "such remedy as the court considers appropriate and just in the circumstances". A "court of competent jurisdiction" is one that possesses (1) jurisdiction over the person; (2) jurisdiction over the subject matter; and (3) jurisdiction to grant the remedy. The court should interpret s. 24 of the *Charter* to facilitate direct access to appropriate and just *Charter* remedies, while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals.

A legislative grant of remedial power under s. 24 may be either express or implied. A "functional and structural" approach to determining whether a tribunal is competent to grant *Charter* remedies under s. 24(2) accords with the approach to discerning the implied powers of statutory bodies; with the test established for determining whether a tribunal has jurisdiction to consider *Charter* issues under s. 52(1) of the *Constitution Act, 1982*; and with the principles underlying s. 24. It strikes a balance between meaningful access to *Charter* relief and deference to the role of the legislatures, and promotes direct and early access to *Charter* remedies in forums competent to issue such relief. At the same time, Parliament and the legislatures, subject to constitutional constraints, may expressly or impliedly withhold the power to grant any or all *Charter* remedies. Whether Parliament or

intimés par la *Charte canadienne des droits et libertés*. Le juge de paix a ordonné à la Couronne de communiquer le formulaire et de payer aux intimés les dépens afférents à leur requête en communication. La Couronne a communiqué le formulaire, mais a demandé avec succès à la Cour de l'Ontario (Division générale) l'annulation de l'ordonnance la condamnant aux dépens, pour le motif que le tribunal des infractions provinciales n'était pas un « tribunal compétent » au sens du par. 24(1) de la *Charte* pour rendre une telle ordonnance. La Cour d'appel de l'Ontario a estimé que le juge agissant en vertu de la *LIP* avait le pouvoir de rendre une telle ordonnance et a accueilli l'appel. Elle a renvoyé l'affaire à la Division générale pour que celle-ci décide si, eu égard aux circonstances de l'espèce, le juge avait fait erreur en accordant les dépens.

Arrêt : Le pourvoi est rejeté. Le juge de paix qui préside un procès en vertu de la *LIP* a le pouvoir de condamner la Couronne à payer les frais de justice en cas de violation de la *Charte*.

Si un acte du gouvernement est contraire à la *Charte*, l'art. 24 établit le droit d'obtenir réparation à cet égard. Le paragraphe 24(1) permet à « un tribunal compétent » d'accorder « la réparation que le tribunal estime convenable et juste eu égard aux circonstances ». Un « tribunal compétent » est un tribunal qui a (1) compétence sur l'intéressé, (2) compétence sur l'objet du litige, et (3) compétence pour accorder la réparation demandée. Les tribunaux doivent interpréter l'art. 24 d'une manière propre à faciliter l'accès direct aux réparations convenables et justes prévues par la *Charte*, tout en respectant la structure et les pratiques du système judiciaire existant ainsi que le rôle qui appartient en exclusivité au Parlement et aux législatures, savoir celui de fixer la compétence des tribunaux judiciaires et administratifs.

Le pouvoir de réparation visé à l'art. 24 peut être accordé de façon explicite ou implicite dans une loi. L'approche « fonctionnelle et structurelle » appliquée pour déterminer si un tribunal a compétence pour accorder des réparations en vertu du par. 24(2) de la *Charte* est compatible avec l'approche générale permettant de reconnaître les pouvoirs implicites des organismes créés par une loi, avec le critère établi pour décider si un tribunal est compétent pour examiner les questions relatives à la *Charte* au regard du par. 52(1) de la *Loi constitutionnelle de 1982* et avec les principes qui sous-tendent l'art. 24. L'approche fonctionnelle et structurelle permet de réaliser l'équilibre entre l'accès concret aux réparations prévues par la *Charte* et la déférence envers le rôle des législatures, en plus de favoriser l'accès direct et rapide aux réparations fondées sur la *Charte* devant

a legislature intended to exclude a particular remedial power is determined by reference to the function the legislature has asked the tribunal to perform and the powers and processes with which it has furnished it.

Applying this approach to the *POA* suggests that provincial offences courts have power to award costs under s. 24(1). As quasi-criminal courts, they are the preferred forum, in terms of information, for issuing *Charter* remedies in cases before them, particularly where the *Charter* violation relates to the conduct of the trial. The legislature has given them a full complement of criminal law remedies to fill gaps in statutory jurisdiction, and to ensure that the remedy that ultimately flows is in fact both appropriate and just. Costs awards to discipline untimely disclosure are integrally connected to the function of the provincial offences court as a quasi-criminal trial court. Fracturing the availability of *Charter* remedies between provincial offences courts and superior courts could, in some circumstances, effectively deny the accused access to a remedy and a court of competent jurisdiction. The provincial offences court has detailed procedural rules, and abides by the standard rules of evidence. Judicial independence is required of justices of the peace. They receive legal training. The court's rulings are subject to appellate review, and there can be interveners on this appeal. Various considerations suggest that the fashioning of costs orders as a *Charter* remedy may be safely entrusted to provincial offences courts.

In sum, the function and structure of the *POA* indicate that the legislature intended the *POA* court to deal with *Charter* issues incidental to its process that it is suited to resolve. *POA* justices may thus be assumed, absent a contrary indication, to possess the power to order payment of legal costs by the Crown as a remedy for *Charter* violations arising from untimely disclosure.

des juridictions compétentes pour les accorder. Par ailleurs, sous réserve des limites d'ordre constitutionnel, le Parlement et les législatures peuvent priver explicitement ou implicitement un tribunal du pouvoir d'accorder soit toute réparation fondée sur la *Charte* soit l'une ou l'autre de ces réparations. Pour décider si le Parlement ou la législature concernée entendait exclure un pouvoir de réparation donné, on examine la fonction qu'il a demandé au tribunal d'accomplir, ainsi qu'aux pouvoirs et procédures dont celui-ci a été doté.

L'application de cette approche à la *LIP* suggère que le tribunal des infractions provinciales a le pouvoir d'accorder les dépens en vertu du par. 24(1). En tant que juridiction quasi criminelle, le tribunal des infractions provinciales constitue, du point de vue de la connaissance des faits, la juridiction privilégiée pour accorder des réparations fondées sur la *Charte* dans les affaires introduites devant lui, particulièrement lorsque la violation de la *Charte* est liée au déroulement du procès. La législature l'a doté de toute la panoplie des réparations du droit criminel pour suppléer aux lacunes de la compétence prévue par la loi et pour garantir que la réparation accordée en bout de ligne soit dans les faits convenable et juste. Le prononcé d'une condamnation aux dépens pour sanctionner la communication tardive d'éléments de preuve fait partie intégrante du rôle du tribunal des infractions provinciales en tant que cour de juridiction quasi criminelle. Le fait de diviser entre le tribunal des infractions provinciales et les cours supérieures le pouvoir d'ordonner des réparations fondées sur la *Charte* pourrait avoir pour effet, dans certains cas, d'empêcher concrètement l'accusé d'avoir accès à une réparation et à un tribunal compétent. Le tribunal des infractions provinciales dispose de ses propres règles de procédure détaillées et il suit les règles de preuve ordinaires. Les juges de paix doivent être indépendants. Ils reçoivent une formation juridique. Les décisions du tribunal sont susceptibles de révision par voie d'appel et des intervenants peuvent participer à cet appel. Diverses considérations tendent à indiquer qu'on peut confier sans risque au tribunal des infractions provinciales la responsabilité d'élaborer des ordonnances en matière de dépens en tant que réparation fondée sur la *Charte*.

En résumé, la fonction et la structure de la *LIP* indiquent que la législature entendait que le tribunal de la *LIP* examine les questions incidentes liées à la *Charte* qui surviennent dans le cours de ses procédures et qu'il est apte à résoudre. Sauf indication contraire, on peut donc présumer que les juges de la *LIP* possèdent le pouvoir d'ordonner à la Couronne de payer les frais de justice à titre de réparation pour les violations de la *Charte* découlant du défaut de communiquer la preuve en temps utile.

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Hart Schwartz and *Line Forestier*, for the appellant.

Norman A. Keith and *Rebecca K. Saturley*, for the respondents.

Nancy L. Irving and *Peter De Freitas*, for the intervener the Attorney General of Canada.

George H. Copley, *Q.C.*, for the intervener the Attorney General of British Colombia.

Written submissions only by *James A. Bowron*, for the intervener the Attorney General for Alberta.

Kent Roach, for the intervener the Criminal Lawyers' Association of Ontario.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1998), 42 O.R. (3d) 354, 166 D.L.R. (4th) 593, 114 O.A.C. 258, 130 C.C.C. (3d) 1, 39 C.C.E.L. (2d) 1, 58 C.R.R. (2d) 1, [1998] O.J. No. 4735 (QL), qui a accueilli un appel d'une décision de la Cour de l'Ontario (Division générale) (1995), 25 O.R. (3d) 420, 101 C.C.C. (3d) 48, [1995] O.J. No. 2330 (QL), qui avait fait droit à la demande de contrôle judiciaire présentée par l'appelante. Pourvoi rejeté.

Hart Schwartz et *Line Forestier*, pour l'appelante.

Norman A. Keith et *Rebecca K. Saturley*, pour les intimés.

Nancy L. Irving et *Peter De Freitas*, pour l'intervenant le procureur général du Canada.

George H. Copley, *c.r.*, pour l'intervenant le procureur général de la Colombie-Britannique.

Argumentation écrite seulement par *James A. Bowron*, pour l'intervenant le procureur général de l'Alberta.

Kent Roach, pour l'intervenante la Criminal Lawyers' Association of Ontario.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 This appeal raises the issue of whether a provincial court justice acting under the Ontario *Provincial Offences Act*, R.S.O. 1990, c. P.33 ("*POA*"), has the power to order costs against the Crown for failure to comply with the *Canadian Charter of Rights and Freedoms*. While on its face a matter of procedure, the issue is of importance. To the extent that it is difficult or impossible to obtain remedies for *Charter* breaches, the *Charter* ceases to be an effective instrument for maintaining the rights of Canadians.

2 The respondents were charged under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, with failing to comply with safety requirements on a construction project. The prosecution proceeded. The respondents requested that the Crown disclose, among other items, a copy of the Prosecution Approval Form. This form is routinely prepared by Ministry of Labour inspectors when deciding whether to lay charges under the *Occupational Health and Safety Act*. The Crown twice refused to disclose the form on the ground that it was protected by solicitor-client privilege. A justice of the peace acting as a trial justice under the *POA* held that the Crown's failure to disclose this form amounted to a violation of the respondents' rights under the *Charter*.

3 The justice of the peace ordered the Crown to disclose the form and to pay the costs of the respondents' disclosure motion. The Crown disclosed the form, but successfully applied to have the order for costs quashed on the basis that a provincial offences court is not a "court of competent jurisdiction" to direct such an order under s. 24(1) of the *Charter*. The Ontario Court of Appeal held that a justice

Version française du jugement de la Cour rendu par

LE JUGE EN CHEF —

I. Introduction

Le présent pourvoi soulève la question de savoir si le juge agissant en vertu de la *Loi sur les infractions provinciales* de l'Ontario, L.R.O. 1990, ch. P.33 (« *LIP* »), peut condamner la Couronne aux dépens pour cause de violation de la *Charte canadienne des droits et libertés*. Bien qu'il s'agisse à première vue d'une question d'ordre procédural, elle n'en est pas moins importante. Dans la mesure où il est difficile ou impossible d'obtenir réparation en cas de violation de la *Charte*, celle-ci cesse de protéger efficacement les droits des Canadiens.

Les intimés ont été accusés, en vertu de la *Loi sur la santé et la sécurité au travail*, L.R.O. 1990, ch. O.1, de ne pas avoir respecté les règles de sécurité sur un chantier de construction. Des poursuites ont été intentées. Les intimés ont demandé à la Couronne de leur communiquer, entre autres choses, une copie du formulaire autorisant l'engagement de poursuites. Les inspecteurs du ministère du Travail remplissent systématiquement ce formulaire lorsqu'ils décident de l'à-propos de porter des accusations en vertu de la *Loi sur la santé et la sécurité au travail*. La Couronne a, à deux reprises, refusé de communiquer ce document, invoquant le secret professionnel de l'avocat. Le juge de paix qui a présidé le procès en vertu de la *LIP* a conclu que le défaut de la Couronne de communiquer le formulaire en question constituait une atteinte aux droits garantis par la *Charte* aux intimés.

Il a ordonné à la Couronne de communiquer le formulaire et de payer aux intimés les dépens afférents à leur requête en communication. La Couronne a communiqué le formulaire, mais a demandé avec succès l'annulation de l'ordonnance la condamnant aux dépens pour le motif que le tribunal des infractions provinciales n'était pas un « tribunal compétent » au sens du par. 24(1) de la

operating under the *POA* does have the power to issue such an order and allowed the appeal. The Crown appeals that order to this Court.

I conclude that a trial justice acting under the Ontario *POA* has power to order legal costs against the Crown for a *Charter* breach.

II. Constitutional and Statutory Provisions

Section 24 of the *Charter* provides as follows:

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.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Section 90 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, provides as follows:

90. (1) The validity of any proceeding is not affected by,

(a) any irregularity or defect in the substance or form of the summons, warrant, offence notice, parking infraction notice, undertaking to appear or recognizance; or

(b) any variance between the charge set out in the summons, warrant, parking infraction notice, offence notice, undertaking to appear or recognizance and the charge set out in the information or certificate.

(2) Where it appears to the court that the defendant has been misled by any irregularity, defect or variance mentioned in subsection (1), the court may adjourn the hearing and may make such order as the court considers appropriate, including an order under section 60 for the payment of costs.

Charter pour rendre une telle ordonnance. La Cour d'appel de l'Ontario a estimé que le juge agissant en vertu de la *LIP* avait le pouvoir de rendre une telle ordonnance et a accueilli l'appel. La Couronne se pourvoit contre cette ordonnance auprès de notre Cour.

Je conclus que les juges qui président les procès en vertu de la *LIP* de l'Ontario ont le pouvoir de condamner la Couronne aux dépens en cas de violation de la *Charte*. 4

II. Les dispositions constitutionnelles et législatives pertinentes

L'article 24 de la *Charte* est ainsi rédigé : 5

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

L'article 90 de la *Loi sur les infractions provinciales*, L.R.O. 1990, ch. P.33, prévoit ce qui suit : 6

90 (1) Ne portent pas atteinte à la validité d'une instance :

a) les irrégularités ou les vices de fond ou de forme dans l'assignation, le mandat, l'avis d'infraction, l'avis d'infraction de stationnement, la promesse de comparaître ou l'engagement;

b) les divergences entre l'accusation énoncée dans l'assignation, le mandat, l'avis d'infraction de stationnement, l'avis d'infraction, la promesse de comparaître ou l'engagement et celle énoncée dans la dénonciation ou le procès-verbal.

(2) Si le tribunal estime que le défendeur a été induit en erreur par une irrégularité, un vice ou une divergence mentionnées au paragraphe (1), il peut ajourner l'audience et rendre l'ordonnance qu'il juge appropriée, y compris ordonner le paiement de dépens aux termes de l'article 60.

III. Judgments

A. *Ontario Court (Provincial Division)* (March 23, 1995)

7 Justice of the peace Harris found that the Crown had failed in its duty of disclosure by withholding the requested Prosecution Approval Form, but refused to stay the proceedings or quash the charges. Instead, he ordered production of the document to the respondents and awarded costs in the amount of $2000. In reaching this conclusion, he relied on *R. v. Mardave Construction (1990) Ltd.*, Ont. Ct. (Prov. Div.), January 10, 1994, which held that the disclosure of the Prosecution Approval Form by the Ministry of Labour is an essential element of the Crown's duty of full and complete disclosure.

B. *Ontario Court (General Division)* (1995), 25 O.R. (3d) 420

8 McRae J. of the Ontario Court (General Division) quashed this order on the ground that a provincial offences court does not have jurisdiction under s. 24(1) of the *Charter* to award costs against the Crown for violations of an accused's *Charter* rights. Citing *Mills v. The Queen*, [1986] 1 S.C.R. 863, McRae J. held that a *POA* trial court could constitute a "court of competent jurisdiction" to issue such an award under s. 24(1) only if it enjoyed jurisdiction over the person, jurisdiction over the offence or subject matter, and power to grant the remedy sought. Since the first two elements of this test were clearly satisfied, his analysis addressed the final issue of whether a trial justice operating under the *POA* is empowered, independently of the *Charter*, to issue an award of costs.

9 McRae J. concluded that the *POA* does not confer jurisdiction to award legal fees; in fact, he observed that the history and structure of the *POA* evinced a

III. Les décisions des juridictions inférieures

A. *Cour de l'Ontario (Division provinciale)* (23 mars 1995)

Le juge de paix Harris a conclu que la Couronne avait manqué à son obligation en matière de communication de la preuve en ne produisant pas le formulaire autorisant l'engagement de poursuites qui était demandé, mais il a refusé d'ordonner l'arrêt des procédures ou d'annuler les accusations. Il a plutôt ordonné la production du document aux intimés et leur a accordé la somme de 2000 $ au titre des dépens. Il a tiré cette conclusion en s'appuyant sur l'affaire *R. c. Mardave Construction (1990) Ltd.*, C. Ont. (Div. prov.), 10 janvier 1994, dans laquelle il a été jugé que la communication du formulaire par le ministère du Travail était un aspect essentiel de l'obligation de communication complète et intégrale de la preuve par la Couronne.

B. *Cour de l'Ontario (Division générale)* (1995), 25 O.R. (3d) 420

Le juge McRae de la Cour de l'Ontario (Division générale) a annulé cette ordonnance pour le motif que le tribunal des infractions provinciales n'a pas compétence, en vertu du par. 24(1) de la *Charte*, pour condamner la Couronne aux dépens en cas de violation des droits garantis à l'accusé par la *Charte*. Se référant à l'arrêt *Mills c. La Reine*, [1986] 1 R.C.S. 863, le juge McRae a conclu que la juridiction de jugement dans le cadre d'une instance fondée sur la *LIP* peut constituer un « tribunal compétent » pour accorder une telle réparation en vertu du par. 24(1), seulement si elle a compétence sur l'intéressé ainsi que sur l'infraction ou l'objet du litige et si elle possède le pouvoir d'accorder la réparation demandée. Comme les deux premiers éléments de ce critère étaient clairement respectés, il a fait porter son analyse sur le dernier point, la question de savoir si le juge présidant un procès en vertu de la *LIP* a le pouvoir, indépendamment de la *Charte*, de prononcer une ordonnance relative aux dépens.

Le juge McRae a conclu que la *LIP* ne conférait pas compétence pour adjuger les frais de justice. En fait, il a souligné que l'historique et l'économie de

clear legislative intention to preclude such awards. Further, he concluded that the Provincial Division, as a statutory court, has no inherent or additional jurisdiction with respect to the award of costs against the Crown in provincial offences proceedings. Absent statutory or inherent jurisdiction to order costs under the *POA*, McRae J. held that such jurisdiction could not flow under s. 24(1). In this regard, he distinguished a series of cases where such jurisdiction was found in provincial courts operating under the *Criminal Code*, R.S.C. 1985, c. C-46, noting that these cases involved the expansion of existing statutory authority to order costs against the Crown. Since the provincial offences court lacked this original jurisdiction, it could not constitute a "court of competent jurisdiction" to order the remedy sought in this case.

la *LIP* faisaient ressortir l'intention claire du législateur de ne pas accorder ce pouvoir. Il a ajouté que, en tant que tribunal créé par une loi, la Division provinciale n'avait aucune compétence inhérente ou supplémentaire l'habilitant à condamner la Couronne aux dépens dans le cadre de procédures relatives aux infractions provinciales. Le juge McRae a estimé que, en l'absence de compétence inhérente ou prévue par la loi permettant de statuer sur les dépens en vertu de la *LIP*, cette compétence ne pouvait découler du par. 24(1). À cet égard, il a distingué la présente affaire d'une série de décisions dans lesquelles il a été jugé que les cours provinciales agissant en vertu du *Code criminel*, L.R.C. 1985, ch. C-46, possédaient cette compétence, soulignant que ces décisions concernaient l'élargissement du pouvoir d'origine législative existant de condamner la Couronne aux dépens. Étant donné que le tribunal des infractions provinciales ne disposait pas de cette compétence initiale, il ne pouvait être un « tribunal compétent » pour ordonner la réparation demandée en l'espèce.

C. *Ontario Court of Appeal* (1998), 42 O.R. (3d) 354

C. *Cour d'appel de l'Ontario* (1998), 42 O.R. (3d) 354

The Ontario Court of Appeal, *per* O'Connor J.A., allowed the appeal on the basis that s. 90(2) of the *POA* empowers a provincial offences court to order costs against the Crown, albeit in limited circumstances, and that this sufficed to establish jurisdiction under s. 24(1) to make an award of costs for a *Charter* breach.

10 La Cour d'appel de l'Ontario, sous la plume du juge O'Connor, a accueilli l'appel pour le motif que le par. 90(2) de la *LIP* habilitait le tribunal des infractions provinciales à condamner la Couronne aux dépens — quoique dans des circonstances limitées — et que cela suffisait pour établir l'existence de la compétence de prononcer, en vertu du par. 24(1), une ordonnance relative aux dépens en cas de violation de la *Charte*.

O'Connor J.A. noted that the discretion conferred by s. 90(2) on *POA* justices to "make such order as the court considers appropriate" is exceedingly broad on its face. Moreover, he found nothing in the language or scheme of s. 90(2), or the *POA* as a whole, that indicated an intention to limit or restrict the ordinary meaning of this provision. Consequently, he concluded at p. 360 that s. 90(2), unlike the other costs provisions in the *POA*, "confers a broad and general power that includes, but ... is not limited to, ordering the payment of witness costs". This power extends to the award of legal

11 Le juge O'Connor a souligné que le pouvoir discrétionnaire de « rendre l'ordonnance qu'il juge appropriée » qui est conféré par le par. 90(2) au juge de la *LIP* est à première vue extrêmement large. Qui plus est, il n'a rien vu dans le texte ou l'économie du par. 90(2) ou dans la *LIP* considérée globalement qui indiquait l'intention de restreindre le sens ordinaire de cette disposition. Il a en conséquence conclu que, contrairement aux autres dispositions relatives aux dépens figurant dans la *LIP*, le par. 90(2) [TRADUCTION] « confère un pouvoir large et général qui permet notamment d'ordonner

costs against the Crown where the court is satisfied that the defendant has been misled by certain procedural irregularities, as set out under s. 90(1).

12 The remaining question was whether this narrow remedial jurisdiction under the *POA* satisfies the requirement of "power to grant the remedy sought" necessary to constitute a court of competent jurisdiction under s. 24(1). O'Connor J.A. concluded that it did. Even a narrowly prescribed authority to issue a remedy, in his opinion, suffices to enable the court to make the same type of remedial order for a *Charter* breach. Where, as here, a court has the power to make the type of order sought (i.e. for legal costs) independently of the *Charter*, even in very limited circumstances, it also has the power to make the same order for a *Charter* breach under s. 24(1). Having concluded that justice of the peace Harris had jurisdiction to make the costs award for the *Charter* breach, the Court of Appeal remanded the case to the General Division to determine whether in the circumstances of the case he erred in granting costs.

IV. Issue

13 The sole issue is whether a trial justice acting under the Ontario *Provincial Offences Act* has the power to award costs for a *Charter* breach.

V. Analysis

14 The *Charter* guarantees the fundamental rights and freedoms of all Canadians. It does this through two kinds of provisions. The first are provisions describing the rights and freedoms guaranteed. The second are provisions providing remedies or sanctions for breaches of these rights. If a law is inconsistent with the *Charter*, s. 52 of the *Constitution Act, 1982* provides that it is invalid to the extent of

le paiement des frais des témoins » (p. 360). Ce pouvoir autorise également le tribunal à condamner la Couronne au paiement des frais de justice, lorsqu'il estime que le défendeur a été induit en erreur par certaines irrégularités procédurales prévues au par. 90(1).

La dernière question à trancher était de savoir si la compétence limitée en matière de réparation prévue par la *LIP* satisfaisait la condition exigeant que le tribunal concerné ait le « pouvoir d'accorder la réparation demandée » nécessaire pour être un tribunal compétent au sens du par. 24(1). Le juge O'Connor a estimé que tel était le cas. À son avis, même un pouvoir de réparation restreint suffit pour habiliter le tribunal à rendre le même genre d'ordonnance réparatrice en cas de violation de la *Charte*. Lorsque, comme en l'espèce, le tribunal a le pouvoir de rendre le genre d'ordonnance demandée (c.-à-d. relative aux frais de justice) indépendamment de la *Charte*, même dans des circonstances très limitées, il a également le pouvoir de rendre la même ordonnance en vertu du par. 24(1) pour cause de violation de la *Charte*. Ayant conclu que le juge de paix Harris avait compétence pour adjuger les dépens à l'égard de la violation de la *Charte*, la Cour d'appel a renvoyé l'affaire à la Division générale pour que celle-ci décide si, eu égard aux circonstances de l'espèce, le juge de paix Harris avait fait erreur en les accordant.

IV. La question en litige

La seule question en litige est de savoir si le juge qui préside un procès en vertu de la *Loi sur les infractions provinciales* de l'Ontario a le pouvoir d'adjuger les dépens pour cause de violation de la *Charte*.

V. L'analyse

La *Charte* garantit les droits et libertés fondamentaux de tous les Canadiens. Elle le fait au moyen de deux types de dispositions. Les premières décrivent les droits et libertés garantis. Les deuxièmes établissent les réparations ou sanctions applicables en cas d'atteintes à ces droits. Les dispositions de toute règle de droit incompatibles avec la *Charte* sont rendues inopérantes par l'effet de

the inconsistency. On the other hand, if a government action is inconsistent with the *Charter*, s. 24 provides remedies for the inconsistency. If the violation produced evidence that the Crown seeks to use against the accused, s. 24(2) provides that the court must exclude the evidence if its admission would bring the administration of justice into disrepute. In other cases, s. 24(1) permits a "court of competent jurisdiction" to provide "such remedy as the court considers appropriate and just in the circumstances". If a remedy is to be had in the instant case, it must issue under s. 24(1).

The essential issue is whether the trial justice who ordered the Crown to pay costs is a "court of competent jurisdiction" under s. 24(1) to make such an award. This Court has considered the attributes of a "court of competent jurisdiction" on a number of occasions, commencing with its seminal decision in *Mills*, *supra*. In that case, Lamer J. (as he then was), with whom all agreed on this point, defined a "court of competent jurisdiction" as one that possesses (1) jurisdiction over the person; (2) jurisdiction over the subject matter; and (3) jurisdiction to grant the remedy (p. 890). Subsequent decisions of this Court have affirmed this three-tiered test for identifying the courts and tribunals competent to issue *Charter* remedies under s. 24: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75. Only where a court or tribunal possesses all three attributes is it considered a "court of competent jurisdiction" for the purpose of ordering the desired *Charter* relief under s. 24.

In the present case, the jurisdiction of the provincial offences court over the parties and the subject matter is uncontested. The dispute between the parties centres on the third and final attribute of a court of competent jurisdiction: the power to grant the remedy sought. In determining whether the *POA* justice in this case possessed the "power to grant the remedy sought", namely legal costs, we are guided

l'art. 52 de la *Loi constitutionnelle de 1982*. D'autre part, si un acte du gouvernement est contraire à la *Charte*, l'art. 24 établit le droit d'obtenir réparation à cet égard. Si la violation a permis d'obtenir des éléments de preuve que la Couronne entend utiliser contre l'accusé, le par. 24(2) prescrit que le tribunal doit les écarter si leur utilisation est susceptible de déconsidérer l'administration de la justice. Dans les autres cas, le par. 24(1) permet à un « tribunal compétent » d'accorder « la réparation que le tribunal estime convenable et juste eu égard aux circonstances ». S'il y a lieu d'accorder une réparation en l'espèce, elle doit l'être en vertu du par. 24(1).

15 La question fondamentale consiste à déterminer si le juge qui a ordonné à la Couronne de payer les dépens est « un tribunal compétent » au sens du par. 24(1) pour rendre une telle ordonnance. Notre Cour a examiné les attributs d'un « tribunal compétent » à plusieurs reprises depuis son arrêt de principe en la matière, l'arrêt *Mills*, précité. Dans cette affaire, le juge Lamer (plus tard Juge en chef du Canada), avec l'appui des autres juges sur ce point, a défini un « tribunal compétent » comme étant un tribunal qui a (1) compétence sur l'intéressé, (2) compétence sur l'objet du litige, et (3) compétence pour accorder la réparation demandée (p. 890). Dans des arrêts ultérieurs, notre Cour a confirmé ce critère à trois volets permettant d'identifier les tribunaux judiciaires et administratifs qui sont compétents pour accorder des réparations fondées sur l'art. 24 de la *Charte* : *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929; *Mooring c. Canada (Commission nationale des libérations conditionnelles)*, [1996] 1 R.C.S. 75. Ce n'est que dans les cas où le tribunal judiciaire ou administratif concerné possède les trois attributs qu'il est considéré comme un « tribunal compétent » pour accorder la réparation voulue en vertu de l'art. 24 de la *Charte*.

16 En l'espèce, personne ne conteste la compétence du tribunal des infractions provinciales sur les parties et sur l'objet du litige. Le différend entre les parties porte sur le troisième et dernier attribut d'un tribunal compétent : le pouvoir d'accorder la réparation demandée. Pour déterminer si, en l'espèce, le juge de la *LIP* possédait le « pouvoir d'accorder la réparation demandée », à savoir les frais de justice,

by the principles set out in previous decisions, and the approach these decisions mandate to interpreting s. 24 of the *Charter*.

A. *Section 24: Principles of Interpretation*

17 In interpreting the phrase "court of competent jurisdiction", we must keep in mind four related propositions. These propositions have informed the Court's approach to s. 24 since it first considered this provision in *Mills*.

18 First, s. 24(1), like all *Charter* provisions, commands a broad and purposive interpretation. This section forms a vital part of the *Charter*, and must be construed generously, in a manner that best ensures the attainment of its objects: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134. Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a "large and liberal" interpretation: *British Columbia Development Corp. v. Friedmann*, [1984] 2 S.C.R. 447, at p. 458; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, at para. 21. Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights. In *Mills*, McIntyre J. observed at p. 965 that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion". This broad remedial mandate for s. 24(1) should not be frustrated by a "[n]arrow and technical" reading of the provision (see *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at p. 366).

19 The second proposition flows from the first: s. 24 must be interpreted in a way that achieves its

nous suivons les principes énoncés dans les arrêts antérieurs et l'approche prescrite par ceux-ci aux fins d'interprétation de l'art. 24 de la *Charte*.

A. *L'article 24 : principes d'interprétation*

Dans l'interprétation de l'expression « tribunal compétent », nous devons garder à l'esprit quatre propositions connexes, qui inspirent l'approche appliquée par notre Cour pour l'interprétation de l'art. 24 depuis qu'elle a examiné cette disposition pour la première fois dans l'arrêt *Mills*.

Premièrement, comme toutes les autres dispositions de la *Charte*, le par. 24(1) commande une interprétation large et téléologique. Il constitue une partie essentielle de la *Charte* et doit être interprété de la manière la plus généreuse qui soit compatible avec la réalisation de son objet : *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 155; *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114, p. 1134. Il s'agit en outre d'une disposition réparatrice qui, de ce fait, bénéficie de la règle générale d'interprétation législative selon laquelle les lois réparatrices reçoivent une interprétation « large et libérale » : *British Columbia Development Corp. c. Friedmann*, [1984] 2 R.C.S. 447, p. 458; *Régie des transports en commun de la région de Toronto c. Dell Holdings Ltd.*, [1997] 1 R.C.S. 32, par. 21. Dernière considération et élément le plus important : le texte de cette disposition paraît accorder au tribunal le plus vaste pouvoir discrétionnaire possible aux fins d'élaboration des réparations applicables en cas de violations des droits garantis par la *Charte*. Dans l'arrêt *Mills*, précité, le juge McIntyre a fait remarquer qu'« [i]l est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu » (p. 965). Il ne faut pas que ce large mandat réparateur du par. 24(1) soit mis en échec par une interprétation « étroite et formaliste » de la disposition (voir *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357, p. 366).

La deuxième proposition découle de la première : il faut interpréter l'art. 24 de façon à permettre la

purpose of upholding *Charter* rights by providing effective remedies for their breach. If the Court's past decisions concerning s. 24(1) can be reduced to a single theme, it is that s. 24(1) must be interpreted in a manner that provides a full, effective and meaningful remedy for *Charter* violations: *Mills*, *supra*, at pp. 881-82 (*per* Lamer J.), p. 953 (*per* McIntyre J.); *Mooring*, *supra*, at paras. 50-52 (*per* Major J.). As Lamer J. observed in *Mills*, s. 24(1) "establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights" (p. 881). Through the provision of an enforcement mechanism, s. 24(1) "above all else ensures that the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians" (p. 881).

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*, *supra*, 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.

The third proposition guiding the interpretation of s. 24 is that subs. (1) and (2) must be read together to create a harmonious interpretation. The conjunction of the two subsections, one dealing with remedies in general and the other dealing with exclusion of evidence that would bring the administration of justice into disrepute, suggests that both are concerned with providing remedies for *Charter* breaches. Moreover, the remedies under each of the two subsections are confined to "court[s] of competent jurisdiction". Thus this phrase must be

réalisation de son objet, qui est de protéger les droits garantis par la *Charte* en assurant des réparations efficaces en cas d'atteintes à ceux-ci. Si la jurisprudence de notre Cour concernant le par. 24(1) peut être réduite à un thème, on peut dire que le par. 24(1) doit être interprété de manière à assurer une réparation complète, efficace et utile à l'égard des violations de la *Charte* : *Mills*, précité, p. 881-882 (le juge Lamer), p. 953 (le juge McIntyre); *Mooring*, précité, par. 50-52 (le juge Major). Comme l'a indiqué le juge Lamer dans l'arrêt *Mills*, le par. 24(1) « fait du droit à une réparation la pierre angulaire de la mise en œuvre effective des droits accordés par la *Charte* » (p. 881). C'est l'établissement d'une voie de recours par le par. 24(1) qui « avant tout fera de la *Charte* un instrument éloquent et vigoureux de protection des droits et des libertés des Canadiens » (p. 881).

20 L'effet de l'interprétation du par. 24(1) se répercute nécessairement sur tous les droits garantis par la *Charte*, puisqu'un droit, aussi étendu soit-il en théorie, est aussi efficace que la réparation prévue en cas de violation, sans plus. Dès le départ, notre Cour a jugé que le par. 24(1) avait pour objet de fournir une « réparation directe » (*Mills*, précité, p. 953, le juge McIntyre). Pour reprendre les propos du juge Lamer dans l'arrêt *Mills*, « [l]a réparation doit pouvoir s'obtenir facilement et les droits constitutionnels ne devraient pas être [TRADUCTION] "étouffés dans les délais et les difficultés de procédure" » (p. 882). Exiger moins minerait le rôle que joue le par. 24(1) en tant que pierre angulaire sur laquelle reposent les droits et libertés garantis par la *Charte* et que mécanisme essentiel à leur concrétisation et à leur protection.

21 Selon la troisième proposition guidant l'interprétation de l'art. 24, les par. 24(1) et (2) doivent être lus en corrélation pour créer une interprétation harmonieuse. La combinaison des deux paragraphes, l'un portant sur les réparations en général et l'autre sur l'exclusion des éléments de preuve susceptibles de déconsidérer l'administration de la justice, tend à indiquer qu'ils visent tous deux à fournir des réparations à l'égard des violations de la *Charte*. De plus, seuls les « tribuna[ux] compétent[s] » peuvent accorder les réparations

interpreted in a way that produces just and workable results for both the grant of general remedies and the exclusion of evidence in particular.

22 The final proposition is that s. 24 should not be read so broadly that it endows courts and tribunals with powers that they were never intended to exercise. The jurisdictions of Canada's various courts and tribunals are fixed by Parliament and the legislatures, not by judges: *Mills*, *supra*, at p. 952 (*per* McIntyre J.). It is Parliament or the legislature that determines if a court or tribunal is a "court of competent jurisdiction": *Weber*, *supra*, at para. 65. Legislative intention is the guiding light in identifying courts of competent jurisdiction.

23 As McIntyre J. cautioned in *Mills*, *supra*, at p. 953, the *Charter* was not intended to "turn the Canadian legal system upside down". The task facing the court is to interpret s. 24(1) in a manner that provides direct access to *Charter* remedies while respecting, so far as possible, "the existing jurisdictional scheme of the courts": *Mills*, at p. 953 (*per* McIntyre J.); see also the comments of La Forest J. (at p. 971) and Lamer J. (at p. 882) in the same case; and *Weber*, *supra*, at para. 63. The framers of the *Charter* did not intend to erase the constitutional distinctions between different types of courts, nor to intrude on legislative powers more than necessary to achieve the aims of the *Charter*.

24 In summary, the task of the court in interpreting s. 24 of the *Charter* is to achieve a broad, purposive interpretation that facilitates direct access to appropriate and just *Charter* remedies under ss. 24(1) and (2), while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals. With these

prévues par ces deux paragraphes. Par conséquent, il faut interpréter cette expression de façon à produire des résultats justes et applicables en ce qui concerne l'octroi de réparations en général et l'exclusion d'éléments de preuve en particulier.

Conformément à la dernière proposition, l'art. 24 ne doit pas être interprété de façon si large qu'il aurait pour effet d'investir les tribunaux judiciaires et administratifs de pouvoirs qu'ils n'ont jamais été censés exercer. Ce sont le Parlement et les législatures, et non pas les juges, qui définissent la compétence des différents tribunaux judiciaires et administratifs canadiens : *Mills*, précité, p. 952 (le juge McIntyre). C'est le Parlement ou la législature concernée qui décide si un tribunal judiciaire ou administratif est un « tribunal compétent » : *Weber*, précité, par. 65. L'intention du législateur est le phare qui permet d'identifier les tribunaux compétents.

Conformément à la mise en garde faite par le juge McIntyre dans l'arrêt *Mills*, précité, p. 953, la *Charte* n'est pas censée « provoquer le bouleversement du système judiciaire canadien ». Les tribunaux ont pour tâche d'interpréter le par. 24(1) de manière à permettre aux justiciables d'avoir accès directement aux réparations prévues par la *Charte*, tout en respectant, dans la mesure du possible, « le régime existant de compétence des tribunaux » : *Mills*, p. 953 (le juge McIntyre); voir aussi les commentaires des juges La Forest (à la p. 971) et Lamer (à la p. 882) dans le même arrêt; et *Weber*, précité, par. 63. Les rédacteurs de la *Charte* ne voulaient pas supprimer les distinctions que fait la Constitution entre les différents types de tribunaux ni empiéter plus que de besoin sur les pouvoirs législatifs pour réaliser les objectifs de la *Charte*.

En résumé, le tribunal appelé à interpréter l'art. 24 de la *Charte* doit faire une interprétation large et téléologique, propre à faciliter l'accès direct aux réparations convenables et justes prévues par les par. 24(1) et (2) de la *Charte*, tout en respectant la structure et les pratiques du système judiciaire existant ainsi que le rôle qui appartient en exclusivité au Parlement et aux législatures, savoir celui de fixer

guiding principles in mind, I return to the question at the heart of this appeal: when does a court or tribunal possess "power to grant the remedy sought", such that it satisfies the final branch of the *Mills* test of a court of competent jurisdiction?

B. *When Does a Court or Tribunal Have the "Power to Grant the Remedy Sought"?*

Whether a court or tribunal enjoys the "power to grant the remedy sought" is, first and foremost, a matter of discerning the intention of Parliament or the Legislature. The governing question in every case is whether the legislator endowed the court or tribunal with the power to pronounce on *Charter* rights and to grant the remedy sought for the breach of these rights.

Section 24 does not confer jurisdiction on any court or tribunal; rather, the power of the tribunal to grant the remedy sought must emanate from a source other than the *Charter* itself: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 222. Where, as here, the tribunal in question is a creature of statute, this power must derive from its enabling legislation. It is a fundamental principle that statutory bodies may perform only those tasks assigned to them by Parliament or one of the provincial legislatures, and in performing those tasks they have at their disposal only those powers granted to them expressly or impliedly: *Doyle v. The Queen*, [1977] 1 S.C.R. 597, at p. 602; R. W. Macaulay and J. L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (looseleaf), vol. 3, at pp. 23-17 *et seq*. The enactment of the *Charter* did not alter this fundamental tenet: it remains the role of Parliament and the legislatures, and not the judiciary, to assign jurisdiction to the various courts and tribunals comprising our legal system.

la compétence des tribunaux judiciaires et administratifs. Gardant ces principes directeurs à l'esprit, je reviens à la question qui est au cœur du présent pourvoi : Dans quels cas un tribunal judiciaire ou administratif possède-t-il le « pouvoir d'accorder la réparation demandée », respectant ainsi le dernier volet du critère établi dans *Mills* pour déterminer si un organisme donné est un tribunal compétent?

B. *Quand un tribunal judiciaire ou administratif a-t-il le « pouvoir d'accorder la réparation demandée »?*

25 Pour déterminer si un tribunal judiciaire ou administratif possède le « pouvoir d'accorder la réparation demandée », il faut d'abord et avant tout dégager l'intention du Parlement ou de la législature. La question déterminante dans chaque cas est de savoir si le législateur a investi le tribunal en question du pouvoir de statuer sur les droits garantis par la *Charte* et d'accorder la réparation demandée en cas de violation de ces droits.

26 L'article 24 n'a pas pour effet de conférer compétence à quelque tribunal judiciaire ou administratif que ce soit; le pouvoir du tribunal d'accorder la réparation demandée doit émaner d'une autre source que la *Charte* elle-même : *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, p. 222. Lorsque, comme en l'espèce, le tribunal a été créé par une loi, ce pouvoir doit découler de la loi habilitante. Selon un principe fondamental, les organismes créés par une loi ne peuvent accomplir que les tâches qui leur ont été confiées par le Parlement ou la législature provinciale concernée et, dans l'exécution de ces tâches, ils ne disposent que des pouvoirs qui leur ont été accordés explicitement ou implicitement : *Doyle c. La Reine*, [1977] 1 R.C.S. 597, p. 602; R. W. Macaulay et J. L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (éd. feuilles mobiles), vol. 3, p. 23-17 et suiv. L'édiction de la *Charte* n'a pas modifié ce précepte fondamental : il appartient toujours au Parlement et aux législatures, et non pas aux tribunaux, d'attribuer compétence aux tribunaux judiciaires et administratifs qui composent notre système judiciaire.

27 A legislative grant of remedial power under s. 24 may be either express or implied. It is express, for example, where the court or tribunal's constituting legislation explicitly authorizes the order sought as a remedy for *Charter* violations. Since the majority of existing courts and tribunals originated before the advent of the *Charter*, however, express conferral of authority is likely to prove rare. The more common scenario, and the one presented by the case at bar, arises where the court or tribunal's enabling legislation is silent on the issue of its remedial jurisdiction under the *Charter*. In such cases, the grant of "power to grant the remedy sought" under s. 24, if it exists, must be implied.

Le pouvoir de réparation visé à l'art. 24 peut être accordé de façon explicite ou implicite dans une loi. Ce pouvoir est explicite quand, par exemple, la loi constitutive du tribunal judiciaire ou administratif concerné autorise explicitement l'ordonnance demandée en tant que réparation pour les violations de la *Charte*. Cependant, comme la plupart des tribunaux judiciaires et administratifs actuels existaient avant l'édiction de la *Charte*, il sera vraisemblablement rare de trouver une disposition attribuant expressément un tel pouvoir. La situation la plus fréquente est celle où, comme en l'espèce, la loi habilitante du tribunal judiciaire ou administratif est muette sur le pouvoir de celui-ci d'accorder des réparations en vertu de la *Charte*. Dans de tels cas, l'attribution du « pouvoir d'accorder la réparation demandée » en vertu de l'art. 24, si ce pouvoir existe, est nécessairement implicite.

28 When is it appropriate to infer a legislative intention to empower a tribunal or court to grant the desired *Charter* relief? This question has elicited divergent responses in the lower courts and in the parties' submissions. Three competing approaches can be articulated. For the purposes of this discussion, they can be identified as the literal approach, the "type of" approach, and the functional and structural approach.

Quand convient-il d'inférer que le législateur entendait investir le tribunal judiciaire ou administratif du pouvoir d'accorder la réparation voulue en vertu de la *Charte*? Cette question a reçu des réponses divergentes tant devant les juridictions inférieures que dans les observations des parties. Trois approches distinctes peuvent être dégagées. Pour les fins de la présente analyse, nous les appellerons l'approche littérale, l'approche fondée sur le « genre de réparation » et l'approche fonctionnelle et structurelle.

29 The literal approach is the most restrictive. It would recognize jurisdiction in a tribunal to issue a remedy under s. 24 only where that tribunal enjoys inherent or express statutory jurisdiction to grant the *Charter* remedy in question. Absent inherent jurisdiction to issue a *Charter* remedy, it could be found only where spelled out expressly in the tribunal's enabling legislation. This approach would virtually confine the power to grant *Charter* remedies under s. 24 to courts of inherent jurisdiction, since few if any statutory tribunals are endowed with express powers to grant *Charter* remedies. On this approach, the answer to the question of whether the trial justice in this case could make a costs order under s. 24(1) would clearly be no. The difficulty with this approach is that it arguably runs counter

L'approche littérale est la plus restrictive. Suivant cette méthode, le tribunal aurait compétence pour accorder une réparation donnée en vertu de l'art. 24 uniquement lorsqu'il possède, soit de façon inhérente soit suivant les termes exprès de la loi, compétence pour accorder la réparation fondée sur la *Charte* dont il est question. En l'absence de compétence inhérente autorisant l'octroi d'une réparation fondée sur la *Charte*, la compétence ne peut exister que si la loi habilitante du tribunal la prévoit expressément. Cette approche aurait virtuellement pour effet de réserver aux seuls tribunaux possédant une compétence inhérente le pouvoir d'accorder des réparations en vertu de l'art. 24 de la *Charte*, puisque peu ou pas de tribunaux créés par une loi sont investis du pouvoir explicite

to the broad remedial purpose of s. 24. Moreover, it renders s. 24(1) redundant. The Crown concedes that this approach to defining "power to grant the remedy sought" is overly restrictive.

d'accorder des réparations fondées sur la *Charte*. Selon cette approche, la réponse à la question de savoir si en l'espèce le juge du procès pouvait, en vertu du par. 24(1), rendre une ordonnance relative aux dépens serait clairement négative. Le problème que crée cette approche est que, peut-on soutenir, elle contrecarre le large objectif réparateur de l'art. 24. En outre, elle rend le par. 24(1) redondant. La Couronne concède que cette façon de définir le « pouvoir d'accorder la réparation demandée » est trop restrictive.

The "type of" approach interprets the requirement of "power to grant the remedy sought" less restrictively, as requiring only that the tribunal have the authority to issue the "type of" remedy sought, independently of the *Charter*. On this view, a tribunal can issue the same "type of" remedies under s. 24(1) that it is empowered to issue under statute.

30 L'approche fondée sur le « genre de réparation » aboutit à une interprétation moins restrictive de la condition exigeant l'existence du « pouvoir d'accorder la réparation demandée », puisqu'elle requiert seulement que le tribunal ait le pouvoir d'accorder le « genre » de réparation demandée, indépendamment de la *Charte*. Selon ce point de vue, le tribunal peut accorder, en vertu du par. 24(1), le même « genre » de réparations que celles qu'il a le pouvoir d'accorder en vertu de la loi.

The Ontario Court of Appeal adopted this approach in the present case. O'Connor J.A., for the Court of Appeal, held that statutory authority to grant a particular remedy, even if its exercise is confined to very limited circumstances, is sufficient to empower the court to order the same type of remedy under s. 24(1). Having found that s. 90(2) of the *POA* confers the authority to order legal costs against the Crown, albeit in circumstances limited to addressing procedural irregularities, he concluded that the provincial offences court could order a costs award under s. 24(1) as a remedy for non-disclosure. The Alberta Court of Appeal adopted the same approach to defining the power to grant the remedy sought in *R. v. Pang* (1994), 95 C.C.C. (3d) 60.

31 La Cour d'appel de l'Ontario a retenu cette approche en l'espèce. S'exprimant au nom de la Cour d'appel, le juge O'Connor a estimé que l'existence, dans une loi habilitante, du pouvoir d'accorder une réparation particulière — même si l'exercice de ce pouvoir est restreint à des circonstances très limitées — suffit pour habiliter le tribunal à ordonner le même genre de réparation en vertu du par. 24(1). Ayant jugé que le par. 90(2) de la *LIP* conférait le pouvoir de condamner la Couronne au paiement des frais de justice, quoique seulement en cas d'irrégularités procédurales, il a conclu que le tribunal des infractions provinciales pouvait ordonner le paiement des dépens en vertu du par. 24(1) à titre de réparation pour la non-communication d'éléments de preuve. La Cour d'appel de l'Alberta a adopté la même approche pour définir le pouvoir d'accorder la réparation demandée dans l'arrêt *R. c. Pang* (1994), 95 C.C.C. (3d) 60.

This approach has much to recommend it. Intuitively, tribunals should be able to grant *Charter* remedies similar to those they grant in other contexts. Yet it, too, is not without difficulty. The most

32 Beaucoup de choses militent en faveur de cette approche. Instinctivement, on serait porté à dire que les tribunaux devraient être habilités à accorder, en vertu de la *Charte*, des réparations

obvious difficulty lies in defining remedial powers of like "type". How closely must the statutory remedy resemble the *Charter* remedy sought? For example, the respondents argue that witness costs and legal costs are the same "type of" remedy, and that authority under the *POA* to order the former translates into jurisdiction under s. 24(1) to order the latter. Both of the courts below rejected this submission on the ground that these are distinct, rather than analogous, remedies.

33 Similar problems arise from the treatment of statutory limits placed on the court's authority to issue the remedy sought. O'Connor J.A. treated such limits as irrelevant; once statutory authority for a remedy is found, even if limited to prescribed circumstances, general *Charter* jurisdiction to issue a like remedy follows. Legislative conferral of narrow jurisdiction may thus have the effect of conferring much broader *Charter* jurisdiction. The Crown objects, contending that statutory restrictions imposed on the court's power to issue a remedy should equally restrict its jurisdiction to issue that remedy under the *Charter*. These difficulties, while perhaps not insurmountable, suggest that the apparent clarity and simplicity of the "type of approach" belie considerable uncertainty.

34 A second concern with the "type of" approach is that it fails to examine whether the court or tribunal's process and powers make it an appropriate forum for resolving the *Charter* issues in question. Instead, the "type of" approach mechanically transforms all statutory remedies at a tribunal's disposal into *Charter* remedies. As a result,

analogues à celles qu'ils accordent dans d'autres contextes. Toutefois, cette méthode n'est pas non plus sans problèmes, le plus évident étant la définition des pouvoirs de réparation du même « genre ». Jusqu'à quel point la réparation prévue par la loi doit-elle ressembler à la réparation demandée en vertu de la *Charte*? Par exemple, les intimés prétendent que l'indemnisation des frais des témoins et l'indemnisation des frais de justice constituent le même « genre » de réparation et que le pouvoir que confère la *LIP* d'ordonner le paiement des premiers emporte le pouvoir d'ordonner le paiement des seconds en vertu du par. 24(1). Les deux juridictions inférieures ont rejeté cet argument au motif qu'il s'agit de réparations distinctes plutôt qu'analogues.

Des problèmes similaires découlent de la façon dont on considère les restrictions dont la loi pertinente assortit le pouvoir du tribunal d'accorder la réparation demandée. Le juge O'Connor a considéré que ces restrictions n'étaient pas pertinentes; une fois qu'on a trouvé dans la loi le pouvoir d'ordonner une réparation, même si son application est limitée à des circonstances prescrites, il en découle un pouvoir général d'accorder une réparation de ce genre en vertu de la *Charte*. L'existence d'une compétence limitée conférée par la loi peut donc avoir pour effet d'accorder une compétence fondée sur la *Charte* beaucoup plus large. La Couronne conteste cet argument, soutenant plutôt que les restrictions dont la loi assortit le pouvoir du tribunal d'accorder une réparation doivent également s'appliquer à son pouvoir d'accorder cette réparation en vertu de la *Charte*. Bien qu'elles ne soient peut-être pas insurmontables, ces difficultés tendent à indiquer que la clarté et la simplicité apparentes de « l'approche fondée sur le genre de réparation » cachent une incertitude considérable.

Le deuxième problème que soulève l'approche fondée sur le « genre de réparation » est qu'elle ne tient pas compte de la question de savoir si la procédure et les pouvoirs du tribunal judiciaire ou administratif en font un forum approprié pour trancher les questions relatives à la *Charte* qui lui seraient soumises. Au contraire, cette approche

it risks burdening a tribunal with applications for *Charter* remedies that it is not designed — by virtue of its function, expertise, mandate and process — to fashion, simply because one can point to narrow and carefully circumscribed authority to grant these remedies in its constituent statute. Conversely, this approach could deprive a tribunal of a *Charter* remedy that is manifestly integral to the purpose it serves, simply on the basis that Parliament or the legislatures did not see the need to provide this remedy under statute to address non-*Charter* issues. In sum, the "type of" approach, while attempting to discern legislative intent from the statutory powers conferred upon the tribunal, risks neglecting the larger picture of whether the *Charter* jurisdiction sought will ultimately advance or frustrate the purpose and mandate of the tribunal. Yet, it is this very issue, in my view, that is of paramount concern when determining legislative intent.

This concern leads to the third possible approach to defining "power to grant the remedy sought". This approach answers the question of whether a court or tribunal has the power to issue the remedy sought by focusing on its function and structure. On this view, it is not necessary that the court or tribunal have the power to grant the precise remedy sought or even a remedy of the same "type". Although these factors may weigh heavily in the analysis, they are not determinative. The paramount question remains whether the court or tribunal, by virtue of its function and structure, is an appropriate forum for ordering the *Charter* remedy in issue. If so, it can reasonably be inferred, in the absence of any contrary indication, that the legislature intended the court or tribunal to have this remedy at its disposal when

convertit automatiquement en réparations fondées sur la *Charte* toutes les réparations prévues par la loi dont dispose le tribunal. En conséquence, l'application de cette approche risque d'accabler le tribunal de demandes sollicitant des réparations fondées sur la *Charte* qu'il n'est pas conçu — en raison de sa fonction, de son expertise, de son mandat et de sa procédure — pour élaborer, et ce simplement parce qu'on peut trouver dans sa loi constitutive le pouvoir limité et soigneusement circonscrit d'accorder ces réparations. À l'inverse, cette approche pourrait priver le tribunal concerné de la possibilité d'ordonner une réparation fondée sur la *Charte* qui fait manifestement partie intégrante de sa raison d'être, du seul fait que le Parlement ou la législature n'a pas jugé nécessaire de prescrire cette réparation dans la loi à l'égard des questions ne concernant pas la *Charte*. Bref, en tentant de dégager l'intention du législateur à la lumière des pouvoirs confiés par la loi au tribunal, on risque, par l'application de l'approche fondée sur le « genre de réparation », de négliger la question plus large de savoir si la compétence en matière d'application de la *Charte* qu'on invoque aidera ou nuira à la réalisation de l'objet et du mandat du tribunal en bout de ligne. C'est pourtant cette question même qui est, à mon avis, la considération primordiale lorsqu'on détermine l'intention du législateur.

35 Cette considération mène à la troisième approche susceptible de permettre de définir le « pouvoir d'accorder la réparation demandée ». C'est en s'attachant à la fonction et à la structure du tribunal judiciaire ou administratif concerné que cette approche répond à la question de savoir si celui-ci a le pouvoir d'accorder la réparation demandée. Selon ce point de vue, il n'est pas nécessaire que le tribunal concerné ait le pouvoir d'accorder exactement la réparation qu'on lui demande ni même une réparation du même « genre ». Bien que ces facteurs puissent peser lourdement dans l'analyse, ils ne sont pas déterminants. La question primordiale demeure celle de savoir si, de par sa fonction et sa structure, le tribunal concerné est un forum bien choisi pour ordonner la réparation fondée sur la *Charte* qui est en jeu. Dans l'affirmative, il est raisonnablement

confronted with *Charter* violations that arise in the course of its proceedings. This approach, as I shall discuss in greater detail, is implicit in *Mills* and affirmed in *Weber* and *Mooring*.

36 Parliament and the provincial legislatures premise legislation on the fact that courts and tribunals operate within a legal system governed by the constitutional rights and norms entrenched by the *Charter*. The "functional and structural" approach reflects this premiss. It rests on the theory that where Parliament or a legislature confers on a court or tribunal a function that engages *Charter* issues, and furnishes it with procedures and processes capable of fairly and justly resolving these incidental *Charter* issues, then it must be presumed that the legislature intended the court or tribunal to exercise this power.

37 This approach may require some elaboration, particularly as it relates to courts and tribunals constituted prior to the *Charter*'s enactment. The relevant provisions of the *POA*, for example, predate the *Charter*. This is likely true of the vast majority of statutes currently governing the operation of courts and tribunals across the nation. Clearly, the remedial jurisdiction of these bodies under s. 24 of the *Charter* could not have entered the contemplation of Parliament or the legislatures at the time these statutes were enacted. Consequently, it might be argued that pre-*Charter* legislation can never evince an implied intention to empower a tribunal to issue *Charter* remedies.

38 This argument, however, rests on an overly narrow view of legislative intention. The intention of Parliament or the legislatures is not frozen for all time at the moment of a statute's enactment, such that a court interpreting the statute is forever

possible d'inférer, en l'absence de toute indication contraire, que le législateur entendait que le tribunal dispose de cette réparation à l'égard des violations de la *Charte* surgissant dans le cours des procédures qui se déroulent devant lui. Comme je vais le préciser, cette approche est contenue implicitement dans l'arrêt *Mills* et elle a été confirmée dans les arrêts *Weber* et *Mooring*.

Le Parlement et les législatures provinciales fondent leurs lois sur la prémisse que les tribunaux judiciaires et administratifs œuvrent au sein d'un système de justice régi par les droits et les normes constitutionnels consacrés par la *Charte*. L'approche « fonctionnelle et structurelle » reflète cette prémisse. Elle repose sur la théorie voulant que, lorsque le Parlement ou une législature confère à un tribunal judiciaire ou administratif une fonction soulevant des questions relatives à la *Charte* et le dote de procédures propres à lui permettre de trancher de façon juste et équitable ces questions incidentes, il faut présumer que le législateur voulait que le tribunal exerce ce pouvoir.

Cette approche exige peut-être certaines précisions, particulièrement en ce qui concerne les tribunaux judiciaires ou administratifs constitués avant l'édiction de la *Charte*. Les dispositions pertinentes de la *LIP*, par exemple, sont antérieures à la *Charte*. C'est probablement le cas de la vaste majorité des lois qui régissent actuellement le fonctionnement des tribunaux judiciaires et administratifs dans l'ensemble du pays. Il est évident que, lorsqu'ils ont édicté ces lois, le Parlement et les législatures ne pouvaient avoir à l'esprit la compétence réparatrice que serait susceptible de conférer à ces organismes l'art. 24 de la *Charte*. En conséquence, il est possible de prétendre qu'on ne peut jamais dégager des lois antérieures à la *Charte* l'intention implicite d'habiliter un tribunal à accorder des réparations fondées sur la *Charte*.

Cet argument repose toutefois sur une interprétation trop restrictive de l'intention du législateur. L'intention du Parlement ou des législatures n'est pas figée à jamais au moment de l'édiction d'une loi, de sorte que les tribunaux interprétant cette loi

confined to the meanings and circumstances that governed on that day. Such an approach risks frustrating the very purpose of the legislation by rendering it incapable of responding to the inevitability of changing circumstances. Instead, we recognize that the law speaks continually once adopted: *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, at p. 814; see also *Interpretation Act*, R.S.O. 1990, c. I.11, s. 4. Preserving the original intention of Parliament or the legislatures frequently requires a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities. While the courts strive ultimately to give effect to legislative intention, the will of the legislature must be interpreted in light of prevailing, rather than historical, circumstances: see, for example, *Symes v. Canada*, [1993] 4 S.C.R. 695, at pp. 727-29 (*per* Iacobucci J.), and pp. 793-94 (*per* L'Heureux-Dubé J., dissenting); *Tataryn*, *supra*, at pp. 814-15.

It follows that the remedial powers of courts and tribunals — even those that antedate the *Charter* — must be interpreted in light of the *Charter*'s enactment. The enactment of the *Charter* was undoubtedly a watershed event in our legal history and tradition — it added a "new dimension to the Canadian legal system" (*Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 600), ushering in a new regime of constitutional rights and remedies. The *Charter* guaranteed new rights to individuals against government authority; accordingly, "[i]t should not be a matter for surprise that individuals claiming to have such rights assert them before agencies created to provide a speedy determination of their rights in relation to governmental authority": *Douglas College*, *supra*, at p. 600 (*per* La Forest J., quoting Desjardins J.A. from *Tétreault-Gadoury v. Canada (Canada Employment and Immigration Commission)*, [1989] 2 F.C. 245 (C.A.), at p. 279). In other words, the *Charter*'s enactment necessarily embroiled numerous courts and tribunals in the new regime of *Charter* rights and remedies. The statutory powers of these bodies must be

devraient éternellement s'en tenir aux concepts et circonstances qui avaient cours à cette date. Une telle approche risque de contrecarrer la réalisation de l'objet même visé par la loi en rendant la loi impuissante à réagir aux inévitables changements de circonstances. Au contraire, nous reconnaissons que, après son adoption, la loi a vocation permanente : *Tataryn c. Succession Tataryn*, [1994] 2 R.C.S. 807, p. 814; voir également *Loi d'interprétation*, L.R.O. 1990, ch. I.11, art. 4. Pour préserver l'intention originale du Parlement ou des législatures, il faut fréquemment interpréter leurs textes de loi au moyen d'une approche dynamique et sensible à l'évolution des réalités sociales et matérielles. Bien que les tribunaux visent en dernière analyse à donner effet à l'intention du législateur, la volonté de ce dernier doit être interprétée à la lumière de la situation qui a cours plutôt que des circonstances historiques : voir, par exemple, *Symes c. Canada*, [1993] 4 R.C.S. 695, p. 727-729 (le juge Iacobucci), et p. 793-794 (le juge L'Heureux-Dubé, dissidente); *Tataryn*, précité, p. 814-815.

39 Il s'ensuit que les pouvoirs réparateurs des tribunaux judiciaires et administratifs — même les tribunaux antérieurs à la *Charte* — doivent être interprétés à la lumière de l'édiction de ce texte. L'édiction de la *Charte* est indubitablement un fait marquant de notre histoire et de notre tradition juridiques — elle a ajouté une « nouvelle dimension au système juridique canadien » (*Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, p. 600) en introduisant un nouveau régime de droits et réparations constitutionnels. La *Charte* a garanti aux individus de nouveaux droits opposables aux autorités gouvernementales, de sorte qu'il n'y a « [r]ien d'étonnant à ce que des individus, qui prétendent avoir ces droits, les réclament dans des organismes qui ont été créés pour départager de façon expéditive leurs droits vis-à-vis [de] l'administration » : *Douglas College*, précité, p. 600 (le juge La Forest, citant le juge Desjardins dans *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration du Canada)*, [1989] 2 C.F. 245 (C.A.), p. 279). En d'autres termes, par suite de l'édiction de la *Charte*, de nombreux tribunaux judiciaires et

interpreted in light of this profound shift in the landscape of Canadian law.

40 The *Charter* itself provides insight into how the powers of pre-existing courts and tribunals should be approached. In this regard, I note that the *Charter*'s enactment is an expression not only of Parliament's will, but also of that of the respective provincial legislatures by adoption. The common intention was to integrate the new regime of *Charter* rights and remedies into the existing jurisdictional scheme: *Mills*, *supra*, at p. 953 (*per* McIntyre J.). As La Forest J. observed in *Mills*, at p. 971, the *Charter*'s enactment did not mandate "the wholesale invention of a parallel system for the administration of *Charter* rights over and above the machinery already available for the administration of justice". Instead, the framers of the *Charter* intended aggrieved parties to have recourse to a remedy from existing courts and tribunals.

41 To this end, s. 24 identifies a "court of competent jurisdiction" as the appropriate venue for *Charter* relief. This formula clearly draws from the courts and tribunals comprising our legal system at the time of the *Charter*'s enactment, and enlists them in the implementation of *Charter* rights and remedies. No additional legislative "stamp of approval" is contemplated. Indeed, the operation of the *Charter* as the "supreme law of the land" would be wholly frustrated if its application were deferred until the legislatures revisited each pre-*Charter* court or tribunal to confer the necessary jurisdiction to grant *Charter* remedies. Moreover, forcing these courts and tribunals to function as if the *Charter* were never enacted, even where their operation squarely implicates *Charter* rights and freedoms, risks seriously (and unnecessarily) compromising their effective functioning. It

administratifs ont nécessairement été touchés par le nouveau régime de droits et réparations établi par la *Charte*. Les pouvoirs d'origine législative confiés à ces organismes doivent être interprétés à la lumière de cette profonde évolution de la situation juridique au Canada.

La *Charte* elle-même fournit des indications sur la façon d'interpréter les pouvoirs des tribunaux judiciaires et administratifs préexistants. À cet égard, je souligne que l'édiction de la *Charte* est non seulement l'expression de la volonté du Parlement, mais également de celle des législatures provinciales par adoption. L'intention commune était d'intégrer le nouveau régime de droits et réparations prévus par la *Charte* au régime existant de compétence des tribunaux : *Mills*, précité, p. 953 (le juge McIntyre). Comme l'a fait remarquer le juge La Forest dans l'arrêt *Mills*, p. 971, l'édiction de la *Charte* n'a pas exigé « que l'on invente de toutes pièces un système parallèle pour l'administration des droits conférés par celle-ci qui viendra s'ajouter aux mécanismes déjà existants d'administration de la justice ». Les rédacteurs de la *Charte* ont plutôt voulu que les parties s'estimant lésées puissent solliciter une réparation auprès des tribunaux judiciaires et administratifs existants.

À cette fin, l'article 24 précise que le « tribunal compétent » est le forum approprié pour connaître des demandes de réparation fondées sur la *Charte*. Cette formule puise clairement parmi les tribunaux judiciaires et administratifs qui composaient notre système de justice au moment de l'édiction de la *Charte* et les mobilise pour mettre en œuvre les droits et réparations prévus par celle-ci. Aucune autre « approbation » du législateur n'est envisagée. De fait, on contrecarrait complètement l'effet de la *Charte* en tant que « loi suprême du pays » si on suspendait son application jusqu'à ce que le Parlement et les législatures aient réexaminé la situation de chaque tribunal judiciaire ou administratif antérieur à la *Charte* afin de l'investir de la compétence nécessaire pour accorder des réparations fondées sur la *Charte*. Qui plus est, forcer ces tribunaux à agir comme si la *Charte* n'avait jamais été adoptée, même lorsque des droits et libertés garantis par

may also impact the quality of justice rendered at the end of the day.

In my view, the "functional and structural" approach is more consistent with the original intention of Parliament or the legislature in establishing the tribunal (albeit interpreted in light of the *Charter*'s enactment) and the aspirations of the *Charter* itself. Where the *Charter*'s enactment implicated a court or tribunal in new constitutional issues, it should be presumed that the legislature intended the court or tribunal to resolve these issues where it is suited to do so by virtue of its function and structure. It is only in this manner that the purpose of the *Charter* — and the mandates of those courts and tribunals that predate its enactment — can be meaningfully realized.

The content of the "functional and structural" approach may also require elaboration. Framed broadly, this test asks whether the court or tribunal in question is suited to grant the remedy sought under s. 24 in light of its function and structure. The assessment is contextual. The factors relevant to the inquiry and the weight they carry will vary with the particular circumstances at hand. Nonetheless, it is possible to catalogue some of the considerations captured under the general headings of "function" and "structure".

The function of the court or tribunal is an expression of its purpose or mandate. As such, it must be assessed in relation to both the legislative scheme and the broader legal system. First, what is the court or tribunal's function within the legislative scheme? Would jurisdiction to order the remedy sought under s. 24(1) frustrate or enhance this role? How essential is the power to grant the remedy sought to the effective and efficient functioning of the court or tribunal? Second, what is

celle-ci sont nettement en jeu dans les instances se déroulant devant eux, risque de compromettre sérieusement (et inutilement) leur bon fonctionnement. Une telle mesure pourrait aussi influencer la qualité de la justice qui est rendue en bout de ligne.

42 J'estime que l'approche « fonctionnelle et structurelle » est davantage conforme à l'intention qu'avait initialement le Parlement ou la législature concernée lors de l'établissement du tribunal en cause (bien que cette intention soit interprétée à la lumière de l'édiction de la *Charte*) et aux objectifs visés par la *Charte* elle-même. Dans les cas où, par la suite de l'édiction de la *Charte*, un tribunal judiciaire ou administratif est aux prises avec de nouvelles questions d'ordre constitutionnel, il faut présumer que le législateur entendait que cet organisme tranche ces questions lorsque, de par sa fonction et sa structure, il est apte à le faire. Ce n'est qu'ainsi que l'objectif visé par la *Charte* — et le mandat des tribunaux judiciaires et administratifs qui existaient au moment de son édiction — pourront être concrètement réalisés.

43 Il est peut-être également nécessaire de donner des précisions sur le contenu de l'approche « fonctionnelle et structurelle ». Essentiellement, ce critère pose la question de savoir si, eu égard à sa fonction et à sa structure, le tribunal judiciaire ou administratif concerné est apte à accorder la réparation demandée en vertu de l'art. 24. Il s'agit d'une évaluation contextuelle. Les facteurs pertinents pour les fins de l'analyse ainsi que leur poids respectif varient en fonction des circonstances de l'espèce. Il est néanmoins possible de classer certaines des considérations visées sous les rubriques générales « fonction » et « structure ».

44 La fonction du tribunal judiciaire ou administratif concerné est l'expression de son objectif ou mandat. En tant que telle, elle doit être appréciée en fonction du régime établi par la loi et du système de justice en général. Premièrement, quelle est la fonction du tribunal dans le cadre du régime établi par la loi? L'existence du pouvoir d'ordonner la réparation demandée en vertu du par. 24(1) aurait-elle pour effet d'entraver ce rôle ou de le renforcer? Dans quelle mesure le pouvoir d'accorder la

the function of the court or tribunal in the broader legal system? Is it more appropriate that a different forum redress the violation of *Charter* rights?

45 The inquiry into the structure of the court or tribunal relates to the compatibility of the institution and its processes with the remedy sought under s. 24. Depending on the particular remedy in issue, any or all of the following factors may be salient: whether the proceedings are judicial or quasi-judicial; the role of counsel; the applicability or otherwise of traditional rules of proof and evidence; whether the court or tribunal can issue subpoenas; whether evidence is offered under oath; the expertise and training of the decision-maker; and the institutional experience of the court or tribunal with the remedy in question: see *Mooring*, *supra*, at paras. 25-26. Other relevant considerations may include the workload of the court or tribunal, the time constraints it operates under, its ability to compile an adequate record for a reviewing court, and other such operational factors. The question, in essence, is whether the legislature or Parliament has furnished the court or tribunal with the tools necessary to fashion the remedy sought under s. 24 in a just, fair and consistent manner without impeding its ability to perform its intended function.

46 Two sources may provide guidance in determining the function and structure of a court or tribunal: the language of the enabling legislation and the history and accepted practice of the institution. The court or tribunal's constituting legislation may clearly describe its function and structure. However, it often may be necessary to consider other factors to fully appreciate the court or tribunal's function, or the strengths and limitations of its processes. Factors like the workload of the court or tribunal, the time constraints it operates under, and its experience and proficiency with a particular

réparation demandée est-il essentiel au fonctionnement efficace et efficient du tribunal? Deuxièmement, quelle fonction exerce le tribunal au sein du système de justice en général? Une autre juridiction conviendrait-elle davantage pour réparer l'atteinte portée aux droits garantis par la *Charte*?

L'examen de la structure du tribunal porte sur la compatibilité de l'institution et de ses procédures avec la réparation demandée en vertu de l'art. 24. Selon la réparation particulière en cause, tous les facteurs suivants — ou l'un d'eux — peuvent être importants : la question de savoir si les procédures sont de nature judiciaire ou quasi judiciaire, le rôle des avocats, l'applicabilité ou non des règles de preuve traditionnelles, la question de savoir si le tribunal peut délivrer des assignations à comparaître, celle de savoir si les témoins déposent sous serment, l'expertise et la formation du décideur et l'expérience institutionnelle du tribunal relativement à la réparation en question : voir *Mooring*, précité, par. 25-26. Parmi les autres considérations susceptibles d'être pertinentes, mentionnons la charge de travail du tribunal, ses contraintes de temps, sa capacité de constituer un dossier suffisant pour les besoins d'une cour de révision et toute autre considération opérationnelle du genre. Essentiellement, il s'agit de déterminer si la législature ou le Parlement a doté le tribunal judiciaire ou administratif concerné des outils nécessaires pour lui permettre de façonner de manière juste, équitable et uniforme la réparation demandée en vertu de l'art. 24, sans nuire à sa capacité d'accomplir sa fonction première.

Deux sources peuvent aider à déterminer la fonction et la structure du tribunal judiciaire ou administratif concerné : le texte de sa loi habilitante ainsi que l'historique de l'institution et sa pratique reconnue. Il arrive que la loi constitutive du tribunal décrive clairement sa fonction et sa structure. Toutefois, il peut souvent s'avérer nécessaire de considérer d'autres facteurs afin de bien saisir la fonction du tribunal, ou les points forts et les limites de ses mécanismes. Il est impossible d'évaluer, au regard du seul texte de la loi pertinente, des facteurs comme la charge de tra-

remedy, cannot be assessed on the face of the relevant legislation alone; rather, regard must be had to the day-to-day practice of the court or tribunal in question.

Having outlined the "functional and structural" approach to defining the third element of the *Mills* test, the power to grant the remedy sought, I turn to the considerations that support it. First, this approach is consistent with the authorities. Second, it is consistent with the Court's approach to discerning legislative intent in other contexts, such as the authority of a tribunal to consider the constitutionality of its enabling legislation under s. 52 of the *Constitution Act, 1982*. Finally, and most importantly, it comports with the foundational principles animating s. 24. I will discuss each of these reasons in turn.

(1) Consistency with the Authorities

The previous decisions of this Court regarding s. 24(1) support a functional and structural approach to determining whether a court or tribunal has the "power to grant the remedy sought" as required by the third branch of the *Mills* test. Although not always expressed in these terms, considerations of function and structure are central to the Court's analysis in each of these previous cases.

In *Mills*, the Court considered whether a preliminary inquiry judge or justice is a court of competent jurisdiction for the purposes of entering a stay of proceedings as a remedy for the violation of an accused's right under s. 11(*b*) of the *Charter* to trial within a reasonable time. McIntyre J., speaking for a unanimous Court on this point, held that a preliminary inquiry judge or justice is not a court of competent jurisdiction for this purpose. In reaching this conclusion, he emphasized the specialized function performed by the preliminary inquiry judge in the criminal process, and the

vail du tribunal, les contraintes de temps auxquelles il est assujetti ainsi que son expérience et son expertise relativement à une réparation donnée; il faut plutôt tenir compte de la pratique quotidienne du tribunal en question.

47 Après avoir exposé l'approche « fonctionnelle et structurelle » applicable pour définir le troisième élément du critère établi dans l'arrêt *Mills* — soit le pouvoir d'accorder la réparation demandée — je vais maintenant examiner les considérations qui militent en faveur de cette approche. Premièrement, elle est conforme à la jurisprudence pertinente. Deuxièmement, elle est compatible avec l'approche utilisée par notre Cour pour dégager l'intention du législateur dans d'autres contextes, par exemple le pouvoir du tribunal d'examiner la constitutionnalité de sa loi habilitante au regard de l'art. 52 de la *Loi constitutionnelle de 1982*. Enfin, facteur le plus important, cette approche respecte les principes fondamentaux qui sont à la base de l'art. 24. Je vais examiner chacune de ces considérations à tour de rôle.

(1) La conformité à la jurisprudence

48 Les arrêts antérieurs de notre Cour sur le par. 24(1) appuient l'application d'une méthode fonctionnelle et structurelle afin de déterminer si, comme l'exige le troisième volet du critère établi dans l'arrêt *Mills*, un tribunal a le « pouvoir d'accorder la réparation demandée ». Bien que cela ne soit pas toujours exprimé en ces termes, les considérations relatives à la fonction et à la structure constituent un aspect central de l'analyse de la Cour dans ces arrêts antérieurs.

49 Dans l'arrêt *Mills*, notre Cour s'est demandé si le juge ou juge de paix présidant l'enquête préliminaire constituait un tribunal compétent pour ordonner l'arrêt des procédures comme réparation en cas d'atteinte au droit de l'accusé d'être jugé dans un délai raisonnable prévu à l'al. 11*b*) de la *Charte*. Exprimant l'opinion unanime de notre Cour sur cette question, le juge McIntyre a conclu que le juge ou juge de paix présidant l'enquête préliminaire n'était pas un tribunal compétent à cette fin. En tirant cette conclusion, il a souligné la fonction spécialisée qu'accomplit le juge de l'enquête

incompatibility of this function with the remedy sought (at pp. 954-55):

> After all the evidence has been taken, he may commit the accused for trial if, in his opinion, the evidence is sufficient, or discharge the accused if, in his opinion, upon the whole of the evidence no sufficient case is made out to put the accused on trial. He has no jurisdiction to acquit or convict, nor to impose a penalty, nor to give a remedy. He is given no jurisdiction which would permit him to hear and determine the question of whether or not a *Charter* right has been infringed or denied. He is, therefore, not a court of competent jurisdiction under s. 24(1) of the *Charter*. . . . I might add at this stage that it would be a strange result indeed if the preliminary hearing magistrate could be said to have the jurisdiction to give a remedy, such as a stay under s. 24(1), and thus bring the proceedings to a halt before they have started and this in a process from which there is no appeal.

50 Although this holding disposed of the specific issue on appeal in *Mills*, McIntyre, Lamer and La Forest JJ. proceeded to consider the availability of *Charter* remedies in the criminal process more generally, both at the preliminary inquiry and at trial. Here functional and structural concerns dominated. McIntyre, Lamer and La Forest JJ., in defining the remedial jurisdiction of criminal courts under s. 24(1), were predominantly concerned with identifying the arsenal of remedies that would best fulfil the function of the provincial criminal court, as a court of first instance, without straining its competence as an institution.

51 In this regard, the function of statutory criminal courts in the broader criminal justice system was a paramount consideration. As McIntyre J. observed, "most of the criminal work at first instance is done in these courts, therefore most of the applications for a remedy under s. 24(1) of the *Charter* will be made to them" (p. 955). He emphasized the need for complete resolution, wherever possible, at the trial level, where the court is best situated to rule on *Charter* issues arising before it and to fashion appropriate and just remedies. This role, in his

préliminaire dans le cadre du processus pénal et l'incompatibilité de cette fonction avec la réparation demandée (aux p. 954-955) :

> Lorsque toute la preuve a été recueillie, il peut renvoyer l'accusé pour subir son procès s'il estime que cette preuve est suffisante ou encore libérer l'accusé s'il juge la preuve insuffisante pour justifier le renvoi à procès. Il n'a pas compétence pour prononcer l'acquittement ou pour déclarer coupable, ni pour imposer une peine, ni encore pour accorder une réparation. Il n'a pas non plus la compétence qui l'autoriserait à entendre et à juger la question de savoir s'il y a eu violation ou négation d'un droit garanti par la *Charte*. Il s'ensuit donc qu'il n'est pas un tribunal compétent au sens du par. 24(1) de la *Charte*. [. . .] Il convient d'ajouter ici que le résultat serait bien étrange si l'on pouvait dire que le magistrat à l'enquête préliminaire avait compétence pour accorder une réparation, telle une suspension des procédures en vertu du par. 24(1), arrêtant ainsi les procédures avant même qu'elles ne commencent, et ce par une décision non susceptible d'appel.

Bien que cette conclusion ait tranché la question précise qui faisait l'objet du pourvoi dans l'arrêt *Mills*, les juges McIntyre, Lamer et La Forest ont ensuite examiné l'applicabilité des réparations prévues à la *Charte* dans le cadre du processus pénal en général, tant à l'enquête préliminaire qu'au procès. Dans cette affaire, les considérations d'ordre fonctionnel et structurel ont dominé. En définissant la compétence dont disposent les cours de juridiction criminelle en manière de réparations fondées sur le par. 24(1), les juges McIntyre, Lamer et La Forest se sont attachés avant tout à définir l'arsenal de réparations qui permettrait le mieux à la cour provinciale de juridiction criminelle de s'acquitter de sa fonction, en tant que tribunal de première instance, sans grever ses ressources institutionnelles.

À cet égard, le rôle des cours de juridiction criminelle créées par la loi au sein du système de justice pénale en général a constitué le facteur prédominant. Comme l'a fait remarquer le juge McIntyre, « la plupart des affaires criminelles seront entendues en première instance par ces tribunaux-là. Par conséquent, la majorité des demandes de réparation fondées sur le par. 24(1) de la *Charte* leur seront adressées » (p. 955). Il a souligné la nécessité que ces demandes soient tranchées complètement, chaque fois que la chose est possible, en première

opinion, demanded an expansive remedial jurisdiction for statutory criminal courts under s. 24(1), unconstrained by the lesser array of remedies they might enjoy under statute. In his words, "[a] claim for a remedy under s. 24(1) arising in the course of the trial will fall within the jurisdiction of these courts as a necessary incident of the trial process" (p. 955). He contemplated resort to the superior court of the province for a *Charter* remedy only where prerogative relief is sought.

The only limit McIntyre J. placed on a statutory criminal court's "power to grant the remedy sought" under s. 24(1) was that imposed by the constitutional division of powers: "[s]uch remedies must remain . . . within the ambit of criminal powers" (p. 955). One finds no requirement in McIntyre J.'s reasons that the statute under which the court is acting expressly authorize the remedy sought, or empower the court to order remedies of the same "type". Rather, the emphasis is on creative and complete resolution at the trial level. To this end, he contemplated the widest possible discretion in provincial trial judges to fashion appropriate and just remedies, circumscribed only by the requirement that these remedies fall within the criminal sphere. It is in this manner that the function of the court, as a criminal court of first instance, is best fulfilled.

Lamer J. arrived at the same conclusion. In his view, a criminal trial court, whether of statutory or inherent jurisdiction, is empowered to grant any criminal law remedy under s. 24(1). He expressly rejected the proposition that statutory trial courts are confined to the remedies assigned to them by

instance, où le tribunal est le mieux placé pour statuer sur les questions relatives à la *Charte* soulevées devant lui et élaborer des réparations convenables et justes. À son avis, ce rôle exigeait que les cours de juridiction criminelle créées par une loi jouissent d'une vaste compétence en matière de réparations fondées sur le par. 24(1), sans être limitées à l'éventail plus restreint de réparations à leur disposition aux termes de leur loi habilitante. Pour reprendre ses propos : « [u]ne demande de réparation en vertu du par. 24(1) présentée au cours du procès sera du ressort de ces tribunaux en tant qu'accessoire nécessaire du procès » (p. 955). Il a indiqué qu'on ne devrait s'adresser à la cour supérieure de la province pour obtenir une réparation fondée sur la *Charte* que lorsqu'il est question de brefs de prérogative.

52 La seule limite à laquelle le juge McIntyre a assujetti l'exercice par les cours de juridiction criminelle créées par la loi du « pouvoir d'accorder la réparation demandée » en vertu du par. 24(1) était celle découlant du partage des compétences par la Constitution : « ces réparations [. . .] doivent relever du pouvoir en matière criminelle » (p. 955). Les motifs du juge McIntyre ne font état d'aucune exigence requérant que la loi en vertu de laquelle le tribunal agit autorise expressément la réparation demandée ou habilite le tribunal à ordonner des réparations du même « genre ». Le juge McIntyre insiste plutôt sur le besoin d'apporter, en première instance, des solutions complètes et ingénieuses aux questions qui se posent. À cette fin, il a considéré que les juges provinciaux qui président des procès devaient jouir du plus large pouvoir discrétionnaire possible afin d'élaborer des réparations convenables et justes, pouvoir qui serait limité uniquement par l'obligation que ces réparations appartiennent au droit criminel. C'est de cette manière que le tribunal concerné, en tant que cour de juridiction criminelle de première instance, est le plus à même de s'acquitter de son rôle.

53 Le juge Lamer est arrivé à la même conclusion. À son avis, une cour de juridiction criminelle — que sa compétence découle de la loi ou soit inhérente — a le pouvoir d'accorder, en vertu du par. 24(1), toute réparation relevant du droit criminel. Il a expressément rejeté l'argument voulant que les juridictions

statute, at least in the absence of clear legislative intent (at pp. 886-87):

> I do not see the need, once the distinction between criminal and other remedies is made, for making a further distinction within the criminal law system between trial judges dependent upon the trial court in which they sit. Since they already have the jurisdiction to make a final complete determination of the trial, they already have a plenitude of criminal law remedies available, such as adjournment, bail, ordering disclosure, excluding evidence, entering stays.

Again, the emphasis is not on the remedies that criminal courts "already have . . . available", but rather on the remedies that will best promote the function of the criminal trial court in our system of criminal justice.

54 In determining the range of remedies available to criminal trial courts under s. 24(1), Lamer J. was motivated primarily by the concern that these courts not venture into the types of remedies which by their own process (or structure) they are not properly equipped to fashion. He considered two opposing interpretations of s. 24(1) in the heart of his argument. The first is the proposition that a criminal court with jurisdiction over both the subject matter and the parties enjoys full jurisdiction to grant any appropriate and just remedy, including "civil remedies in addition to those remedies that are traditionally within their jurisdiction" (p. 885). The second proposition would "extend to any judge having jurisdiction over the person and the subject matter jurisdiction to grant any criminal law remedy" (p. 886 (emphasis added)).

55 Lamer J. approached this matter as a choice between alternatives — permitting criminal trial judges to draw from the full range of remedies, including civil remedies, in addressing *Charter* violations or, alternatively, restricting the scope of available remedies to the criminal domain. Neither

de jugement créées par une loi doivent se limiter aux réparations que cette loi les habilite à accorder, à tout le moins en l'absence d'intention claire du législateur (aux p. 886-887) :

> Je ne vois pas la nécessité, une fois que la distinction entre les voies de recours criminelles et les autres est faite, de faire une autre distinction au sein même du système de droit criminel entre les juges du procès en fonction du tribunal auquel ils siègent. Comme ils détiennent déjà la compétence de statuer définitivement au fond, ils détiennent déjà la plénitude des redressements du droit criminel existants, tels l'ajournement, la libération sous cautionnement, l'ordonnance de communication de pièces, d'exclusion de preuves, la suspension d'instance.

Ici encore, l'accent n'est pas sur les réparations que les cours de juridiction criminelle « détiennent déjà », mais plutôt sur celles qui permettront le mieux à la juridiction de jugement de jouer son rôle au sein de notre système de justice pénale.

Lorsqu'il a déterminé l'éventail des réparations que peuvent accorder les juridictions de jugement en vertu du par. 24(1), le juge Lamer était principalement animé par le souci que ces juridictions ne se hasardent pas à accorder des réparations que, en raison de leur propre procédure (ou structure), elles ne sont pas adéquatement équipées pour façonner. Il a examiné deux interprétations opposées du par. 24(1) qui touchaient au cœur de son argument. Selon la première interprétation, la juridiction compétente tant à l'égard de l'objet du litige que des parties détient entière compétence pour accorder toute réparation convenable et juste, y compris « des réparations civiles, outre les réparations qui relèvent traditionnellement de leur compétence » (p. 885). La deuxième interprétation « étendrai[t] [. . .] à tout juge compétent *ratione personae* et *ratione materiae* la compétence d'accorder toutes réparations de droit criminel » (p. 886 (je souligne)).

Le juge Lamer a considéré cette question comme un choix entre deux solutions : mettre à la disposition des juges présidant les procès criminels toute la gamme des réparations, y compris les réparations civiles, pour remédier aux violations de la *Charte* ou, subsidiairement, restreindre l'éventail

approach evinces concern with whether the court has a particular remedial power under statute, or pursuant to its inherent jurisdiction.

Lamer J. endorsed the second approach for criminal trial judges; that is, he concluded that once jurisdiction over the person and subject matter is established, a criminal court is empowered to grant any criminal law remedy. This conclusion was compelled by the structural limitations of the criminal trial process (at p. 886):

> [D]esirable as might be a system whereby a person could get from the judge he or she is before a plenitude of remedies [i.e. including civil remedies], this approach has to be defeated by the fundamental differences as between the civil and criminal process. . . . [I]t will be difficult to afford the alleged violators, susceptible to pay damages or to be the object of some injunction, a fair hearing within the criminal justice process, whilst guaranteeing the accused all traditional safeguards. Furthermore, the criminal courts are not staffed and equipped to cope with such types of determinations.

Thus, Lamer J. concluded that the function performed by criminal trial courts mandates an expansive remedial jurisdiction under the *Charter*, circumscribed only by the boundaries of the court's expertise and procedures, which coincided with the boundaries of the criminal law.

La Forest J.'s reasons in *Mills* are also consistent with the functional and structural approach to defining "power to grant the remedy sought". Like Lamer and McIntyre JJ., he expressed a preference for complete resolution of *Charter* issues at the trial level, stating, at p. 972, that the "trial court will ordinarily be the appropriate court to grant the remedy". He contemplated an exception to this general principle only for exigent circumstances, such as where a trial court has not been set at the time the remedy is required, or where the trial court itself is implicated in the breach of the *Charter* right. This language

des réparations applicables à celles relevant du domaine criminel. Dans ni l'une ni l'autre de ces approches, on ne s'arrête à la question de savoir si le tribunal détient un pouvoir de réparation particulier en vertu soit de la loi soit de sa compétence inhérente.

56 Le juge Lamer a retenu la deuxième approche en ce qui a trait aux juges présidant les procès criminels, concluant en effet qu'une fois établie la compétence sur les parties et sur l'objet du litige, la cour de juridiction criminelle est habilitée à accorder toute réparation relevant du droit criminel. Les limitations structurelles du processus pénal ont forcé cette conclusion (à la p. 886) :

> [A]ussi désirable que puisse être un système en vertu duquel le justiciable pourrait obtenir du juge devant qui il comparaît un ensemble de réparations [c.-à-d. y compris des réparations civiles], cette façon de voir doit être rejetée à cause des différences fondamentales existant entre les voies de droit civiles et les voies de droit criminelles [. . .] [I]l sera difficile de fournir à des contrevenants présumés, ayant éventuellement à payer des dommages-intérêts ou devant faire l'objet de quelque injonction, une audition équitable dans le cadre des voies de droit criminelles, tout en garantissant au prévenu toutes les protections traditionnelles. De plus, les juridictions criminelles n'ont pas le personnel ni ne sont équipées pour connaître de ce genre d'affaires.

En conséquence, le juge Lamer a estimé que la fonction exercée par les juridictions criminelles requiert une vaste compétence en matière de réparations fondées sur la *Charte*, compétence circonscrite uniquement par les limites de l'expertise et des procédures du tribunal, qui coïncident avec les limites du droit criminel.

57 Les motifs exposés par le juge La Forest dans l'arrêt *Mills* sont eux aussi compatibles avec l'approche fonctionnelle et structurelle applicable pour définir le « pouvoir d'accorder la réparation demandée ». À l'instar des juges Lamer et McIntyre, le juge La Forest a exprimé sa préférence pour la résolution complète, au procès, des questions relatives à la *Charte*, affirmant que c'est « normalement la juridiction de première instance qui [a] compétence pour accorder la réparation » (p. 972). Il n'a envisagé qu'une exception à ce principe général, à savoir les situations d'urgence, tels

suggests that apart from such exceptional circumstances, provincially appointed criminal courts are courts of competent jurisdiction to issue remedies under s. 24. He imposes only one limitation on this remedial jurisdiction: "civil remedies should await action in a civil court" (p. 971).

58 Functional and structural considerations also dominated the Court's comments on the powers of preliminary inquiry judges to exclude evidence on *Charter* grounds. A minority, led by Lamer J., would have recognized this power, on the basis that excluding inadmissible evidence, including on *Charter* grounds, is central to the preliminary inquiry's function: determining whether there is sufficient admissible evidence to put the accused on trial. McIntyre and La Forest JJ., writing for the majority view, held that preliminary inquiry judges cannot exclude evidence under s. 24(2). In arriving at this result, they emphasized the limited screening function of the preliminary inquiry and the difficulty of making, at a preliminary stage, the s. 24(2) determination of whether in "all the circumstances" admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute (at pp. 970-71, *per* La Forest J.).

59 In summary, the reasons of McIntyre, Lamer and La Forest JJ. in *Mills* were unanimous in emphasizing that the power of courts to issue *Charter* remedies turns on the function and structure of these courts. In effect, a judge sitting on a criminal trial, by reason of the function he or she is discharging, has the power to grant *Charter* remedies incidental to that trial. To this end, the judge may draw from

les cas où l'identité du tribunal devant lequel se déroulera le procès n'a pas encore été déterminée au moment où la réparation est requise et ceux où la juridiction de jugement elle-même est impliquée dans l'atteinte au droit protégé par la *Charte*. Ces propos suggèrent que, sauf dans de telles circonstances exceptionnelles, les cours de juridiction criminelle constituées par les provinces sont des tribunaux compétents pour accorder des réparations en vertu de l'art. 24. Le juge La Forest n'impose qu'une seule restriction à cette compétence en matière de réparation : « pour obtenir une réparation civile, il faudra procéder par voie d'action devant un tribunal civil » (p. 971).

Les considérations d'ordre fonctionnel et structurel ont également dominé dans les commentaires de notre Cour sur le pouvoir des juges présidant les enquêtes préliminaires d'écarter des éléments de preuve pour des motifs prévus par la *Charte*. Les juges minoritaires, sous la plume du juge Lamer, auraient reconnu l'existence de ce pouvoir, parce que l'exclusion d'éléments de preuve inadmissibles, y compris pour des motifs prévus par la *Charte*, est un aspect central du rôle de l'enquête préliminaire, qui est de déterminer si la preuve est suffisante pour faire passer la personne inculpée en jugement. Rédigeant l'opinion de la majorité, les juges McIntyre et La Forest ont conclu que les juges présidant les enquêtes préliminaires ne pouvaient écarter des éléments de preuve en vertu du par. 24(2). En concluant ainsi, ils ont souligné la fonction de filtrage limitée de l'enquête préliminaire et la difficulté de décider à un stade préliminaire, en vertu du par. 24(2), si « eu égard aux circonstances » l'utilisation d'éléments de preuve obtenus en violation à la *Charte* est susceptible de déconsidérer l'administration de la justice (aux p. 970-971, le juge La Forest).

En résumé, dans les motifs qu'ils ont exposés dans l'arrêt *Mills*, les juges McIntyre, Lamer et La Forest ont unanimement souligné le fait que le pouvoir des tribunaux d'accorder des réparations en vertu de la *Charte* est tributaire de la fonction et de la structure de ces tribunaux. En fait, le juge qui préside un procès criminel possède, en raison de la fonction qu'il accomplit, le pouvoir d'accorder les

the full ambit of criminal law remedies in fashioning an appropriate and just response to a *Charter* violation. This approach facilitates the function of the trial court, by promoting complete resolution of *Charter* issues at the trial level and allowing the court significant flexibility in fashioning remedies to meet the precise circumstances of the case at bar. At the same time, it heeds the structural limits of the criminal trial process, by confining the courts' remedial powers to the criminal sphere.

réparations fondées sur la *Charte* qui sont accessoires à ce procès. À cette fin, il peut puiser dans toute la panoplie des réparations relevant du droit criminel pour façonner une réponse convenable et juste à une violation de la *Charte*. Cette méthode aide la juridiction de jugement à s'acquitter de sa fonction en favorisant, à cette étape, la résolution complète des questions relatives à la *Charte* et en laissant au tribunal une souplesse considérable dans l'élaboration de réparations adaptées aux circonstances précises de l'affaire dont il est saisi. Par la même occasion, cette méthode respecte les limites structurelles du processus pénal en restreignant au domaine du droit criminel les pouvoirs des tribunaux en matière de réparations.

Subsequent jurisprudence affirms this functional and structural approach. Since *Mills*, two judgments of this Court have dealt with "court of competent jurisdiction" under s. 24: *Weber*, *supra*, and *Mooring*, *supra*. Both cases focused on the remedial jurisdiction of administrative tribunals under s. 24. In *Weber*, the Court addressed the question of whether a labour arbitrator is a court of competent jurisdiction under s. 24(1) for the purposes of awarding damages for a *Charter* breach. In *Mooring*, the Court considered whether the National Parole Board could exclude *Charter*-offending evidence as a court of competent jurisdiction under s. 24. In both cases, the jurisdiction of the tribunal over the person and subject matter was established; the critical issue was whether the tribunal enjoyed the power to grant the remedy sought. This jurisdiction was found in the labour arbitrator in *Weber*, but not in the Parole Board in *Mooring*.

60 La jurisprudence subséquente confirme cette méthode fonctionnelle et structurelle. Dans deux affaires depuis l'arrêt *Mills*, notre Cour a examiné la notion de « tribunal compétent » au sens de l'art. 24 : *Weber*, précité, et *Mooring*, précité. Ces deux arrêts portaient principalement sur la compétence des tribunaux administratifs en matière de réparations fondées sur l'art. 24. Dans *Weber*, notre Cour s'est demandé si un arbitre en droit du travail était un tribunal compétent au sens du par. 24(1) pour accorder des dommages-intérêts en cas de violation de la *Charte*. Dans *Mooring*, notre Cour s'est penchée sur la question de savoir si la Commission nationale des libérations conditionnelles était un tribunal compétent au sens de l'art. 24 pour écarter des éléments de preuve recueillis en violation de la *Charte*. Dans ces deux arrêts, la compétence du tribunal à l'égard des parties et de l'objet du litige a été établie; la question fondamentale était de savoir si le tribunal jouissait du pouvoir d'accorder la réparation demandée. Dans *Weber*, on a conclu que l'arbitre détenait cette compétence, mais dans *Mooring* on a jugé que la Commission nationale des libérations conditionnelles ne l'avait pas.

In *Weber*, a labour arbitrator was found to be a court of competent jurisdiction under s. 24(1) to award damages primarily because the Board's constituent statute authorized it to make an award of this type. The statute conferred on the Board the mandate, function and structure to make damage awards.

61 Dans l'arrêt *Weber*, notre Cour a conclu qu'un arbitre en droit du travail était, au sens du par. 24(1), un tribunal compétent pour accorder des dommages-intérêts, principalement parce que la loi constitutive de la commission l'autorisait à rendre une décision de ce genre. La loi investissait

While the reasons do not use the language of function and structure, the decision may be seen as turning on the fact that the legislature had equipped the tribunal to make damage awards generally and therefore must have intended this power to extend to *Charter*-based claims. In short, the Board was by function and structure equipped to grant the remedy sought.

62 It is in *Mooring*, *supra*, that the language of function and structure first emerges in express form. Moving beyond the "type of" remedy language of *Weber*, Sopinka J., for the majority, engaged in a detailed analysis of the "structure and function" of the Board (at para. 24) in assessing whether the Board had the "power to grant the remedy sought". A number of aspects of the Board's structure, in his opinion, weighed against its competency to exclude relevant evidence as a *Charter* remedy (at para. 26):

> [T]he Parole Board does not hear and assess evidence, but instead acts on information. The Parole Board acts in an inquisitorial capacity without contending parties — the state's interests are not represented by counsel, and the parolee is not faced with a formal "case to meet". From a practical perspective, neither the Board itself nor the proceedings in which it engages have been designed to engage in the balancing of factors that s. 24(2) demands. [Emphasis added.]

63 Similarly, Sopinka J. found that the function of the Board — assessing the risk posed to society by parolees — counseled against finding jurisdiction to exclude relevant evidence. These factors, combined with the lack of statutory authority to exclude relevant evidence, led Sopinka J. to the conclusion that the Board did not have jurisdiction over the remedy sought. Major J. (McLachlin J. concurring) dissented, but did not suggest that the function of the Board and its

en effet la commission en cause du mandat, de la fonction et la structure nécessaires pour ordonner le paiement de dommages-intérêts. Bien que les termes fonction et structure ne soient pas utilisés dans les motifs, on peut considérer que la décision repose sur le fait que la législature avait doté le tribunal des attributs requis pour accorder des dommages-intérêts de façon générale et qu'elle devait, en conséquence, avoir voulu que ce pouvoir s'étende aux demandes fondées sur la *Charte*. Bref, de par sa fonction et sa structure, la Commission en cause était en mesure d'accorder la réparation demandée.

C'est dans l'arrêt *Mooring*, précité, que les expressions fonction et structure ont été utilisées explicitement pour la première fois. S'éloignant de l'expression « genre de » réparation utilisée dans *Weber*, le juge Sopinka, s'exprimant pour la majorité, s'est livré à une analyse approfondie de « la structure et de la fonction » de la Commission (au par. 24) pour déterminer si celle-ci avait le « pouvoir d'accorder la réparation demandée ». À son avis, un certain nombre d'aspects de la structure de la Commission militaient contre l'existence de la compétence de celle-ci d'écarter des éléments de preuve pertinents en tant que réparation fondée sur la *Charte* (au par. 26) :

> [L]a Commission n'entend et n'évalue aucun témoignage, et [elle] agit plutôt sur la foi de renseignements. Elle exerce des fonctions d'enquête sans la présence de parties opposées : il n'y a pas d'avocat pour défendre les intérêts de l'État, et le détenu en liberté conditionnelle n'a pas de « preuve à réfuter » comme telle. D'un point de vue pratique, ni la Commission ni les procédures qu'elle engage n'ont été conçues pour procéder à l'évaluation de facteurs requise par le par. 24(2). [Je souligne.]

De même, le juge Sopinka a estimé que la fonction de la Commission — l'appréciation du risque que constituent pour la société les détenus en liberté conditionnelle — militait contre la reconnaissance de la compétence d'écarter des éléments de preuve pertinents. Ces facteurs, conjugués à l'absence dans la loi de pouvoir autorisant la Commission à écarter des éléments de preuve pertinents, ont amené le juge Sopinka à conclure que celle-ci n'avait pas compétence à l'égard de la réparation demandée.

suitability to hear *Charter* matters were not determinative.

In *Mooring* and *Weber*, the language of the statutes creating and empowering the tribunals played a more prominent role than was evident in *Mills*. As discussed, a court or tribunal's enabling legislation will often prove invaluable in discerning legislative intent. The history and accepted practice of the institution may also provide insight. In some circumstances, one source may provide more guidance than the other. In *Mills*, for example, the function of criminal trial courts, and the structural limits of their procedures and processes, were accepted by the Court as largely self-evident, without need to resort to the precise language of their governing statutes. Since all criminal courts are uniformly competent to grant criminal law remedies, there is no virtue in making further distinctions based on the source of the court's jurisdiction; in the words of Lamer J., there is no principled basis "for making a further distinction within the criminal law system between trial judges dependent upon the trial court in which they sit" (p. 886).

By contrast, in assessing the remedial jurisdiction of administrative tribunals in *Weber* and *Mooring*, the Court emphasized the tribunals' statutory authority to issue remedies of the type sought. This focus on statutory authority in assessing power to grant the remedy sought makes eminent sense in the administrative context. Administrative tribunals, unlike criminal courts, do not share substantially uniform structures and functions. Their structures and functions are as diverse as the roles they perform in Canadian society. Administrative tribunals vary widely in virtually every aspect — experience, expertise, structure, function, resources and mandate: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at pp. 634-35; *Canadian*

Le juge Major (avec l'appui du juge McLachlin) a exposé des motifs de dissidence, mais il n'a pas suggéré que la fonction de la Commission et son aptitude à connaître des questions relatives à la *Charte* n'étaient pas des considérations déterminantes.

64 Dans les arrêts *Mooring* et *Weber*, le texte de la loi constitutive et habilitante de chacun des tribunaux administratifs concernés a joué un rôle plus important que dans l'arrêt *Mills*. Comme il a été expliqué précédemment, la loi habilitante du tribunal judiciaire ou administratif se révèle souvent très utile pour dégager l'intention du législateur. L'histoire de l'organisme et sa pratique reconnue peuvent également fournir des indications. Dans certaines circonstances, une source peut éclairer davantage qu'une autre. Dans l'arrêt *Mills*, par exemple, la Cour a estimé que la fonction des cours de juridiction criminelle et les limites structurelles de leurs processus et procédures étaient largement évidentes, sans qu'il soit nécessaire de se référer au texte précis de leur loi habilitante. Étant donné que toutes les cours de juridiction criminelle sont compétentes pour accorder des réparations relevant du droit criminel, il ne sert à rien de faire d'autres distinctions reposant sur la source de la compétence du tribunal concerné. Pour reprendre les mots du juge Lamer, il n'y a aucun fondement de principes permettant « de faire une autre distinction au sein même du système de droit criminel entre les juges du procès en fonction du tribunal auquel ils siègent » (p. 886-887).

65 Par contre, dans le cours de son examen de la compétence des tribunaux administratifs concernés en matière de réparations dans les arrêts *Weber* et *Mooring*, notre Cour a souligné que ces tribunaux avaient, en vertu de leur loi habilitante, le pouvoir d'ordonner des réparations du genre de celles demandées. Le fait de mettre l'accent sur le pouvoir conféré par la loi pour déterminer l'existence du pouvoir d'accorder la réparation demandée est éminemment logique en contexte administratif. Contrairement aux cours de juridiction criminelle, les divers tribunaux administratifs n'ont pas des structures et des fonctions substantiellement uniformes. Leurs structures et leurs fonctions sont aussi diverses que les rôles qu'ils jouent dans la société canadienne. Les tribunaux administratifs diffèrent

Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, at para. 117. It follows that courts must carefully consider an administrative tribunal's constituent statute to determine its intended function and structure.

66 A significant factor in this analysis will be the nature of the tribunal's power to grant remedies under statute. Statutory authority to grant a particular remedy, or the lack thereof, is a telling indication of the tribunal's level of experience and expertise with that type of remedy, and possibly the compatibility of this remedy with its function. These are all compelling factors in answering the central question of whether the legislature can be taken to have intended the tribunal to determine *Charter* rights and award the remedy sought for breaches of those rights. In general, the stronger the nexus between the tribunal's statutory jurisdiction to grant remedies, on one hand, and the remedial jurisdiction sought under s. 24 on the other, the more compelling the inference that the tribunal is competent to issue the desired *Charter* relief.

67 However, statutory authority to grant the type of remedy sought will not always prove conclusive; it is merely one of a number of factors to be considered in discerning the structure and function of the tribunal, as a means of determining the intention of Parliament or the legislature. Another critical factor may be the presence or absence of safeguards necessary to permit the tribunal to give fair and informed decisions on *Charter* rights and award remedies for their breach. As discussed, these considerations led the majority of the Court in *Mooring* to hold that the Parole Board lacked the jurisdiction over the remedy sought (the exclusion of improp-

grandement les uns des autres à pratiquement tous égards — expérience, expertise, structure, fonction, ressources et mandat : *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623, p. 634-635; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3, par. 117. Il s'ensuit que la cour appelée à statuer sur la question doit examiner avec soin la loi constitutive d'un tribunal administratif pour déterminer la fonction et la structure qu'on entendait lui donner.

Un facteur important dans cette analyse est la nature du pouvoir dont dispose le tribunal administratif pour accorder des réparations en vertu de cette loi. L'existence ou l'absence du pouvoir d'ordonner une réparation donnée en vertu de la loi est révélatrice quant au niveau d'expérience et d'expertise du tribunal relativement à ce genre de réparation et, possiblement, quant à la compatibilité de cette réparation avec la fonction du tribunal. Ces facteurs sont tous des éléments essentiels pour répondre à la question fondamentale de savoir si l'on peut considérer que le législateur entendait que le tribunal concerné se prononce sur les droits garantis par la *Charte* et accorde la réparation demandée en cas d'atteinte à ces droits. En général, plus fort est le lien entre le pouvoir du tribunal d'ordonner des réparations en vertu de sa loi habilitante d'une part, et la compétence en matière de réparations qu'on désire qu'il exerce en vertu de l'art. 24 d'autre part, plus incontournable est la conclusion que le tribunal est compétent pour accorder la réparation demandée sous le régime de la *Charte*.

Cependant, l'existence dans la loi du pouvoir d'accorder le genre de réparation demandée ne sera pas toujours déterminante. En effet, elle n'est que l'un des divers facteurs qui doivent être pris en compte pour déterminer la structure et la fonction du tribunal administratif concerné, dans le but de dégager l'intention du Parlement ou de la législature. La présence ou l'absence des mesures de protection nécessaires pour permettre au tribunal de statuer de façon équitable et éclairée sur les droits garantis par la *Charte* et d'accorder des réparations pour leur violation peut s'avérer un autre facteur important. Comme il a été indiqué plus tôt, ces fac-

erly obtained evidence under s. 24(2)), and therefore was not a court of competent jurisdiction under s. 24.

In summary, the jurisprudence of this Court on s. 24(1) demonstrates a dominant concern with discerning legislative intent in light of the tribunal's function and the practical limits imposed by its structure. At heart, this is a functional and structural analysis. This approach found its clearest expression in the reasons of Sopinka J. in *Mooring*, but it also animated the dissenting opinion in that case, as well as the previous decisions of this Court in *Weber* and *Mills*.

(2) Consistency with the Approach to Discerning Legislative Intent in Other Contexts

The "functional and structural" approach to determining whether a tribunal is competent to grant *Charter* remedies under s. 24(2) accords with the general approach to discerning the implied powers of statutory bodies, and the test established by this Court for determining whether a tribunal has jurisdiction to consider *Charter* issues under s. 52(1) of the *Constitution Act, 1982*.

It is well established that a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate: *Halsbury's Laws of England* (4th ed. 1995), vol. 44(1), at para. 1335. In other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions: *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

teurs ont amené les juges majoritaires de notre Cour dans *Mooring* à conclure que la Commission des libérations conditionnelles n'avait pas compétence pour accorder la réparation demandée (l'exclusion d'éléments de preuve obtenus en violation du par. 24(2)) et n'était donc pas un tribunal compétent au sens de l'art. 24.

68 En résumé, la jurisprudence de notre Cour sur le par. 24(1) témoigne du souci prédominant de dégager l'intention du législateur à la lumière de la fonction du tribunal concerné et des limites que sa structure lui impose. Il s'agit fondamentalement d'une analyse fonctionnelle et structurelle. Cette approche, qui a été exprimée on ne peut plus clairement dans les motifs du juge Sopinka dans *Mooring*, est également au cœur de l'opinion dissidente dans cet arrêt ainsi que dans les arrêts *Weber* et *Mills* rendus antérieurement par notre Cour.

(2) Cohérence avec l'approche applicable pour dégager l'intention du législateur dans d'autres contextes

69 L'approche « fonctionnelle et structurelle » appliquée pour déterminer si un tribunal a compétence pour accorder des réparations en vertu du par. 24(2) de la *Charte* est compatible avec l'approche générale permettant de reconnaître les pouvoirs implicites des organismes créés par une loi et avec le critère établi par notre Cour pour décider si un tribunal est compétent pour examiner les questions relatives à la *Charte* au regard du par. 52(1) de la *Loi constitutionnelle de 1982*.

70 Il est bien établi qu'un organisme créé par une loi jouit non seulement des pouvoirs que celle-ci lui confère expressément, mais aussi, par implication nécessaire, de tous ceux qui sont raisonnablement nécessaires à l'accomplissement de son mandat : *Halsbury's Laws of England* (4e éd. 1995), vol. 44(1), par. 1325. En d'autres termes, les pouvoirs d'un tribunal judiciaire ou administratif créé par une loi ne se limitent pas aux termes exprès de sa loi habilitante, mais englobent également les pouvoirs nécessaires à l'exécution des fonctions qu'il est censé accomplir : *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722.

71 Consequently, the function of a statutory body is of principal importance in assessing whether it is vested with an implied power to grant the remedy sought. Such implied powers are found only where they are required as a matter of practical necessity for the court or tribunal to accomplish its purpose: *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.). While these powers need not be absolutely necessary for the court or tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose: *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Bell Canada*, *supra*; Macaulay and Sprague, *supra*, vol. 4, at p. 29-2. This emphasis on the function of a court or tribunal, in discerning the powers with which the legislature impliedly endowed it, accords with the functional and structural approach to the *Mills* test set out above.

Par conséquent, la fonction d'un organisme créé par une loi est un facteur de première importance pour déterminer s'il a été investi du pouvoir implicite d'accorder la réparation demandée. De tels pouvoirs implicites existent uniquement lorsqu'ils sont nécessaires en pratique pour que le tribunal judiciaire ou administratif puisse s'acquitter de sa mission : *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275 (C.A.). Bien qu'il ne soit pas essentiel que ces pouvoirs soient absolument nécessaires pour que le tribunal judiciaire ou administratif puisse réaliser les objectifs visés par sa loi constitutive, ils doivent être nécessaires pour lui permettre de le faire de façon efficace et efficiente : *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601 (C.A.); *Bell Canada*, précité; Macaulay et Sprague, *op. cit.*, vol. 4, p. 29-2. Cette attention particulière à la fonction du tribunal judiciaire ou administratif, dans le cadre de la détermination des pouvoirs que le législateur lui a implicitement conférés, concorde avec l'approche fonctionnelle et structurelle applicable à l'égard du critère établi dans l'arrêt *Mills* décrite précédemment.

72 Not surprisingly, the Court has adopted a similar approach to determining whether an administrative tribunal has jurisdiction to consider the constitutional validity of its constituent statute under s. 52(1). This analysis rests on the proposition that statutory bodies can only derive the authority to consider *Charter* issues from Parliament or the legislatures. It lies entirely within the discretion of Parliament or the legislatures to confer this authority upon a tribunal or, conversely, to withhold this jurisdiction: *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. Consequently, the question in every case is "whether the legislature intended to confer on the tribunal the power to interpret and apply the *Charter*": *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at pp. 14-15.

Il n'est pas étonnant que notre Cour ait adopté une approche analogue pour déterminer si un tribunal administratif a compétence pour se prononcer sur la constitutionnalité de sa loi constitutive au regard du par. 52(1). Cette analyse repose sur la prémisse selon laquelle seul le Parlement ou la législature concernée peut investir un organisme créé par une loi du pouvoir de connaître des questions liées à la *Charte*. Il appartient entièrement au Parlement ou aux législatures de conférer ce pouvoir à un tribunal administratif ou, à l'inverse, de l'en priver : *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22. Par conséquent, la question qui se pose dans chaque affaire est de savoir « si le législateur entendait conférer au tribunal le pouvoir d'interpréter et d'appliquer la *Charte* » : *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5, p. 15.

73 Where such an intention is not stated expressly, it may be implied from the structure of the tribunal's enabling legislation, the powers conferred on

Lorsque cette intention n'est pas indiquée expressément, elle peut être inférée de l'économie de la loi habilitante du tribunal en question, des pouvoirs

the tribunal, the functions it performs and the overall context in which it operates under the legislation: *Tétreault-Gadoury* (S.C.C.), *supra*; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854. This is, in essence, a functional and structural analysis.

(3) Consistency with Section 24

Finally, the functional and structural approach to assessing a court or tribunal's power to grant the remedy sought comports with the principles underscoring s. 24. As set out earlier, the task of the court in interpreting s. 24 of the *Charter* is to achieve a liberal, purposive approach that promotes direct access to appropriate and just *Charter* remedies under s. 24(1) and (2), while respecting the structure and practice of the existing court system and the exclusive role of the legislative branch in prescribing the jurisdiction of courts and tribunals. The proper approach to s. 24 cannot be so restrictive that it unnecessarily impedes direct access to *Charter* remedies in a competent forum, nor can it be overly relaxed, to the extent that courts and tribunals may find themselves burdened with applications for *Charter* relief that the legislature never intended — or equipped — them to entertain.

The functional and structural approach strikes this balance between meaningful access to *Charter* relief and deference to the role of the legislatures. It rests on the theory that where a legislature confers on a court or tribunal a function that involves the determination of matters where *Charter* rights may be affected, and furnishes it with processes and powers capable of fairly and justly resolving those incidental *Charter* issues, then it must be inferred, in the absence of a contrary intention, that the legislature intended to empower the tribunal to apply the *Charter*. This approach promotes direct and early access to *Charter* remedies in forums competent to issue such relief. At the same time, the jurisdiction

conférés à celui-ci, des fonctions qu'il exerce et du contexte global dans lequel il exerce ses activités en vertu de la loi : *Tétreault-Gadoury* (C.S.C.), précité; *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854. Il s'agit là essentiellement d'une analyse fonctionnelle et structurelle.

(3) Conformité avec l'art. 24

74 Enfin, l'approche fonctionnelle et structurelle qui est appliquée pour décider si un tribunal judiciaire ou administratif a le pouvoir d'accorder la réparation demandée est compatible avec les principes qui sous-tendent l'art. 24. Comme il a été mentionné précédemment, il incombe au tribunal qui interprète l'art. 24 de la *Charte*, d'appliquer une approche libérale et téléologique, qui facilite l'accès direct à des réparations convenables et justes fondées sur les par. 24(1) et (2) de la *Charte*, tout en respectant la structure et les pratiques du système judiciaire existant ainsi que le rôle qui appartient en exclusivité au pouvoir législatif, soit celui de fixer la compétence des tribunaux judiciaires et administratifs. L'approche qu'il convient d'appliquer à l'égard de l'art. 24 ne doit pas être restrictive au point de gêner inutilement la possibilité d'avoir accès directement à des réparations fondées sur la *Charte* devant le forum compétent. Elle ne doit non plus être si souple que les tribunaux judiciaires et administratifs soient inondés de demandes de réparations fondées sur la *Charte* que le législateur n'a jamais voulu leur confier et à l'égard desquelles il ne leur a pas fourni les outils requis.

75 L'approche fonctionnelle et structurelle permet de réaliser cet équilibre entre l'accès concret aux réparations prévues par la *Charte* et la déférence envers le rôle des législatures. Elle repose sur la théorie selon laquelle, lorsqu'un législateur confie à un tribunal judiciaire ou administratif une fonction l'amenant à trancher des questions susceptibles de toucher des droits garantis par la *Charte* et le dote de mécanismes et procédures lui permettant de décider de façon juste et équitable ces questions accessoires liées à la *Charte*, il faut alors en déduire, en l'absence d'intention contraire, que le législateur entendait habiliter ce tribunal à appliquer la *Charte*. Cette approche

of courts and tribunals ultimately remains a matter of legislative intention. Parliament and the legislatures remain master over the powers the tribunals they create possess. Subject to constitutional constraints, they may withhold the power to grant any or all *Charter* remedies. They may indicate such exclusion either expressly, or by implication, such as where they do not properly equip the tribunal to hear and decide *Charter* rights and remedies. Whether Parliament or the legislature intended to exclude a particular remedial power is determined by reference to the function the legislature has asked the tribunal to perform and the powers and processes with which it has furnished it.

C. *Application*

76 The issue before us is whether a justice sitting under the *POA* can find that the Crown, by failing to disclose documents, is in breach of the *Charter* and order it to pay costs under s. 24(1). The resolution of this issue hinges on whether a provincial offences court is a "court of competent jurisdiction" under s. 24(1) for the purposes of ordering a costs award for a *Charter* violation. The first two elements of the tripartite *Mills* test for identifying a "court of competent jurisdiction" — jurisdiction over the parties and the subject matter — are clearly satisfied on the facts of this appeal. The sole issue is whether the provincial offences court satisfies the third and final element of the *Mills* test: power to grant the remedy sought.

77 All parties agree that the *POA* does not expressly confer upon the provincial court the jurisdiction to

favorise l'accès direct et rapide aux réparations fondées sur la *Charte* devant des juridictions compétentes pour les accorder. Par ailleurs, la question de la compétence des tribunaux judiciaires et administratifs dépend en dernière analyse de l'intention du législateur. Le Parlement et les législatures demeurent maîtres des pouvoirs que possèdent les tribunaux qu'ils créent. Sous réserve des limites d'ordre constitutionnel, ils peuvent priver un tribunal du pouvoir d'accorder soit toute réparation fondée sur la *Charte* soit l'une ou l'autre de ces réparations. Ils peuvent indiquer une telle exclusion de façon explicite ou implicite, par exemple dans ce dernier cas en ne dotant pas le tribunal des attributs requis pour statuer sur les droits et réparations prévus par la *Charte*. Pour décider si le Parlement ou la législature concernée entendait exclure un pouvoir de réparation donné, on examine la fonction qu'il a demandé au tribunal d'accomplir, ainsi que les pouvoirs et procédures dont celui-ci a été doté.

C. *Application*

La question dont nous sommes saisis est de savoir si le juge siégeant en vertu de la *LIP* peut conclure que la Couronne a contrevenu à la *Charte* en omettant de communiquer des documents et peut condamner celle-ci aux dépens en vertu du par. 24(1). Pour trancher cette question, il faut décider si le tribunal des infractions provinciales est un « tribunal compétent » au sens du par. 24(1) pour prononcer une condamnation aux dépens pour cause de violation de la *Charte*. À la lumière des faits du présent pourvoi, il est clair que sont respectés, en l'espèce, les deux premiers éléments du critère à trois volets énoncé dans l'arrêt *Mills* pour déterminer si un tribunal est un « tribunal compétent », à savoir la compétence sur les parties et la compétence sur l'objet du litige. Il reste seulement à décider si le tribunal des infractions provinciales satisfait au troisième et dernier élément du critère énoncé dans *Mills* : l'existence du pouvoir d'accorder la réparation demandée.

Les parties s'accordent pour dire que la *LIP* ne confère pas explicitement au tribunal provincial le

award legal costs as a *Charter* remedy. The remaining question, then, is whether such an intention is implied by the function and structure of the provincial offences court. I have reached the conclusion, upon consideration of these factors, that the provincial offences court is an appropriate forum for the just resolution of this *Charter* issue, and that the legislature, having sufficiently equipped this court to fashion a costs remedy in these circumstances, intended it to exercise this power to address violations of the *Charter* that arise in the course of its proceedings.

(1) The Function of the Provincial Offences Court

The function of a provincial court operating under the *POA* is to try provincial offences. While the majority of these offences involve minor regulatory infractions, they also concern important matters like environmental protection and, as here, workplace health and safety. These offences carry penalties ranging from significant fines to terms of imprisonment. The public and penal nature of such prosecutions suggests they are more criminal than civil in nature: see W. D. Drinkwalter and J. D. Ewart, *Ontario Provincial Offences Procedure* (1980), at pp. 4-7. Provincial offences courts are, for practical purposes, quasi-criminal courts, determining guilt and innocence and imposing commensurate criminal penalties.

This brings the provincial offences court within the ambit of *Mills*. As discussed, this Court in *Mills* envisioned a front-line role for statutory criminal courts in dispensing *Charter* remedies, with the superior courts occupying a complete and concurrent, but primarily residual role in proceedings not originating before them. Indeed, a superior court is compelled to decline jurisdiction to issue *Charter* relief, unless "it is more suited than the trial court to

pouvoir d'accorder les frais de justice en tant que réparation fondée sur la *Charte*. La question qu'il reste donc à trancher est de savoir si cette intention ressort implicitement de la fonction et de la structure du tribunal des infractions provinciales. Après examen de ces facteurs, j'en suis arrivée à la conclusion que ce tribunal est un forum approprié pour apporter une juste solution à cette question touchant la *Charte* et que, l'ayant doté des outils suffisants pour lui permettre de façonner une réparation au titre des dépens dans les circonstances, la législature entendait qu'il exerce ce pouvoir pour remédier aux violations de la *Charte* survenant au cours des procédures se déroulant devant lui.

(1) La fonction du tribunal des infractions provinciales

78 Le tribunal agissant en vertu de la *LIP* a pour fonction de juger les infractions provinciales. Bien que ces infractions soient en majorité des infractions mineures d'ordre réglementaire, elles portent aussi sur des questions importantes comme la protection de l'environnement et, dans le cas qui nous occupe, la santé et la sécurité au travail. Ces infractions entraînent des peines allant d'amendes considérables à des périodes d'emprisonnement. Le caractère public et pénal des poursuites intentées à l'égard de ces infractions indique que ces poursuites ont un caractère davantage criminel que civil : voir W. D. Drinkwalter et J. D. Ewart, *Ontario Provincial Offences Procedure* (1980), p. 4-7. À toutes fins pratiques, le tribunal des infractions provinciales est une cour de juridiction quasi criminelle, qui décide de la culpabilité ou de l'innocence de l'intéressé et inflige des sanctions d'ordre criminel appropriées.

79 En conséquence, le tribunal des infractions provinciales est visé par l'arrêt *Mills*. Comme il a été vu plus tôt, dans *Mills* notre Cour a envisagé pour les juridictions criminelles créées par une loi un rôle d'intervenant de première ligne en matière de réparations fondées sur la *Charte*, les cours supérieures jouant un rôle complet et parallèle, mais avant tout résiduel, dans les instances non introduites devant elles. D'ailleurs, une cour supérieure est tenue de

assess and grant the remedy that is just and appropriate": *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 603; P. W. Hogg, *Constitutional Law of Canada* (looseleaf ed.), vol. 2, at p. 37-24. Provincial offences courts, like other criminal trial courts, are the preferred forum for issuing *Charter* remedies in the cases originating before them, where they will have the "fullest account of the facts available" (*Mills*, at p. 971, *per* La Forest J.). This is particularly true where the *Charter* violation relates to the conduct of the trial: *R. v. O'Connor*, [1995] 4 S.C.R. 411. This role commends a full complement of criminal law remedies at the disposal of provincial offences courts. This broad remedial jurisdiction is necessary to prevent frequent resort to superior courts to fill gaps in statutory jurisdiction, and to ensure that the remedy that ultimately flows is in fact both appropriate and just.

80 Costs awards to discipline untimely disclosure are integrally connected to the function of the provincial offences court as a quasi-criminal trial court. Costs awards have a long history as a traditional criminal law remedy. Although sparingly used prior to the advent of the *Charter*, superior courts have always possessed the inherent jurisdiction to award costs against the Crown: *R. v. Ouellette*, [1980] 1 S.C.R. 568; *R. v. Pawlowski* (1993), 12 O.R. (3d) 709 (C.A.), at p. 712. In recent years, costs awards have attained more prominence as an effective remedy in criminal cases; in particular, they have assumed a vital role in enforcing the standards of disclosure established by this Court in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. See, for example: *Pawlowski*, *supra*; *Pang*, *supra*; *R. v. Regan* (1999), 137 C.C.C. (3d) 449 (N.S.C.A.).

se déclarer incompétente pour accorder une réparation fondée sur la *Charte*, sauf si « elle [. . .] s'estime plus apte que la juridiction de jugement pour déterminer et accorder la réparation juste et convenable » : *R. c. Rahey*, [1987] 1 R.C.S. 588, p. 603-604; P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, p. 37-24. À l'instar des autres juridictions de jugement, le tribunal des infractions provinciales constitue la juridiction privilégiée pour accorder des réparations fondées sur la *Charte* dans les affaires introduites devant lui, puisqu'il dispose alors de « l'exposé le plus complet possible des faits » (*Mills*, p. 971, le juge La Forest). C'est particulièrement vrai lorsque la violation de la *Charte* est liée au déroulement du procès : *R. c. O'Connor*, [1995] 4 R.C.S. 411. Pour s'acquitter de ce rôle, le tribunal des infractions provinciales doit disposer de toute la panoplie des réparations du droit criminel. Cette vaste compétence réparatrice est nécessaire afin d'empêcher que l'on s'adresse trop fréquemment aux cours supérieures pour suppléer aux lacunes de la compétence prévue par la loi et afin de garantir que la réparation accordée en bout de ligne soit dans les faits convenable et juste.

Le prononcé d'une condamnation aux dépens pour sanctionner la communication tardive d'éléments de preuve fait partie intégrante du rôle du tribunal des infractions provinciales en tant que cour de juridiction quasi criminelle. Les dépens sont une réparation traditionnelle du droit criminel. Bien que les cours supérieures y aient peu souvent eu recours avant l'édiction de la *Charte*, elles ont toujours possédé le pouvoir inhérent de condamner la Couronne aux dépens : *R. c. Ouellette*, [1980] 1 R.C.S. 568; *R. c. Pawlowski* (1993), 12 O.R. (3d) 709 (C.A.), p. 712. Au cours des dernières années, la condamnation aux dépens à pris une place plus importante en tant que réparation efficace dans les affaires criminelles; en particulier, elle est devenue une mesure cruciale en vue d'assurer le respect des normes de communication de la preuve établies par notre Cour dans l'arrêt *R. c. Stinchcombe*, [1991] 3 R.C.S. 326. Voir, par exemple : *Pawlowski*, précité; *Pang*, précité; *R. c. Regan* (1999), 137 C.C.C. (3d) 449 (C.A.N.-É.).

Such awards, while not without a compensatory element, are integrally connected to the court's control of its trial process, and intended as a means of disciplining and discouraging flagrant and unjustified incidents of non-disclosure. Deprived of this remedy, a provincial offences court may be confined to two extreme options for relief — a stay of proceedings or a mere adjournment — neither of which may be appropriate and just in the circumstances. Since untimely pre-trial disclosure will rarely merit a stay of proceedings when the court can protect the fairness of the trial with a disclosure order (*O'Connor*, *supra*, at paras. 75-83; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at paras. 90-92), denying the provincial offences court the jurisdiction to issue a costs award may deprive it of the only effective remedy to control its process and recognize the harm incurred, even in cases involving unjustified and flagrant disregard for the accused's rights. In these circumstances, the issuance of a costs award is a quintessential example of "the development of imaginative and innovative remedies when just and appropriate" that Lamer J. identified as essential to the meaningful enforcement of *Charter* rights through the s. 24 guarantee (*Mills*, *supra*, at p. 887).

81 Bien qu'elle comporte un aspect indemnitaire, une telle réparation est intimement liée à la maîtrise que le tribunal exerce sur sa procédure et elle se veut un moyen de sanctionner et de décourager les cas flagrants et injustifiés de non-communication de la preuve. Privé de cette réparation, le tribunal des infractions provinciales pourrait n'avoir le choix qu'entre deux mesures de redressement extrêmes — l'arrêt des procédures et le simple ajournement — qui risquent toutes deux de ne pas être convenables et justes eu égard aux circonstances. Puisque le défaut de communiquer un élément de preuve en temps utile avant le procès justifie rarement l'arrêt des procédures, lorsque le tribunal peut préserver l'équité du procès au moyen d'une ordonnance de communication (*O'Connor*, précité, par. 75-83; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391, par. 90-92), le fait de refuser au tribunal des infractions provinciales le pouvoir d'ordonner le paiement de dépens pourrait le priver de la seule réparation efficace lui permettant de faire respecter sa procédure et de tenir compte du préjudice causé, même dans les affaires où on a fait fi de manière flagrante et injustifiée des droits de l'accusé. Dans de telles circonstances, le fait d'accorder les dépens constitue l'exemple type de « développe[ment] d[e] réparations imaginatives et innovatrices lorsque cela est juste et convenable », mesure que le juge Lamer a qualifiée d'essentielle pour assurer concrètement l'application des droits protégés par la *Charte* au moyen de la garantie de l'art. 24 (*Mills*, précité, p. 887).

Further, fracturing the availability of *Charter* remedies between provincial offences courts and superior courts could, in some circumstances, effectively deny the accused access to a remedy and a court of competent jurisdiction. It may be unrealistic to expect criminal accused, who often rely on legal aid to mount a defence against the state, to bring a separate action in the provincial superior court to recover the costs arising from the breach of their *Charter* rights. This option, while available in theory, may far too often prove illusory in practice. While some delay or inconvenience may be an inevitable result of balancing access to *Charter* relief with the practice and structure of the existing

82 En outre, le fait de diviser entre le tribunal des infractions provinciales et les cours supérieures le pouvoir d'ordonner des réparations fondées sur la *Charte* pourrait avoir pour effet, dans certains cas, d'empêcher concrètement l'accusé d'avoir accès à une réparation et à un tribunal compétent. Il n'est peut-être pas réaliste de s'attendre à ce que l'accusé — qui est souvent tributaire de l'aide juridique pour se défendre contre l'État — intente une action distincte devant la cour supérieure de la province pour être indemnisé des frais découlant de la violation des droits que lui garantit la *Charte*. Quoiqu'elle existe en théorie, cette solution risque trop souvent de s'avérer illusoire en pratique. Par

legal system, the Court should not interpret the will of the legislature in such a way that it results in the effective denial of *Charter*-mandated relief, in the absence of an unequivocal indication to this effect.

83 The Crown contends that recognizing the jurisdiction in provincial offences courts to order costs for *Charter* breaches would undermine the specialized function of these courts. It argues that the emphasis of the *POA* is on the expedient adjudication of regulatory offences. Since many of these offences involve minor traffic, liquor or municipal by-law infractions with nominal fines, the Crown contends that the framers did not intend to burden these processes with the additional complication and delay of assessing costs awards. The prejudice in these proceedings is less than in criminal proceedings, it is argued, and full legal costs are not required to ameliorate any prejudice that arises from *Charter* violations.

84 It is true that the provincial offences court performs a specialized function that is distinct, in some respects, from that of a traditional criminal court. The purpose of the *POA*, as set out in s. 2(1), is to establish a procedure for the prosecution of provincial offences "that reflects the distinction between provincial offences and criminal offences". However, as discussed, this distinction is not between criminal and non-criminal offences, but rather between criminal and quasi-criminal offences. The proceedings remain penal in nature. And while many of the prosecutions under the *POA* may indeed involve minor regulatory infractions, claims for *Charter* relief will generally arise from prosecutions that involve significant fines and the

ailleurs, quoique le fait de concilier l'accès aux réparations fondées sur la *Charte* d'une part et la pratique et la structure du système de justice existant d'autre part puisse entraîner inévitablement des retards ou des inconvénients, notre Cour ne doit pas, en l'absence d'indication claire à cet effet, interpréter la volonté du législateur d'une manière qui se traduirait dans les faits par la négation d'une réparation prescrite par la *Charte*.

La Couronne soutient que reconnaître au tribunal des infractions provinciales le pouvoir d'ordonner le paiement des dépens en cas de violation de la *Charte* nuirait au rôle spécialisé de ce tribunal. Il plaide que l'idée maîtresse de la *LIP* est la célérité de la prise des décisions touchant les infractions d'ordre réglementaire. Comme bon nombre de ces infractions constituent des contraventions mineures soit à des dispositions relatives à la circulation automobile ou aux boissons alcooliques, soit à des règlements municipaux, infractions punissables par des amendes peu élevées, la Couronne affirme que les rédacteurs de la loi habilitante n'ont pas voulu alourdir ces procédures en leur ajoutant la complexité et les délais supplémentaires qu'occasionne la question des dépens. Le préjudice en cause dans ces instances est moins grand que dans les affaires criminelles, plaide-t-on, et il n'est pas nécessaire d'accorder le plein montant des frais de justice pour remédier à quelque préjudice découlant de violations de la *Charte*.

Il est vrai que le tribunal des infractions provinciales exerce une fonction spécialisée qui, à certains égards, se distingue de celle d'une cour de juridiction criminelle traditionnelle. L'objet de la *LIP*, qui est énoncé au par. 2(1), est d'établir une procédure applicable à la poursuite des infractions provinciales « qui reflète la distinction existant entre les infractions provinciales et les infractions criminelles ». Toutefois, comme il a été expliqué plus tôt, la distinction ne porte pas sur les infractions criminelles et les infractions non criminelles, mais plutôt sur les infractions criminelles et les infractions quasi criminelles. Les instances conservent leur caractère pénal. En outre, bien que bon nombre de poursuites intentées en vertu de la *LIP*

possibility of imprisonment. In these cases, the distinction between provincial courts operating under the *Criminal Code* and the *POA* is far less material. The maximum sentence faced by the individual respondent in the instant case — a $25,000 fine and/or 12 months imprisonment — exceeds the penalties generally levied for a number of summary conviction offences.

portent effectivement sur des infractions mineures d'ordre réglementaire, les demandes de réparations fondées sur la *Charte* découlent généralement de poursuites pour des infractions punissables par des amendes importantes et par l'emprisonnement. Dans ces affaires, la distinction entre les cours provinciales appliquant le *Code criminel* et le tribunal appliquant la *LIP* est beaucoup moins importante. La peine maximale dont est passible la personne physique intimée en l'espèce — une amende de 25 000 $ et une période d'emprisonnement de 12 mois, ou l'une ou l'autre de ces peines — excède les peines généralement infligées à l'égard d'un certain nombre d'infractions punissables par voie de déclaration sommaire de culpabilité.

Further, the Crown concedes that legal costs in criminal and regulatory matters are an exceptional or remarkable event. It is consequently difficult to see how empowering the provincial offences court to order this remedy as an exceptional tool, in the comparatively few instances when *Charter* breaches would arise before it, imperils the expedient operation of these courts.

85 La Couronne concède également que la condamnation au paiement des frais de justice dans les affaires en matières criminelles et réglementaires constitue une mesure exceptionnelle ou extraordinaire. Il est donc difficile de voir comment le fait d'habiliter le tribunal des infractions provinciales à ordonner cette réparation en tant que mesure exceptionnelle, dans les instances relativement peu nombreuses où des violations de la *Charte* se produisent devant lui, mettrait en péril le caractère expéditif de la procédure de ce tribunal.

Nor will recognizing the jurisdiction in provincial offences courts to issue costs awards as a *Charter* remedy risk turning the Canadian legal system "upside down". By ensuring that the remedies available to the provincial offences court fall within its competency as an institution to issue, meaningful access to *Charter* relief is promoted with minimal disruption to the existing jurisdictional scheme. There is little reason to believe that awarding costs will strain the work habits, resources or expertise of provincial offences courts; in fact, experience to this point suggests otherwise.

86 Reconnaître au tribunal des infractions provinciales la compétence d'accorder les dépens à titre de réparation fondée sur la *Charte* ne risque pas non plus de « bouleverser » le système de justice canadien. En faisant en sorte que le tribunal des infractions provinciales ait compétence, en tant qu'institution, pour accorder les réparations qui existent, on favorise l'accès concret aux réparations fondées sur la *Charte* tout en ne dérangeant que de façon minime le régime existant de compétence des tribunaux. Il y a peu de raison de croire que le fait de pouvoir statuer sur les dépens affectera les habitudes de travail, les ressources ou l'expertise du tribunal des infractions provinciales; en fait, l'expérience observée jusqu'à maintenant suggère le contraire.

Neither is there any indication that the Crown will be subjected to such awards unfairly or arbitrarily. Crown counsel is not held to a standard

87 Il n'y a pas non plus la moindre indication que la Couronne sera condamnée aux dépens d'une manière inéquitable ou arbitraire. Les avocats de

of perfection, and costs awards will not flow from every failure to disclose in a timely fashion. Rather, the developing jurisprudence uniformly restricts such awards, at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution. I fail to see how the provision of an expedient remedy in such cases, from a trial court that is not only competent but also ideally situated to make such an assessment, risks disrupting the existing system of justice.

88 Indeed, a failure to recognize this jurisdiction may arguably result in far more disruption of the administration of justice, by requiring resort to another forum to obtain an appropriate and just remedy, with all the attendant delays, expense and inconvenience. Most importantly, it may, as a matter of practical reality, deprive an accused of an appropriate and just remedy for even flagrant violations of his or her *Charter* rights, and thus render illusory both these guaranteed protections and the promise of their enforcement.

89 In summary, the provincial offences court's role as a quasi-criminal court of first instance weighs strongly in favour of an expansive remedial jurisdiction under s. 24 to promote complete resolution of *Charter* issues in the forum best situated to resolve them. In this light, authority to discipline egregious incidents of non-disclosure through awards of legal costs is consistent with — and would enhance — the role performed by these courts in the administration of criminal justice.

(2) The Structure of the Provincial Offences Court

90 The same features that characterize the provincial offences court as a quasi-criminal court also commend it as an appropriate forum for assessing costs awards for *Charter* breaches arising from non-disclosure. There is no appreciable difference between

la Couronne ne sont pas tenus à la perfection et les dépens ne seront pas accordés à chaque omission de communiquer la preuve en temps opportun. Au contraire, la jurisprudence qui s'établit à cet égard limite systématiquement l'octroi des dépens aux dérogations marquées et inacceptables par la poursuite aux normes raisonnables qu'on s'attend qu'elle respecte. Je ne vois pas en quoi le fait qu'une réparation appropriée soit accordée par une juridiction de jugement qui est non seulement compétente mais également fort bien placée pour rendre une telle décision risque de bouleverser le système juridique existant.

D'ailleurs, on peut prétendre que le fait de ne pas reconnaître cette compétence perturberait davantage l'administration de la justice, en obligeant l'intéressé à s'adresser à un autre forum pour obtenir une réparation convenable et juste, avec tous les frais, délais et inconvénients afférents à une telle démarche. Par-dessus tout, ce fait pourrait en pratique priver l'accusé d'une telle réparation, même à l'égard d'atteintes flagrantes aux droits qui lui sont garantis par la *Charte*, et rendre ainsi illusoires ces garanties et la promesse de leur application.

En résumé, le rôle que joue le tribunal des infractions provinciales à titre de juridiction quasi criminelle de première instance milite fortement en faveur de la reconnaissance d'un vaste pouvoir de réparation fondé sur l'art. 24 visant à favoriser la résolution complète des questions liées à la *Charte* par la juridiction la mieux placée pour les régler. Considéré sous cet éclairage, le pouvoir de sanctionner les graves cas de non-communication de la preuve en ordonnant le paiement des frais de justice est non seulement compatible avec le rôle que joue ce type de tribunal dans l'administration de la justice pénale, mais il aurait également pour effet de le renforcer.

(2) La structure du tribunal des infractions provinciales

Les mêmes caractéristiques qui font du tribunal des infractions provinciales une juridiction quasi criminelle en font également un forum approprié pour accorder les dépens pour les violations de la *Charte* découlant de non-communication de la

criminal and quasi-criminal courts in terms of the structural limits of their proceedings. A court in which a justice presides over the trial of a provincial offence under the *POA* is clearly structured as a traditional "court". Iacobucci J., dissenting in *Weber*, *supra*, noted the salient characteristics of a "court": "the rules of procedure and evidence, the independence and legal training of its judges, the possibility of hearing from a third party intervener such as an Attorney General or an *amicus curiae*" (p. 942). A provincial offences court trying an offence under the *POA* satisfies this description. It has its own detailed procedural rules (*Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings*, R.R.O. 1990, Reg. 200), and abides by the standard rules of evidence. Judicial independence is required of justices of the peace. They receive legal training. The court's rulings are subject to appellate review, and there can be interveners on this appeal (*Rules of the Court of Appeal in Appeals Under the Provincial Offences Act*, Reg. 721/94, Rule 21(1)). In sum, it is a judicial process in an adversarial forum governed by the traditional rules of evidence.

preuve. Il n'y a aucune différence appréciable entre les cours criminelles et quasi criminelles du point de vue des limites structurelles de leurs procédures. Le tribunal où un juge préside, en vertu de la *LIP*, un procès relatif à une infraction provinciale est clairement structuré comme un « tribunal » traditionnel. Dans sa dissidence dans l'arrêt *Weber*, précité, le juge Iacobucci a fait état des principales caractéristiques d'un « tribunal » : « les règles de procédure et de preuve, l'indépendance et la formation juridique de ses juges, la possibilité d'entendre un tiers intervenant comme un procureur général ou un *amicus curiae* » (p. 942). Le tribunal des infractions provinciales qui juge une infraction en vertu de la *LIP* correspond à cette description. Il dispose de ses propres règles de procédure détaillées (*Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings*, R.R.O. 1990, Règl. 200), et il suit les règles de preuve ordinaires. Les juges de paix doivent être indépendants. Ils reçoivent une formation juridique. Les décisions du tribunal sont susceptibles de révision par voie d'appel et des intervenants peuvent participer à cet appel (*Règles de la Cour d'appel relatives aux appels interjetés en vertu de la Loi sur les infractions provinciales* de l'Ontario, Règl. 721/94, règle 21(1)). En bref, les instances du tribunal sont des instances judiciaires se déroulant dans le cadre d'une procédure contradictoire régie par les règles de preuve traditionnelles.

The Crown alleges that a number of structural deficiencies in *POA* proceedings impair the ability of provincial offences courts to justly and fairly order costs awards under s. 24(1). It notes that the *POA* lacks a formal method of tariff calculation and makes no provision for the enforcement of costs orders once levied. In sum, the Crown argues that recognizing a jurisdiction in provincial offences courts to order payment of legal costs under s. 24(1) would cast these courts into waters in which they are not properly equipped to tread.

91 La Couronne affirme qu'un certain nombre de vices structurels affectant les procédures fondées sur la *LIP* nuisent à la capacité du tribunal des infractions provinciales de rendre, en vertu du par. 24(1), une ordonnance juste et équitable concernant les dépens. Il souligne que la *LIP* ne prévoit pas de méthode formelle de calcul des dépens et ne pourvoit pas à l'exécution des ordonnances de dépens une fois celles-ci rendues. Bref, la Couronne prétend que reconnaître au tribunal des infractions provinciales la compétence d'ordonner le paiement des dépens en vertu du par. 24(1) plongerait ces tribunaux dans des eaux qu'ils ne sont pas adéquatement équipés pour naviguer.

I do not share this concern. Issues of notice and computation of costs have not proven unmanagea-

92 Je ne partage pas cette crainte. Les problèmes de notification et de calcul des dépens ne se sont pas

ble for provincial courts. Further, trial and appellate courts are developing guidelines to govern when such awards are appropriate and just, curbing the potential for arbitrary or unfair awards: *Pawlowski*, *supra*; *Pang*, *supra*; *R. v. Jedynack* (1994), 16 O.R. (3d) 612 (Gen. Div.); *R. v. Dodson* (1999), 70 C.R.R. (2d) 65 (Ont. C.A.), at p. 73; *R. v. Robinson* (1999), 142 C.C.C. (3d) 303 (Alta. C.A.). Finally, since costs awards are only issued against the Crown, complex collection mechanisms and contempt procedures are unnecessary. These considerations suggest that the fashioning of costs orders as a *Charter* remedy may be safely entrusted to provincial offences courts.

(3) Conclusions on Power to Grant the Remedy Sought in the Instant Case

93 As a quasi-criminal trial court, *POA* justices may be assumed, absent a contrary indication, to possess the power to order payment of legal costs by the Crown as a remedy for *Charter* violations arising from untimely disclosure. This power may be inferred from their quasi-criminal function and structure. As with other criminal trial courts, the role of the provincial offences court in the broader legal system, and particularly its role as a court of first instance, provide the most valuable insight into the powers the legislature intended it to exercise. It is not necessary to engage in a searching examination of the constituent statute to issue the same "type of" remedy in the non-*Charter* context.

94 The language of the *POA*, however, cannot be ignored. If it indicates that the legislature did not intend the provincial offences courts to issue costs orders as a *Charter* remedy, then these courts are

révélés impossibles à gérer pour les cours provinciales. En outre, les tribunaux de première instance et les cours d'appel élaborent des lignes directrices permettant de déterminer dans quels cas de telles ordonnances sont convenables et justes, réduisant ainsi le risque que les dépens soient octroyés de manière arbitraire ou inéquitable : *Pawlowski*, précité; *Pang*, précité; *R. c. Jedynack* (1994), 16 O.R. (3d) 612 (Div. gén.); *R. c. Dodson* (1999), 70 C.R.R. (2d) 65 (C.A. Ont.), p. 73; *R. c. Robinson* (1999), 142 C.C.C. (3d) 303 (C.A. Alb.). Enfin, puisque les dépens sont adjugés uniquement contre la Couronne, il est inutile d'établir de complexes mécanismes de perception des dépens et procédures en matière d'outrage. Ces facteurs tendent à indiquer qu'on peut confier sans risque au tribunal des infractions provinciales la responsabilité d'élaborer des ordonnances en matière de dépens en tant que réparation fondée sur la *Charte*.

(3) Conclusions relatives au « pouvoir d'accorder la réparation demandée » dans la présente affaire

Sauf indication contraire, on peut présumer que les juges de la *LIP* possèdent, en tant que cour de juridiction quasi criminelle, le pouvoir d'ordonner à la Couronne de payer les frais de justice à titre de réparation pour les violations de la *Charte* découlant du défaut de communiquer la preuve en temps utile. L'existence de ce pouvoir peut être inférée du caractère quasi criminel de la fonction et de la structure de ce tribunal. Comme c'est le cas pour d'autres juridictions criminelles de première instance, le rôle du tribunal des infractions provinciales dans l'ensemble du système de justice, particulièrement son rôle de tribunal de première instance, fournit l'indication la plus précieuse sur les pouvoirs que la législature entendait qu'il exerce. Il n'est pas nécessaire de se livrer à un examen approfondi de sa loi constitutive pour trouver le fondement législatif du pouvoir d'accorder le même « genre de » réparation lorsque la *Charte* ne s'applique pas.

On ne saurait toutefois faire abstraction du texte de la *LIP*. Si celui-ci indique que la législature n'entendait pas que le tribunal des infractions provinciales rende des ordonnances en matière de dépens

not so empowered. This brings us to the Crown's argument that the legislature confined the power of *POA* justices to grant costs (and, even then, only witness costs) to specific procedural breaches and that this indicates an intention not to permit them to grant *Charter* remedies for costs in matters other than those prescribed by the *POA*.

I cannot accept this argument. Given all the elements in this case that point to the power to make the order sought under s. 24, I find it difficult to infer a contrary intention from the fact that the statute does not confer on the court a general right to award legal costs. The legislature gave the court functions destined to attract *Charter* issues. These functions by their nature are likely to bring the tribunal into the domain of *Charter* rights. They necessarily implicate matters covered by the *Charter*, including fair trial rights and remedies for violations of these rights. It is therefore reasonable to assume that the legislature intended the *POA* court to deal with those *Charter* issues incidental to its process that it is suited to resolve, by virtue of its function and structure.

In criminal proceedings, incidental *Charter* issues are routinely resolved at the trial stage without recourse to other proceedings, a procedure repeatedly endorsed by this Court as desirable: *Mills*, *supra*; *Rahey*, *supra*; *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53. It is logical to assume that the Ontario Legislature intended the *POA* to operate in tandem with the *Charter*, rather than to negate the *Charter*'s application. Rather than inferring that the legislature intended to narrow the operation of the *Charter* with its silence on the issue of the provincial offences court's jurisdiction under s. 24, the more reasona-

à titre de réparation fondée sur la *Charte*, il n'est alors pas habilité à le faire. Cela nous amène à l'argument de la Couronne selon lequel, d'une part, la législature a limité à des violations procédurales particulières le pouvoir qu'ont les juges de la *LIP* d'accorder les dépens (et encore là, seulement à l'égard des frais des témoins) et, d'autre part, ce fait traduirait l'intention de ne pas autoriser ces juges à rendre de telles ordonnances en tant que réparation fondée sur la *Charte* dans d'autres situations que celles prévues par la *LIP*.

95 Je ne peux accepter cet argument. Compte tenu de tous les éléments qui, dans la présente affaire, militent en faveur de la reconnaissance du pouvoir de rendre l'ordonnance demandée en vertu de l'art. 24, j'estime qu'il est difficile d'inférer l'intention contraire du fait que la loi ne confère pas au tribunal le droit général d'adjuger les frais de justice. La législature a confié au tribunal des fonctions qui ne manquent pas de soulever des questions liées à la *Charte*. De par leur nature, ces fonctions sont susceptibles d'entraîner le tribunal dans le domaine des droits garantis par la *Charte*. Ces fonctions soulèvent nécessairement des questions visées par la *Charte*, notamment le droit à un procès équitable et les réparations afférentes aux atteintes à ce droit. Il est donc raisonnable de supposer que la législature entendait que le tribunal de la *LIP* connaisse des questions incidentes liées à la *Charte* qui surviennent dans le cours de ses procédures et qu'il est apte à résoudre, du fait de sa fonction et de sa structure.

96 En matière criminelle, on résout généralement à l'étape du procès, sans engager d'autres procédures, les questions incidentes liées à la *Charte*, façon de faire que notre Cour a à maintes reprises déclarée souhaitable : *Mills*, précité; *Rahey*, précité; *R. c. Garofoli*, [1990] 2 R.C.S. 1421; *Kourtessis c. M.R.N.*, [1993] 2 R.C.S. 53. Il est logique de présumer que la législature ontarienne entendait faire en sorte que la *LIP* soit appliquée de concert avec la *Charte* plutôt que neutraliser l'application de celle-ci. Au lieu d'inférer que, par son silence sur la question de la compétence du tribunal des infractions provinciales en matière d'appli-

ble inference is that it intended to supplement the court's work with the incidental *Charter* remedies that it is suited to issue.

97 Consequently, I conclude that the provincial offences court enjoys the necessary power to grant the remedy sought in the present case, and is thus a "court of competent jurisdiction" within the meaning of s. 24(1). In my opinion, this result represents an appropriate and principled integration of the procedural regime established by the legislature and the constitutional regime established by the *Charter*.

VI. Conclusion

98 I would dismiss the appeal and remit the matter to the Superior Court of Justice for determination of whether the trial justice erred in finding the conduct of the prosecution warranted an order for legal costs on the facts of the case. The respondents should have their costs here and below.

Appeal dismissed with costs.

Solicitor for the appellant: The Ministry of the Attorney General, Toronto.

Solicitors for the respondents: Donahue Ernst & Young LLP, Toronto.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

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: The Department of Justice, Edmonton.

Solicitor for the intervener the Criminal Lawyers' Association of Ontario: The Criminal Lawyers' Association of Ontario, Toronto.

cation de l'art. 24, la législature voulait restreindre l'application de la *Charte*, il est plus raisonnable de déduire qu'elle entendait élargir la fonction du tribunal aux réparations incidentes fondées sur la *Charte* que celui-ci est apte à accorder.

En conséquence, je conclus que le tribunal des infractions provinciales jouit du pouvoir nécessaire pour accorder la réparation demandée en l'espèce et qu'il est donc un « tribunal compétent » au sens du par. 24(1). À mon avis, ce résultat constitue une harmonisation appropriée et fondée sur des principes du régime procédural établi par la législature et du régime constitutionnel établi par la *Charte*.

VI. Conclusion

Je suis d'avis de rejeter le pourvoi et de renvoyer l'affaire à la Cour supérieure de justice pour qu'elle décide si le juge du procès a fait erreur en concluant, à la lumière des faits de l'espèce, que la conduite de la poursuite justifiait sa condamnation au paiement des frais de justice. Les intimés ont droit aux dépens tant devant notre Cour que devant les juridictions inférieures.

Pourvoi rejeté avec dépens.

Procureur de l'appelante : Le ministère du Procureur général, Toronto.

Procureurs des intimés : Donahue Ernst & Young LLP, Toronto.

Procureur de l'intervenant le procureur général du Canada : Le procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Le ministère du Procureur général, Victoria.

Procureur de l'intervenant le procureur général de l'Alberta : Le ministère de la Justice, Edmonton.

Procureur de l'intervenante la Criminal Lawyers' Association of Ontario : Criminal Lawyers' Association of Ontario, Toronto.

C16740

COURT OF APPEAL FOR ONTARIO

RE:	**HER MAJESTY THE QUEEN (Respondent) and CONSTANTINOS ANDRIOPOULOS AND SPIROS HASAPIS (Appellants) and HER MAJESTY THE QUEEN (Respondent) and CONSTANTINOS ANDRIOPOULOS AND SPIROS HASAPIS (Appellants) and HER MAJESTY THE QUEEN (Respondent) v. PETER ANDRIOPOULOS, SEBASTIANO DINATALE MATTEO DINATALE (Appellants) and HER MAJESTY THE QUEEN (Respondent) v. PETER ANDRIOPOULOS (Appellant) and HER MAJESTY THE QUEEN (Respondent) and PETER ANDRIOPOULOS, ANGELO ARVANITAKIS, KONSTANTINOS ARVANITAKIS, STAVRO STRANTZAS and CONSTANTINE NICOLAIDIS (Appellants)**
BEFORE:	**CATZMAN, CARTHY AND OSBORNE JJ.A.**
COUNSEL:	**ALAN N. YOUNG and PAUL BURSTEIN for the appellant**
	SCOTT C. HUTCHISON for the respondent
HEARD:	**JUNE 2 AND 3, 1994**

E N D O R S E M E N T

These appeals are from an order of Campbell J. dismissing applications for prohibition orders directed to informations charging the appellants with offences under ss.201 and 202 of the *Criminal Code*. The allegations behind the informations concern unlicensed gaming activities in cafés or social clubs.

At the conclusion of the appellants' argument the court delivered oral reasons dismissing the appeals. The recording of those reasons cannot be found and, in the circumstances, the court will now attempt to reproduce them.

The appellants' first two points merge into the assertion that changes in social attitudes indicate that gambling is no longer considered harmful to the public and, thus, Parliament's criminal law power can no longer support the prohibition of the activities referred to in ss.201 and 202 of the *Code*.

The essential fallacy of this proposition is in equating a lottery, licensed, conducted and managed by a province, to all forms of gaming and gambling. Simple gambling between individuals is not prohibited, unless it involves enumerated games such as three-card monte. The business of organized gaming is the subject matter of the prohibitions, presumably because it invites cheating and attracts other forms of criminal activity. There is no evidence that public perceptions of commercial gaming have changed or that it is any less criminal in nature than it ever has been.

Section 207 defines the reach of the crime by stating that it does not extend to lotteries licensed under authority of the province on prescribed conditions. The clear intent is not to condone gaming but to decriminalize it in circumstances where regulations will minimize the potential for public harm. In doing so, s.207 gives no hint that the provinces were to regulate such commercial gaming as is here alleged, nor is there any other basis for saying that such activity does not remain offensive and under the criminal law power of parliament.

The final argument put by the appellants is that the word "notwithstanding" in s.207(1) permits provincial gaming laws, as they evolve, to determine the scope of the federal gaming prohibition and that Ontario has enacted

statutes that purport to govern gaming in all its forms. We do not agree with that construction of s.207(1) for the reasons stated above. The language used simply carves out of previously described offences some very particular circumstances in which the conduct will be considered lawful. Unless the appellants' gaming businesses are conducted and managed or licensed by the province they remain subject to prosecution under ss.201 and 202 of the *Code*. Nor can we see that any provincial statute purports to overlap that jurisdiction.

For these reasons we would dismiss the appeals.

/emr
Released: October 17, 1994

John v. Ballingall et al.
[Indexed as: John v. Ballingall]

Ontario Reports

Court of Appeal for Ontario,

Doherty, Benotto and Trotter JJ.A.

July 7, 2017

136 O.R. (3d) 305 | 2017 ONCA 579

Case Summary

Torts — Defamation — Notice — Libel and Slander Act applying to newspaper's online edition — Time for giving notice under Act and commencing action starting to run when libel comes to knowledge of person defamed — Message from plaintiff complaining of factual errors in article not complying with notice requirements of Act as there was no direct or implied assertion that errors were libellous — Libel and Slander Act, R.S.O. 1990, c. L.12.

The defendant newspaper published an article about the plaintiff in its online edition on December 4, 2013 and in its print version on December 9, 2013. The plaintiff sent the newspaper a message on December 5, 2013 complaining of factual errors in the article. There were no further communications between the parties until April 15, 2015, when the plaintiff sent an e-mail to the defendant reporter alleging libel and threatening legal action. A libel action was commenced on April 28, 2015. The defendants moved successfully pursuant to rule 21.01(1)(a) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 to strike the action because it was statute-barred as the plaintiff had not given notice within six weeks as required by s. 5(1) of the *Libel and Slander Act* and had not commenced the action within three months as required by s. 6 of the Act. The plaintiff appealed.

Held, the appeal should be dismissed.

Section 5(1) of the Act provides that no action for libel "in a newspaper" lies unless notice in writing specifying the matter complained of is given to the defendant within six weeks. While "newspaper" is defined in the Act as meaning "a paper" with certain characteristics, "paper" is broad enough to encompass a newspaper which is published on the Internet and is not restricted to something which is printed on physical paper. The Act applied to the online version of the article in question. The time by which the plaintiff was required to give notice under s. 5(1) and bring his action under s. 6 began to run when the libel came to his knowledge. The plaintiff was aware of the facts on which his cause of action might be founded on December 5, 2013. The message which he sent to the defendant newspaper on that date did not constitute notice under s. 5(1) of the Act as it merely complained of factual errors in the article, and there was no direct or implied assertion that they were libellous. The three-month limitation period in s. 6 of the Act expired long before the plaintiff issued his statement of claim.

Weiss v. Sawyer (2002), 61 O.R. (3d) 526, [2002] O.J. No. 3570, 217 D.L.R. (4th) 129, 163 O.A.C. 2, 116 A.C.W.S. (3d) 950 (C.A.), **apld**

Shtaif v. Toronto Life Publishing Co., [2013] O.J. No. 2778, 2013 ONCA 405, 366 D.L.R. (4th) 82, 306 O.A.C. 155, 228 A.C.W.S. (3d) 1188, **consd**

Other cases referred to

Attorney General v. Edison Telephone Co. of London Ltd. (1880), LR 6 QBD 244; *Bahlieda v. Santa* (2003), 68 O.R. (3d) 115, [2003] O.J. No. 4091, 233 D.L.R. (4th) 382, 20 C.C.L.T. (3d) 297, 28 C.P.R. (4th) 499, 126 A.C.W.S. (3d) 330 (C.A.); [page306] *British Columbia Telephone Co. v. Canada*, [1992] F.C.J. No. 27, 139 N.R. 211, [1992] 1 C.T.C. 26, 92 D.T.C. 6129, 31 A.C.W.S. (3d) 326 (C.A.); *Grossman v. CFTO-T.V. Ltd*. (1982), 39 O.R. (2d) 498, [1982] O.J. No. 3538, 139 D.L.R. (3d) 618, 16 A.C.W.S. (2d) 311 (C.A.) [Leave to appeal to S.C.C. refused (1983), 39 O.R. (2d) 498*n*, [1983] 1 S.C.R. vi, [1983] S.C.C.A. No. 463]; *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, [2014] S.C.J. No. 7, 2014 SCC 7, 314 O.A.C. 1, 453 N.R. 51, 2014EXP-319, J.E. 2014-162, EYB 2014-231951, 95 E.T.R. (3d) 1, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 21 B.L.R. (5th) 248, 46 C.P.C. (7th) 217, 37 R.P.R. (5th) 1, 366 D.L.R. (4th) 641, 2014EXP-319, J.E. 2014-162; *R. v. 974649 Ontario Inc*., [2001] 3 S.C.R. 575, [2001] S.C.J. No. 79, 2001 SCC 81, 206 D.L.R. (4th) 444, 279 N.R. 345, J.E. 2002-9, 154 O.A.C. 345, 159 C.C.C. (3d) 321, 47 C.R. (5th) 316, 88 C.R.R. (2d) 189, REJB 2001-27030, 51 W.C.B. (2d) 452; *Vachon v. Canada Revenue Agency*, [2015] O.J. No. 5170, 2015 ONSC 6096 (S.C.J.); *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802, [1999] O.J. No. 2760, 123 O.A.C. 235, 89 A.C.W.S. (3d) 1315 (C.A.) [Leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 460]

Statutes referred to

Canadian Income Tax Act, S.C. 1970-71-72, c. 63 [rep.]

Libel and Slander Act, R.S.O. 1990, c. L.12, ss. 1(1), 5, (1), (6)

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, s. 4

Telegraph Act 1868, 31 & 32 Vict., c. 110 [rep.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21, 21.01(1)(a)

APPEAL from the order of Trimble J., [2016] O.J. No. 1717, 2016 ONSC 2245 (S.C.J.) dismissing an action.

Maanit Zemel and *Omar Ha-Redeye*, for appellant.

Iris Fischer and *Kaley Pulfer*, for respondents.

The judgment of the court was delivered by
BENOTTO J.A.: —

A. *Introduction*

[1] The appellant is a rapper who performs under the name of Avalanche the Architect. He sued the respondents for libel as a result of an online article written about him. The article was published on the Toronto Star's website on December 4, 2013 and in the print edition on December 9, 2013.

[2] The appellant's claim was struck on a motion under Rule 21 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 because he did not comply with the six-week notice period and the three-month limitation period provided for in ss. 5(1) and 6 of the *Libel and Slander Act*, R.S.O. 1990, c. L.12 ("*LSA*" or the "Act").

[3] He appeals on the basis that the *LSA* does not apply to online articles. He submits the applicable limitation period is two years under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. [page307]

B. *Facts*

[4] Sometime prior to December 2013, the appellant wrote a rap titled "Got Yourself a Gun". As a result of the lyrics to that rap, the appellant was charged with uttering threats to cause death or bodily harm and criminal harassment.

[5] The respondent, Alex Ballingall, is a reporter who works for the respondents, the Toronto Star Newspapers Ltd. (the "Star") and its parent company Torstar Corporation.

[6] Ballingall sought to interview the appellant about the criminal charges. The appellant obtained legal advice and agreed to be interviewed and photographed. Ballingall's article was published in the online version of the Star's newspaper on December 4, 2013. The title to the article was "Rapper says death threat just a lyric". The content of the article described the criminal proceedings.

[7] The following day, the appellant sent the Star an electronic "factual error" message through the Star's website complaining about the article. In the message, he said, in part:

> The title says I said death threat was just a lyric in the rap this is not true I did not admit to making death threat in my rap and in fact I at no point say I am going to commit any type of violence.

[8] On December 9, 2013, the Star published the same article in its print newspaper, but with the headline "Trial to decide if rapper's rhyme is a crime".

[9] There was no further communication between the parties until 16 months later, on April 15, 2015, when the appellant sent an e-mail to Ballingall complaining about the online version of the

article, alleging libel, and threatening legal action. He said, in part:

> All of these lines are not my words inaccurate and misleading as well as libelous so I ask that you please remove them and issue a retraction as the crown has used your story as a reference point as being my sediments (*sic*) and these claims of poetic license are not only not my words it is and never was my defence.

[10] The appellant then issued a statement of claim on April 28, 2015 alleging the words "Rapper says death threat just a lyric" in the online version of the article are false, defamatory and libellous. The statement of claim states: "The significance of the title is that it suggests that the [appellant] thinks that he can make a death threat as long as it is in a song which [the appellant] knows is not a defence under the charter." The scope of the appellant's action was limited to allegations about the online version of the article. [page308]

C. *Motion to Strike*

[11] The respondents brought a motion pursuant to rule 21.01(1)(a) requesting the action be struck on a point of law because it was statute-barred by ss. 5(1) and 6 of the *LSA*.

[12] The motion concerned one issue: whether the *LSA* applies to the newspaper's electronic edition. The appellant did not contest the respondents' submission that if the *LSA* applied, then failing to meet the notice requirement -- both in content and regarding the timing of the notice -- was fatal to the cause of action.

[13] The motion judge concluded the notice and limitation periods in the *LSA* apply to the Star's online version. He further found the appellant's message of December 5, 2013 did not meet the standard required of notice under s. 5(1) of the Act because there was no direct or implied assertion that the statements in the article were libellous or that the appellant contemplated legal action. Although the content of the e-mail sent on April 15, 2015 satisfied the notice requirements, it was sent long past the six-week notice period imposed by the *LSA*. Similarly, the statement of claim was filed long past the three-month time limit set out in the Act.

[14] The motion judge dismissed the claim.

D. *Issues on Appeal*

[15] As described below, the appellant sought to significantly expand the issues on appeal beyond the issue before the motion judge. The issues properly before this court on appeal are:

(1) Does the *LSA* apply to the online article?

(2) Was the *LSA* complied with?

(3) Did the motion judge err in applying rule 21.01(1)(a) to strike the action?

E. *Relevant Provisions of the LSA*

[16] Section 5(1) of the *LSA* provides the notice requirement for an action in libel in a newspaper:

> 5(1) No action for libel *in a newspaper* or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.

(Emphasis added) [page309]

> [17] Section 6 provides the limitation period for an action:
> 6. An action for a libel *in a newspaper* or in a broadcast shall be commenced within three months after the libel has come to the knowledge of the person defamed, but, where such an action is brought within that period, the action may include a claim for any other libel against the plaintiff by the defendant in the same newspaper or the same broadcasting station within a period of one year before the commencement of the action.

(Emphasis added)

> [18] Section 1(1) defines "newspaper" as follows:
> "newspaper" means a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, or containing only, or principally, advertisements, printed for distribution to the public and published periodically, or in parts or numbers, at least twelve times a year.

F. *Analysis*

[19] The appellant submits the motion judge erred in dismissing the claim. In support of his position, he seeks to expand the issues on appeal to include matters not raised before the motion judge, including (i) the application of the *LSA* to the Internet generally; (ii) the application of the *LSA* to various types of online postings; and (iii) whether an Internet posting is a "broadcast" under the *LSA*.

[20] The only issue for this court to decide is the correctness of the motion judge's decision on the facts of this case. This case did not involve the Internet or online postings generally, nor was it about a "broadcast". The issue was whether the online version of a newspaper is -- for the purposes of the *LSA* -- a newspaper.

(1) *Does the Act apply to the online article?*

[21] The appellant submits the online version of the article is not published "in a newspaper" because there is no paper. He argues that because it is not printed on physical paper, it is excluded from the *LSA*. Further, he submits the legislature clearly intended not to include online versions of a newspaper because there has been no amendment to the *LSA* to cover this point.

[22] I do not agree. In *Weiss v. Sawyer* (2002), 61 O.R. (3d) 526, [2002] O.J. No. 3570 (C.A.), this court considered the issue and concluded that a newspaper does not cease to be a newspaper when it is published online. In *Weiss*, an action was commenced against a writer without complying with s. 5(1) of the *LSA*. Lax J. dismissed the claim on the basis that notice

had not been given. This court upheld the motion judge and addressed the same issue as is being considered here. At paras. 24 and 25, Armstrong J.A. said: [page310]

> The Act defines a newspaper in part as a "paper" containing certain categories of information for distribution to the public. I think the word "paper" is broad enough to encompass a newspaper which is published on the internet.
>
> If I am wrong in my conclusion and the word "paper" is to be given a more restrictive meaning i.e. the substance upon which a newspaper is ordinarily printed, then arguably s. 5(1) is not available to the defendant. However, such a result would clearly be absurd. It would mean that if an action was commenced against a newspaper, without serving a s. 5(1) notice, it would be barred in relation to the newsprint publication but not so barred in relation to the online publication, unless of course it fell within the definition of "broadcast". The ordinary meaning rule of statutory interpretation articulated by Ruth Sullivan, in *Driedger on the Construction of Statutes*, is helpful:
>
> (1) It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.
>
> (2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.
>
> (3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible, that is, it must be one of the words are reasonably capable of bearing.
>
> In my view, the purpose and scheme of the notice provision in the *Libel and Slander Act* are to extend its benefits to those who are sued in respect of a libel in a newspaper irrespective of the method or technique of publication. To use the words of Justice Lax, "a newspaper is no less a newspaper because it appears in an online version."

(Citations omitted)

[23] I agree with the analysis in *Weiss* that the word "paper" in the definition of "newspaper" is not restricted to physical paper. To hold otherwise would be to ignore principles of statutory interpretation, which are flexible enough to achieve the intent of the legislature in the context of evolving realities. As the Supreme Court of Canada held in *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, [2001] S.C.J. No. 79, 2001 SCC 81, at para. 38:

> The intention of Parliament or the legislatures is not frozen for all time at the moment of a statute's enactment, such that a court interpreting the statute is forever confined to the meanings and circumstances that governed on that day. Such an approach risks frustrating the very purpose of the legislation by rendering it incapable of responding to the inevitability of changing circumstances. Instead, we recognize that the law speaks continually once adopted. Preserving the original intention of Parliament or the legislatures frequently requires

> a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities.

(Citations omitted) [page311]

[24] The courts have interpreted legislation to apply to advances in technology that did not exist when the provision was enacted. For example, courts have found the *Telegraph Act 1868*[1] applies to telephones, and a fibre optic system is a "cable" within the meaning of the *Canadian Income Tax Act*,[2] despite the fact that neither of these technologies existed at the time the relevant provisions were enacted: see *Attorney General v. Edison Telephone Co. of London Ltd.* (1880), LR 6 QBD 244; and *British Columbia Telephone Co. v Canada*, [1992] F.C.J. No. 27, 139 N.R. 211 (C.A.).

[25] The regime in the *LSA* provides timely opportunity for the publisher to address alleged libellous statements with an appropriate response that could be a correction, retraction or apology. Now that newspapers are published and read online, it would be absurd to provide different regimes for print and online versions.

[26] The appellant submits that *Weiss* was overturned -- or at least questioned -- by this court in *Shtaif v. Toronto Life Publishing Co*., [2013] O.J. No. 2778, 2013 ONCA 405, 306 O.A.C. 155. In that case, *Shtaif* brought several claims against *Toronto Life* magazine arising from an online article. Initially, there was no claim on the basis of the print version. *Shtaif* also sued in negligence and, unlike here, alleged the publication was not broadcast from a station in Ontario and therefore was outside the scope of the *LSA*. The motion judge ruled the online version of the article was not subject to ss. 5 and 6 of the *LSA* because a website posting is not a newspaper. He also held the article was not broadcast in Ontario. Both sides appealed.

[27] This court determined the appropriate course was to have this issue determined by a trial. At paras. 24-26, Laskin J. A. said:

> . . . I think the sensible course is . . . to leave to trial the question whether the internet version of the article is a newspaper published in Ontario or a broadcast from a station in Ontario. I am not satisfied that the evidentiary record before us is sufficient to decide these questions, which have broad implications for the law of defamation.
>
> Leaving these questions for trial also makes practical sense. On my proposed disposition of these appeals, the issue whether the claim for libel in the internet version of the article is subject to the notice and limitation provisions of the *Act* is relevant only to the issue of discoverability, an issue I would also leave to be determined at trial. [page312] Therefore, I would hold that the issue whether the claim for libel in the internet version of the article is subject to ss. 5(1) and 6 of the *Act* is a genuine issue requiring a trial.

[28] The decision in *Shtaif* arises out of facts distinguishable from those here.

[29] First, in *Shtaif*, unlike here, one of the primary issues was discoverability about which there was conflicting evidence. Second, the issue of broadcast location was in issue as the *Toronto Life* server was in Texas. This was a reason the court elected to follow the case of *Bahlieda v. Santa* (2003), 68 O.R. (3d) 115, [2003] O.J. No. 4091 (C.A.), which involved conflicting evidence on the issue of broadcast. In fact, *Bahlieda* was not a newspaper case, but

rather involved a website. In the present case, the issue of broadcast was not raised before the motion judge. Third, *Toronto Life* moved against *Shtaif* for summary judgment, pre-*Hyrniak*,[3] on the basis the limitation period had passed. The motion was not for a ruling on a point of law pursuant to Rule 21, as is the case here.

[30] I also do not accept the appellant's submission that *Shtaif* called into question the *ratio* of *Weiss*. On the contrary, Laskin J.A. affirmed the need for "judicial interpretation" to deal with new technology. At para. 20, he referred to the *LSA* and commented:

The Act was drafted to address alleged defamation in traditional print media and in radio and television broadcasting. It did not contemplate this era of emerging technology, especially the widespread use of the internet. The application of the Act to internet publications will have to come about by legislative amendment or *through judicial interpretation of statutory language* drafted in a far earlier era.

(Emphasis added)

[31] That the court in *Shtaif* chose to send the matter to trial in the context of conflicting evidence on discoverability and the issue of broadcast does not call into question the decision in *Weiss*, which remains binding on this court.

[32] I conclude the *LSA* applies to the online version of the article.

(2) *Since the Act applies, was the action statute-barred?*

[33] The statutory notice requirement in the *LSA* provides media defendants with the timely opportunity to consider whether any retraction or apology is necessary and thereby [page313] mitigate any damages: see *Grossman v. CFTO-T.V. Ltd*. (1982), 39 O.R. (2d) 498, [1982] O.J. No. 3538 (C.A.), at p. 501 O.R., leave to appeal to S.C.C. refused (1983), 39 O.R. (2d) 498*n*, [1983] 1 S.C.R. vi, [1983] S.C.C.A. No. 463.

[34] The appellant submits the notice and limitation periods do not start to run until the article is no longer on the Internet. He suggests, for every day the defamatory words are published online, a new and distinct cause of action accrues and a new limitation period begins to run. The defamatory words were removed on April 29, 2015. Therefore, the last cause of action began to run on April 28, 2015. Based on the motion judge's findings, the notice under the Act was delivered on April 15, 2015, which is 13 days before the last cause of action accrued. Thus, the appellant submits the notice was delivered within the six-week notice period under s. 5(1) of the Act. Further, the statement of claim was issued on April 28, 2015, which is the same day the last limitation period began to run. Therefore, the claim was issued within the three-month limitation period imposed by s. 6 of the Act and was not statute-barred.

[35] I do not accept this submission. The appellant seeks to rely on an incorrect interpretation of the "multiple publication rule". That concept provides that when an alleged libel is republished across different mediums, including the Internet, those republications are treated as distinct libels. In *Shtaif*, the court rejected the notion that the limitation period for a suit about an *online* magazine article starts to run when the plaintiff becomes aware of the *printed* version. This was the basis for the conflicting evidence on discoverability in *Shtaif*. This decision does not mean that each day of online publication grounds a new cause of action. The court in *Vachon v.*

Canada Revenue Agency, [2015] O.J. No. 5170, 2015 ONSC 6096 (S.C.J.) expressly rejected this interpretation of *Shtaif*. I concur with Hackland J., who said, at para. 22:

> The plaintiff argues that the alleged defamation should be taken as having been republished every day [while it] remained accessible on the internet . . . *Shtaif* does not support that proposition . . . any limitation period based on discoverability will run from the point where the internet defamation is discovered.

[36] The time by which the plaintiff must give notice under s. 5(1) and bring his action under s. 6 begins to run when the libel has come to the knowledge of the person defamed. There is no dispute here that, on December 5, 2013, when the appellant submitted the "factual error" message, he was aware of the facts on which his cause of action might be founded. He was aware of the statements, took exception to them as inaccurate and [page314] demanded a correction. The clock began to run on December 5, 2013, when the appellant knew that statements were made that might be considered libellous.

[37] The notice under s. 5(1) of the Act must identify the offending remarks to sufficiently enable the defendant to know which they are, to investigate, and amend or issue an apology or otherwise mitigate damages. The appellant's message of December 5, 2013 did not meet the standard required of notice under s. 5(1). The message was a statement of factual errors in the article and there was no direct or implied assertion that they were libellous.

[38] In addition to the appellant's failure to comply with the six-week notice period, the three-month limitation period similarly expired long before the appellant issued his statement of claim, 16 months later.

(3) *Does Rule 21 apply to dismiss the claim?*

[39] The respondent's motion was decided on the basis of rule 21.01(1)(a), which provides:

> 21.01(1) A party may move before a judge,
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs.

[40] The appellant submits the motion judge incorrectly admitted evidence on the Rule 21 motion. I do not accept this submission. It was the appellant who sought to file an unsworn affidavit. The respondents did not object and the judge granted him leave, but gave the evidence no weight. The only documents the motion judge referred to were those the appellant cited in his statement of claim: see *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802, [1999] O.J. No. 2760 (C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 460.

[41] The appellant submits there were necessary findings of fact to be made before the action could be dismissed. The record does not support this assertion. The appellant acknowledged he sent the December 2013 message. There is therefore no issue as to when time began to run for the purposes of the notice and limitation periods. Since I have concluded the *LSA* applies to the online newspaper article and the claim was not started in time, it is plain and obvious the action cannot succeed. [page315]

G. *Disposition*

[42] I would dismiss the appeal and request that the parties file brief written submissions (no more than seven pages) on costs within 15 days of the release of these reasons.

Appeal dismissed.

Notes

1 1868, 31 & 32 Vict., c. 110.

2 S.C. 1970-71-72, c. 63.

3 *Hyrniak v. Mauldin*, [2014] 1 S.C.R. 87, [2014] S.C.J. No. 7, 2014 SCC 7, which significantly reformed the approach to motions for summary judgment.

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Woods
[Indexed as: Woods (Re)]

Ontario Reports

Court of Appeal for Ontario

Tulloch, Huscroft and Thorburn JJ.A.

March 29, 2021

154 O.R. (3d) 481 | 2021 ONCA 190

Case Summary

Criminal law — Mental disorder — Review board — Hearings — Dispositions — Jurisdiction — Ontario Review Board deciding to hold disposition review hearings by videoconference in response to COVID-19 pandemic — Applicant objecting to videoconference and seeking to have in-person review hearing — Board deciding to proceed with hearing without applicant's consent — Applicant obtaining certiorari order — Board setting aside applicant's conditional discharge and entering detention order — Appeal from detention order allowed — Application for certiorari suspended proceedings before the Board, which erred by holding the hearing without obtaining judge's approval — Crown's appeal from certiorari order dismissed — Board exceeded its jurisdiction by deciding to proceed with hearing without applicant's consent — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.5(9), 672.5(10), 672.5(13) — Criminal Proceedings Rules for the Superior Court of Justice (Ontario), SI/2012-7, rule 43.03(5).

The applicant had been found not criminally responsible (NCR) for uttering a threat to cause death or bodily harm and possession of a weapon for a dangerous purpose. She was subject to a disposition ordered by the Ontario Review Board discharging her into the community with certain conditions. An annual review of her disposition order was scheduled to be heard on May 29, 2020. By then, the Board had decided to hold all of its hearings by videoconference in response to the COVID-19 pandemic. The applicant indicated to the Board through her counsel that she was not comfortable with holding her hearing by videoconference, and obtained an adjournment to July 31. At the July 31 hearing the applicant filed a notice of application submitting that the Board lacked jurisdiction to hold the hearing by videoconference without her consent. The Board dismissed the application and denied a request for a further adjournment. The Board noted that the applicant was, in effect, attempting to postpone her disposition review indefinitely. The Board ruled that it had authority to proceed with the disposition review hearing by videoconference regardless of whether the applicant consented. The Board subsequently set aside the applicant's conditional discharge and entered a detention order. The applicant obtained a writ of *certiorari* to quash the Board's decision to conduct its proceedings by videoconference. The Crown appealed the *certiorari* order. The applicant appealed the detention order.

Held, the Crown's appeal should be dismissed; the applicant's appeal should be allowed.

On a correctness standard there was no basis on which to interfere with the judge's *certiorari* decision. On a plain reading of the relevant sections of Part XX.1 the *Criminal Code*, which governed the NCR regime, the right to be present implied physical presence unless an accused consented to a hearing by videoconference. There was arguably some ambiguity as to whether s. 672.5(9), giving an accused a right to be present at a review hearing, referred only to physical presence. However, any such ambiguity was resolved by s. 672.5(13), which allowed for presence through videoconference. That provision would have been meaningless if s. 672.5(9) did not refer to physical presence. Under s. 672.5(10)(*a*) the Board was [page482] allowed to permit an accused to be absent. The use of the word "permit" did not suggest that the Board was allowed to proceed in the absence of the accused without the accused's consent. In considering the act as a whole, the Board's responsibility to conduct annual review hearings was a core aspect of its jurisdiction over NCR accused persons. Those hearings had to be fair. It was important to keep in mind that the use of technology in criminal proceedings ought to be used to enhance, rather than inhibit, access to justice. The Board's decision to proceed by video was not an extension of its authority to conduct a hearing informally, and proceeding by video was not simply a procedural irregularity. Neither the Board nor the court had the authority to expand the Board's jurisdiction beyond the confines of Part XX.1. As for the purposes of the legislation, the dual objectives of Part XX.1 were the protection of the public and the fair treatment of NCR accused. It was up to Parliament to define the outer limits of the Board's jurisdiction when balancing the accused's procedural rights with the need for expediency. It was foreseeable that an NCR accused might not consent to a video hearing and that a delay could lead to an impractical and potentially dangerous result, but it was the role of the legislature to address such a potential problem. The Board acted without statutory authority.

It was unnecessary to address the merits of the applicant's appeal of her disposition order. Once her counsel filed and served a notice of application to quash in the Superior Court, rule 43.03(5) of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)* operated automatically to suspend the proceedings before the Board. The Board erred in proceeding notwithstanding rule 43.03(5) without first seeking the approval of a judge. The detention order was quashed and the conditional discharge reinstated. The matter was returned to the Board for a new hearing before a differently constituted panel.

Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, 113 A.C.W.S. (3d) 52, REJB 2002-30904, 2002 CCAN para. 10,056; *Bessette v. British Columbia (Attorney General)*, [2019] S.C.J. No. 31, 2019 SCC 31, 2019EXP-1398, EYB 2019-311453, 376 C.C.C. (3d) 147, 433 D.L.R. (4th) 631; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn*., [1993] 3 S.C.R. 724, [1993] S.C.J. No. 114, 108 D.L.R. (4th) 1, 160 N.R. 321, J.E. 93-1815, 17 Admin. L.R. (2d) 141, 93 CLLC para. 14,062, 43 A.C.W.S. (3d) 396; *John v. Ballingall* (2017), 136 O.R. (3d) 305, [2017] O.J. No. 3638, 2017 ONCA 579, 415 D.L.R. (4th) 520, 281 A.C.W.S. (3d) 218 [Leave to appeal to S.C.C. refused [2017] S.C.C.A. No. 377]; *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326, [2006] S.C.J. No. 7, 2006 SCC 7, 264 D.L.R. (4th) 10, 346 N.R. 1, J.E. 2006-620, 222 B.C.A.C. 1, 46 Admin. L.R. (4th) 1,

206 C.C.C. (3d) 161, 36 C.R. (6th) 1, 68 W.C.B. (2d) 722, EYB 2006-102437, 2006 CCAN para. 10,018; *Ontario (Attorney General) v. Taylor* (2010), 98 O.R. (3d) 576, [2010] O.J. No. 207, 2010 ONCA 35, 257 O.A.C. 354, 100 Admin. L.R. (4th) 287; *Ordon Estate v. Grail* (1998), 40 O.R. (3d) 639, [1998] 3 S.C.R. 437, [1998] S.C.J. No. 84, 166 D.L.R. (4th) 193, 232 N.R. 201, J.E. 98-2410, 115 O.A.C. 1, 83 A.C.W.S. (3d) 897, REJB 1998-09407; *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513, [2006] S.C.J. No. 48, 2006 SCC 48, 273 D.L.R. (4th) 193, 353 N.R. 343, J.E. 2006-2096, 151 A.C.W.S. (3d) 717, EYB 2006-110506; *Quebec (Attorney General) v. Carrières Ste Thérèse Ltée*, [1985] 1 S.C.R. 831, [1985] S.C.J. No. 37, 20 D.L.R. (4th) 602, 59 N.R. 391, 13 Admin. L.R. 144, 20 C.C.C. (3d) 408, 31 A.C.W.S. (2d) 297, 15 W.C.B. 1; *R. v. 974649 Ontario Inc*., [2001] 3 S.C.R. 575, [2001] S.C.J. No. 79, 2001 SCC 81, 206 D.L.R. (4th) 444, 279 N.R. 345, J.E. 2002-9, 154 O.A.C. 345, 159 C.C.C. (3d) 321, 47 C.R. (5th) 316, 88 C.R.R. (2d) 189, 51 W.C.B. (2d) 452, REJB 2001-27030, JCPQ 2002-1; *R. v. Conception* (2014), 129 O.R. (3d) 79, [2014] 3 S.C.R. 82, [2014] S.C.J. No. 60, 2014 SCC 60, [page483] 378 D.L.R. (4th) 255, 462 N.R. 315, J.E. 2014-1738, 322 O.A.C. 199, 316 C.C.C. (3d) 182, 13 C.R. (7th) 317, 116 W.C.B. (2d) 393, EYB 2014-242683, 2014 CCAN para. 10,096, 2014 CCAN para. 10,136, 2014EXP-3040; *R. v. Drabinsky*, [2008] O.J. No. 3136, 235 C.C.C. (3d) 350, 79 W.C.B. (2d) 259; *R. v. Gallone* (2019), 147 O.R. (3d) 225, [2019] O.J. No. 4247, 2019 ONCA 663, 379 C.C.C. (3d) 1, 56 C.R. (7th) 288; *R. v. Hutchinson*, [2014] 1 S.C.R. 346, [2014] S.C.J. No. 19, 2014 SCC 19; *R. v. Wookey*, [2016] O.J. No. 4158, 2016 ONCA 611, 363 C.R.R. (2d) 177, 132 W.C.B. (2d) 336, 351 O.A.C. 14; *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC para. 210-006, 76 A.C.W.S. (3d) 894, D.T.E. 98T-154; *Santia (Re)*, [2014] O.R.B.D. No. 1051; *Strachan (Re)*, [2019] O.J. No. 3046, 2019 ONCA 481; *Woods (Re)*, [2021] O.R.B.D. No. 104

Statutes referred to

An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts (Bill C-75), S.C. 2019, c. 25, ss. 1(2), 188, 216, 225(2), 290, 292

Criminal Code, R.S.C. 1985, c. C-46, ss. 487.01(7), 502.1(1), 650(2)(*b*), Part XX.1 [as am.], ss. 672.5 [as am.], (2), (9), (10), (*a*), (13) [as am.], 672.53, 672.81(1), (1.1), (2), (2.1), Part XXII.01, ss. 715.21, 715.23(1)

Mental Health Act, R.S.O. 1990, c. M.7 [as am.]

Rules and regulations referred to

Criminal Proceedings Rules for the Superior Court of Justice (Ontario), SI/2012-7, rule 43.03(5), (6)

Authorities referred to

Community Legal Assistance Society, *Operating in Darkness: BC's Mental Health Act Detention System* (Vancouver: CLAS, 2017)

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

Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014)

APPEAL from disposition of Ontario Review Board, dated October 8, 2020, with reasons dated October 15, 2020 (C68774).

APPEAL from the judgment Monahan J., reported at (2020), 152 O.R. (3d) 595, [2020] O.J. No. 5085, 2020 ONSC 6899 (S.C.J.), granting *certiorari* to quash the ruling of the Ontario Review Board, dated July 31, 2020, holding it had jurisdiction to conduct a disposition review hearing under Part XX.1 of the *Criminal Code* by videoconference without the accused's consent (C68940).

Michael Davies, for appellant (C68774), Joanne Woods.

Dena Bonnet and *Emily Marrocco*, for appellant (C68940) and respondent (C68774), Her Majesty the Queen.

Anita Szigeti and *Maya Kotob*, for respondent (C68940), Joanne Woods. [page484]

Leisha Senko, for respondent (C68774 & C68940), Person in Charge of Centre for Addiction and Mental Health.

David Humphrey and *Michelle Biddulph*, for respondent (C68940), Ontario Review Board.

Amy Ohler and *Eric Neubauer*, for the intervenor (C68940), Criminal Lawyers' Association (Ontario).

The judgment of the court was delivered by
TULLOCH J.A.: —

A. *Introduction*

[1] On May 9, 2012, the court found Ms. Woods not criminally responsible on account of mental disorder ("NCRMD" or "NCR") for charges of uttering a threat to cause death or bodily harm, and possession of a weapon for a dangerous purpose. She has been under the jurisdiction of the Ontario Review Board (the "ORB" or the "Board") ever since.

[2] In May 2020, the ORB announced that it would hold all of its hearings remotely, by videoconference, due to the COVID-19 pandemic. Ms. Woods' annual disposition hearing was

initially scheduled for May 29, 2020. Ms. Woods did not consent to proceeding by videoconference and sought to adjourn her hearing until the Board could convene in person.

[3] After a two-month adjournment, on July 31, 2020, the Board held that the hearing could proceed by videoconference, without Ms. Woods' consent and despite her objections. Ms. Woods served and filed an application to quash the Board's decision in the Ontario Superior Court. Notwithstanding rule 43.03(5) of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, SI/2012-7 -- which suspends the proceedings before the Board once Ms. Woods had served and filed a Notice of Application to quash, unless a judge permits the proceedings to go ahead[1] -- the Board held a disposition hearing by videoconference on September 28, 2020. Just over a week later, on October 8, 2020, the Board ordered Ms. Woods detained at the General Forensic [page485] Unit at the Centre for Addiction and Mental Health ("CAMH"), subject to conditions.

[4] Prior to this order, since April 2017, Ms. Woods had been living in the community under a conditional discharge.

[5] Justice Monahan heard Ms. Woods' application to quash on November 6, 2020. On November 23, 2020, Monahan J. issued a writ of *certiorari* and quashed the Board's July 31, 2020 decision to conduct its proceedings by videoconference, for want of jurisdiction. He held that Part XX.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, which governs the NCR regime, did not authorize the Board to convene by videoconference without the consent of the accused. The parties agreed that this decision only affected the Board's jurisdictional ruling on July 31, 2020, and not the disposition order rendered on October 8, 2020.

[6] The Crown appeals Monahan J.'s *certiorari* order, while Ms. Woods appeals the order of the Board setting aside her conditional discharge and entering a detention order.

[7] For the reasons that follow, I would dismiss the appeal of the *certiorari* application. The Board did not have jurisdiction to proceed by videoconference without the consent of the NCR accused. It follows that the Board rendered Ms. Woods' October 8, 2020 disposition order without jurisdiction. The disposition is therefore null and void for want of jurisdiction.

[8] Accordingly, it is unnecessary to address the merits of Ms. Woods' appeal of her disposition order in great detail. Suffice to say, even if I had reached a different conclusion on the merits of the *certiorari* appeal, the disposition order would still be void because the Board conducted its disposition hearings in violation of rule 43.03(5).

[9] It is my understanding that Ms. Woods is currently detained at the hospital. She has had another disposition hearing in the interim, heard on December 8, 2020 and decided on January 13, 2021. The Board continued her detention order in that disposition: *Woods (Re)*, [2021] O.R.B.D. No. 104. However, this detention order rests on a faulty foundation given that the Board entered the original detention order without jurisdiction.

[10] Thus, the detention order is quashed, and Ms. Woods' conditional discharge is reinstated. I would return the matter to the Board to be heard by a different panel as soon as practicable.

B. *Background and Overview*

[11] As noted above, in May 2020, the ORB announced that it would hold all of its hearings remotely, by videoconference, due to the COVID-19 pandemic. In this announcement, the

Board's Chair also noted that this manner of proceeding may give rise to [page486] "arguable inconsistencies with the *Code*", and individuals with any "misgivings" could apply to have their matter adjourned.

[12] Ms. Woods' annual disposition hearing was initially scheduled for May 29, 2020. Ms. Woods attended the hearing, represented by counsel. She did not consent to the hearing proceeding by videoconference and sought an adjournment until the parties could schedule an in-person hearing. The Board granted the adjournment and scheduled a new hearing date for July 31, 2020.

(a) *The ORB's ruling on jurisdiction*

[13] By the time of Ms. Woods' adjourned hearing date on July 31, 2020, the ORB was still not convening for in-person hearings. The hearing proceeded by videoconference.

[14] Counsel for Ms. Woods filed a notice of application submitting that the Board lacked jurisdiction to hold the hearing by videoconference without her consent. She argued that s. 672.5(13)[2] of the *Criminal Code* only allows the Board to proceed by videoconference "if the accused so agrees". Additionally, counsel for Ms. Woods pointed out that s. 672.81(1),[3] which imposes a mandatory review of dispositions after 12 months, is not absolute and that adjournments are a reasonable justification for an extension of that time period.

[15] The Crown argued that s. 672.81(1) requires the Board to fulfill its statutory duty to hold a hearing within 12 months of the last disposition and that this duty takes priority over any consent required by s. 672.5(13). The Crown also submitted that the current public health emergency rendered s. 672.5(13) "inoperative" in the circumstances. Finally, the Crown argued that the Board is entitled to govern its own process.

[16] The Board, in an oral ruling, dismissed the application and denied Ms. Woods' request for a further adjournment. It held that the Board had the authority to proceed by videoconference notwithstanding s. 672.5(13) and Ms. Woods' objections.

[17] In reasons released on August 25, 2020, the Board decided that an overall review of s. 672.5 and the Board's Rules of [page487] Procedure indicates that the ORB has "wide latitude in deciding how its hearing procedures are to be governed with a fundamental goal of securing '. . . the just determination of the real matters in dispute'". It further held that requests to extend the 12-month review by way of adjournment would be assessed on a case-by-case basis.

[18] In the case at hand, the Board found that another adjournment was unreasonable because there appeared to be significant live issues concerning the hospital's ability to manage Ms. Woods' illness and substance use, and these issues needed to be resolved in a timely manner. The Board also observed that there was no evidence that a denial of an in-person hearing occasioned any unfairness to Ms. Woods.

[19] Since an in-person hearing was not possible while COVID-19 continued to pose a risk, the Board reasoned that Ms. Woods was, in effect, seeking to postpone her annual disposition hearing indefinitely. The Board noted that it was "tempting to conclude" that Ms. Woods' refusal to consent was "a not so subtle manoeuvre to delay her hearing so that she can remain on a conditional discharge and maintain her current privileges without change". The Board reasoned that an interpretation of s. 672.5(13) that would permit Ms. Woods to delay the annual

disposition hearing indefinitely would lead to an absurd result, since it would prevent the Board from fulfilling its statutory mandate.

[20] Based on the foregoing, the Board denied Ms. Woods' request for an adjournment. The hearing was ordered to take place as soon as practicable. The Board found that it had the authority to proceed in Ms. Woods' absence, even if she did not consent to a hearing by videoconference, under s. 672.5(10) (*a*).[4]

(b) *The continuation of Ms. Woods' hearings*

[21] On August 28, 2020, the Board reconvened. Counsel for Ms. Woods informed the Board that she had filed and served an application to quash the Board's July 31, 2020 jurisdictional decision in the Superior Court. She took the position that rule 43.03(5) of the *Criminal Proceedings Rules* applied and suspended the proceedings. In the alternative, counsel for Ms. Woods asked the Board to recuse itself on the basis of a reasonable apprehension of bias. The Board disagreed on both counts and commenced the [page488] hearing. It did not have enough time to hear all the evidence, so the matter was again adjourned to a later date.

[22] A differently constituted panel convened by videoconference on September 28, 2020.[5] Ms. Woods did not attend this hearing. Counsel for Ms. Woods did not have instructions to proceed in Ms. Woods' absence and asked for a further adjournment to either obtain instructions or seek advice from the Law Society as to whether she could participate as counsel without instructions.[6] The Board ordered that the hearing proceed in Ms. Woods' absence, citing s. 672.5(10)(*a*), notwithstanding that her counsel could not participate without her instructions. It heard evidence from the hospital and a psychiatrist regarding Ms. Woods' current medical condition, needs and circumstances. Counsel for Ms. Woods did not, and could not, make submissions or cross-examine any of the witnesses without instructions from her client.

[23] On October 8, 2020, the Board issued its disposition. It set aside Ms. Woods' conditional discharge and entered a detention order.

(c) *Ms. Woods' certiorari application*

[24] A month later, on November 6, 2020, Monahan J. heard Ms. Woods' writ of *certiorari* application to quash the Board's July 31, 2020 decision to proceed by videoconference without her consent. In reasons released on November 23, 2020, Monahan J. allowed the application and quashed the Board's July 31, 2020 decision, holding that the Board acted without legal authority.

[25] At the outset, Monahan J. noted that the Board's jurisdiction is defined and limited by the *Criminal Code*. The default rule in s. 715.21 of the *Criminal Code* provides that "a person who appears at, participates in or presides at a proceeding shall do so personally". Monahan J. found that "personally" means that criminal proceedings must proceed in the physical presence of the accused.

[26] Justice Monahan turned his analysis to Part XX.1 of the *Criminal Code*, which governs the NCRMD regime. He noted that an iteration of the default rule entitling accused individuals to an in-person hearing is found in s. 672.5(9).[7] Subsection 672.5(10) [page489] goes on to list specific circumstances where the accused may be absent from the hearing.

[27] Justice Monahan noted that only s. 672.5(10)(*a*)[8] could apply, which provides that the Board may "permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or chairperson considers proper". However, Monahan J. found the word "permit" in s. 672.5(10)(*a*) to be premised on the accused having waived the right to an in-person hearing. In other words, Monahan J. found that the Board could not rely upon s. 672.5(10)(*a*) to proceed in the absence of an accused without their consent; s. 672.5(10)(*a*) only applies where the accused has waived her right to be present.

[28] Lastly, Monahan J. found that Part XX.1 specifically addresses the Board's ability to proceed by videoconference in s. 672.5(13), and that provision requires the accused's consent.[9]

[29] After his review of the statutory framework, Monahan J. concluded that the Board's decision ignored the clear and unambiguous language of ss. 672.5(9) and (13), which provide the NCR accused with a right to an in-person hearing.

[30] Justice Monahan also pointed out that the Board failed to consider whether it was, in fact, possible to hold a hearing in person. At the time, there was no legal rule or public health recommendation that prevented the Board from convening in person.

[31] More broadly, Monahan J. reasoned that it is open to Parliament, and not the Board, to determine whether to amend s. 672.5(13) and grant the Board authority to conduct a disposition review hearing by videoconference over the objections of the accused. As I return to below, Parliament did not do so in its recent amendments to the *Criminal Code*, which expanded the circumstances under which trials and other criminal proceedings may take place by videoconference.

C. *Analysis*

[32] The central question in the Crown's appeal of Monahan J.'s *certiorari* order is the correct interpretation of Part XX.1 of the *Criminal Code.* The Crown asks this court to find that the Board [page490] has jurisdiction to conduct its proceedings by videoconference without the consent of the NCR accused. This jurisdiction, according to the Crown, derives from the Board's statutory regime, its core mandate and its governing practice directions. The Crown further submits that the exercise of this jurisdiction is reasonable in light of the global pandemic. Notably however, the Crown conceded in the hearing that this jurisdiction is rooted in the Board's legal framework; put another way, the Crown also argues that the jurisdiction to hold proceedings by videoconference, without the NCR person's consent, exists regardless of COVID-19.

[33] For the reasons that follow, I disagree. The Board's conclusion about the boundaries of its jurisdiction is incorrect. The statutory regime provides no authority for the Board to conduct its hearing by videoconference without the consent of the NCR accused. The Board's decision was not justified when one considers the legal constraints under Part XX.1 of the *Criminal Code*.

[34] Again, the Board's proceedings were suspended once counsel for Ms. Woods filed and served the notice of application to quash in the Superior Court pursuant to rule 43.03(5). The Board nonetheless proceeded to convene by videoconference without Ms. Woods' consent and without her counsel participating. It subsequently entered a detention order on October 8, 2020. This disposition was made without jurisdiction from the *Criminal Code,* and in direct contravention of the *Criminal Proceedings Rules.* The detention order would be null and void on both accounts.

[35] The COVID-19 pandemic cannot justify a clear departure from the terms of the *Criminal Code.* The Board is a creature of statute and its powers are strictly circumscribed by the *Criminal Code.* The Board cannot expand its jurisdiction based on a sense of perceived urgency to act outside its statutory authority. Given the liberty interests at stake and the unique vulnerabilities of the NCR accused, the rights provided in the *Criminal Code* and the principles of natural justice must be zealously guarded in disposition hearings, even in the face of a global pandemic. Ms. Woods is entitled to an in-person annual disposition hearing unless and until the *Criminal Code* says otherwise.

(1) *The standard of review*

[36] The parties appeared before Monahan J. on an application for a writ of *certiorari. Certiorari* is an extraordinary remedy that derives from the supervisory jurisdiction of the Superior Court over a tribunal of limited jurisdiction. For parties in criminal or quasi-criminal proceedings, *certiorari* is available to address alleged jurisdictional errors; that is, when a court or tribunal either (a) fails to observe a mandatory provision of a statute, or [page491] (b) acts in breach of the principles of natural justice: *Bessette v. British Columbia (Attorney General)*, [2019] S.C.J. No. 31, 2019 SCC 31, at para. 23. The standard of review is correctness: *Ontario (Attorney General) v. Taylor* (2010), 98 O.R. (3d) 576, [2010] O.J. No. 207, 2010 ONCA 35, at para. 16.

(2) *Statutory interpretation of Part XX.1 of the Criminal Code*

[37] Whether the Board failed to observe a mandatory provision of the *Criminal Code* is a question of statutory interpretation. In Canada, it is trite law that the modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, at para. 26.

[38] The starting point is to determine the ordinary meaning of the text. The ordinary meaning refers to "the understanding that spontaneously comes to mind when words are read in their immediate context" and is "the natural meaning which appears when the provision is simply read through": *R. v. Wookey*, [2016] O.J. No. 4158, 2016 ONCA 611, 351 O.A.C. 14, at para. 25; *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513, [2006] S.C.J. No. 48, 2006 SCC 48, at para. 30; and *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn*., [1993] 3 S.C.R. 724, [1993] S.C.J. No. 114, at p. 735 S.C.R.

[39] After establishing an initial impression, the court must consider and draw inferences from the Act as a whole. This includes related provisions and the overall scheme. It is presumed that the legislature is competent and well informed, that it uses language consistently and that the provisions in the Act collectively form a coherent scheme: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at pp. 162-63 and 186-87; *Ordon Estate v. Grail* (1998), 40 O.R. (3d) 639, [1998] 3 S.C.R. 437, [1998] S.C.J. No. 84, at para. 60.

[40] There is also a presumption against tautology: *R. v. Gallone* (2019), 147 O.R. (3d) 225, [2019] O.J. No. 4247, 2019 ONCA 663, at para. 31. That presumption instructs "that the

legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014), ("Sullivan"), at p. 211, citing *Quebec (Attorney General) v. Carrières Ste.Thérèse Ltée*, [1985] 1 S.C.R. 831, [1985] S.C.J. No. 37, at p. 838 S.C.R. Instead, "[e]very word in a statute is presumed [page492] to make sense and to have a specific role to play in advancing the legislative purpose": *Sullivan*, at p. 211.

[41] Finally, a court must situate its interpretation within the purpose of the legislation. Insofar as the language of the text permits, courts should adopt interpretations that are consistent with the legislative purpose and avoid interpretations that defeat or undermine that purpose. It is presumed that the legislature does not intend absurd consequences: *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 27.

[42] The questions to be answered are whether ss. 672.5(9), (10) and (13) support the conclusions that: (a) the accused has the right to an in-person hearing unless they consent to a hearing by videoconference; and (b) the Board may proceed in the absence of the accused without their consent. Given the interrelated nature of these questions, I will consider them in a blended manner.

[43] Before doing so, I will briefly summarize ss. 672.5(9), (10) and (13). Subsection 672.5(9) states that "[s]ubject to subsection (10), the accused has the right to be present during the whole of the hearing". Subsection (10) goes on to list specific circumstances where the accused may be absent from the hearing. As noted above, only ss. 672.5(10)(*a*) is applicable and it reads: "The court or the chairperson of the Review Board may (a) permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or chairperson considers proper." The statute specifically addresses videoconferencing in s. 672.5(13), which provides: "[i]f the accused so agrees, the court or the chairperson of the Review Board may permit the accused to appear by closed-circuit television or videoconference for any part of the hearing".

(a) *The ordinary meaning*

[44] When read alone, s. 672.5(9) arguably gives rise to some ambiguity as to whether the term "present" entitles an accused to be *physically* present. The right to be present could simply mean a right to attend the hearing. In contemporary times, someone could attend a hearing either physically or virtually. This would be consistent with the approach of courts to consider advances in technology that did not exist when Parliament enacted the provision: *John v. Ballingall* (2017), 136 O.R. (3d) 305, [2017] O.J. No. 3638, 2017 ONCA 579, at para. 24, leave to appeal to S.C.C. refused [2017] S.C.C.A. No. 377. Such an approach ensures that statutory interpretation applies "a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities": [page493] *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, [2001] S.C.J. No. 79, 2001 SCC 81, at para. 38.

[45] However, any ambiguity about whether an accused's right to be "present" entitles him or her to an in-person hearing is resolved when one considers s. 672.5(13). That section explicitly addresses circumstances where an NCRMD accused's "presence" may be virtual, that is, through a videoconference. Parliament was careful to stipulate that the NCRMD accused must agree to appear by videoconference. This provision would have no meaning if s. 672.5(9) did

not entitle the NCRMD accused to be physically present at a hearing. As noted above, the presumption of tautology states that "[e]very part of a provision or set of provisions should be given meaning if possible", and courts should avoid, "as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant": *R. v. Hutchinson*, [2014] 1 S.C.R. 346, [2014] S.C.J. No. 19, 2014 SCC 19, at para. 16; *Sullivan*, at p. 211.

[46] A plain reading of s. 672.5(10)(*a*) does not assist this court in interpreting whether the accused person has a right to be physically present. The Board's ability in certain circumstances to proceed in the absence of the accused does not speak to whether the accused is entitled to an in-person hearing.

[47] However, a plain reading of s. 672.5(10)(*a*) does shed light on whether the Board may proceed in the absence of the accused without their consent. I am not convinced that the Board may do so. The word "permit" in s. 672.5(10)(*a*) implies that the Board may grant the accused permission to be absent. Stated otherwise, it is premised on an accused waiving her right to an in-person hearing.

[48] The word "permit" also has a specific connotation in the *Criminal Code* context. Justice Monahan pointed to s. 650(2)(*b*) -- a virtually identical provision -- which courts have interpreted as only applying where an accused has waived their right to be present at trial: *R. v. Drabinsky*, [2008] O.J. No. 3136, 235 C.C.C. (3d) 350 (S.C.J.), at paras. 7-11. Justice Mohanan also compared the word "permit" with the language of s. 715.23(1), which provides: "[e]xcept as otherwise provided in this Act, the court may order an accused to appear by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances". Under s. 672.5(13), which carves out an exception to s. 715.23(1), the Board may only "permit" (as opposed to "order") the accused to appear by videoconference. It is presumed that the legislature uses words consistently and intentionally. I agree with Monahan J.'s analysis on this point. [page494]

[49] On a plain reading of ss. 672.5(9), (10) and (13), the right to be present implies a physical presence unless the accused consents to a hearing by videoconference. Additionally, the Board cannot proceed in the absence of the accused unless she has waived her right to be present.

(b) *The Act as a whole*

[50] The next step involves a consideration of the Act as a whole. The Crown asks us to interpret ss. 672.5(9), (10) and (13) in light of ss. 672.81(1), 672.5(2) and 672.53. Subsection 672.81(1) requires the Board to hold annual hearings to review dispositions made with respect to an NCR accused.[10] Subsection 672.5(2) provides that a review hearing may be conducted as informally as is appropriate in the circumstances.[11] Finally, s. 672.53 provides that any procedural irregularity in relation to a disposition hearing will not affect the validity of the hearing itself unless the irregularity causes substantial prejudice to the NCR accused.[12] I will deal with each of these provisions in turn.

[51] There is no question that the Board must conduct review hearings on an annual basis and that this responsibility is a core aspect of its jurisdiction over NCR accused persons. Annual review hearings are of paramount importance as they allow the Board to ensure that the

disposition is appropriately calibrated in a manner that balances the liberty interests of the accused with the protection of the public.

[52] However, those hearings must be fair. An annual review hearing that proceeds by videoconference, over the objections of the accused, and without representation for the accused, cannot be considered fair. In the absence of consent of the NCR accused, only Parliament may require accused persons to forego the protections currently provided by the *Criminal Code.*

[53] In the present context, the need for fairness is amplified given the vulnerability of those under the jurisdiction of the [page495] Board. For some NCR accused, the forced use of videoconferencing could contribute to anxiety or paranoia relating to the use of technology: Community Legal Assistance Society ("CLAS"), *Operating in Darkness: BC's Mental Health Act Detention System* (Vancouver: CLAS, 2017), at p. 135. Here it is important to keep in mind that the use of technology in criminal proceedings should be used to enhance access to justice, not inhibit it. The court and the Board must remain vigilant about the risk that COVID-19 protocols could erode the fairness of the decision-making process.

[54] Presently, there are other ways to accommodate the needs for NCR accused people who do not consent to attending their annual hearing virtually. Part XX.1 contemplates circumstances where this review period can be extended beyond a year. Specifically, s. 672.81(1.1) permits the Board to extend the time for holding a hearing by a maximum of 24 months in certain circumstances.[13] As I return to below, if a public safety issue arises, the accused remains under the hospital's supervision. An accused can still be hospitalized without their consent pursuant to the *Mental Health Act*, R.S.O. 1990, c. M.7.

[55] The Crown also argues that the Board's decision to proceed by video was an extension of its authority under s. 672.5(2) to conduct the hearing informally where circumstances permit. I am not convinced that this is what Parliament had in mind when drafting this provision. In the limited jurisprudence surrounding s. 672.5(2), this provision has been used to make reasonable accommodations when it comes to information gathering or requests on consent of all parties. For example, the Board has invoked s. 672.5(2) to make informal information requests from the hospital on an urgent basis: *R. v. Conception*, [2014] 3 S.C.R. 82, [2014] S.C.J. No. 60, 2014 SCC 60, at para. 122. It has also been used to permit an NCR accused's parents to attend an in-person hearing by video link with the consent of all parties: *Santia (Re)*, [2014] O.R.B.D. No. 1051, at para. 9. Permission to operate informally is meant to assist the Board in executing its role as an inquisitorial tribunal; it is not meant to supersede an accused person's codified rights.

[56] Finally, I am not of the view that proceeding by video is simply a "procedural irregularity". The Crown asks this court to [page496] find that remote hearings "do not impact the exercise of the procedural or substantive rights of the accused as they allow for meaningful participation". This case does not provide the necessary evidentiary record for this court to weigh-in on the extent to which a video forum impacts an accused's substantive and procedural rights. However, as alluded to above, I am not prepared to treat the difference between an in-person hearing and a videoconference hearing as insignificant. The court must be cautious in endorsing such a broad proposition about the rights of vulnerable people in a time of crisis. Suffice to say, I am persuaded that the *Criminal Code* treats deviations from in-person hearings as more than mere procedural irregularities.

[57] Turning to the Act more broadly, it is important to note that the Board's jurisdiction is defined and limited by the *Criminal Code*. The default rule in s. 715.21 of the *Criminal Code* provides that "a person who appears at, participates in or presides at a proceeding shall do so personally". When read in the context of other provisions in the Code, including ss. 502.1(1) or 487.01(7), "personally" in s. 715.21 means that criminal proceedings must proceed in the physical presence of the accused.

[58] In 2019, Parliament enacted the default rule in s. 715.21 as part of a series of amendments to the *Criminal Code* that sought to modernize criminal procedure and expand the circumstances in which the accused and other participants in a criminal proceeding may appear virtually: *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, (Bill C-75), S.C. 2019, c. 25, ss. 1(2), 188, 216, 225(2), 290 and 292.

[59] In the new Part XXII.01, entitled "Remote Attendance by Certain Persons", Parliament provided a judge or justice the authority to preside over proceedings via remote means, and in certain circumstances, to require the accused to appear by videoconference. Parliament had the opportunity to expand remote appearances to Part XX.1 of the *Criminal Code* to grant the Board statutory authority to order an NCR accused to appear by video. Parliament did not do so. This may well have been a legislative oversight. However, in the absence of an amendment, neither the Board nor this court has the authority to expand the Board's jurisdiction beyond the confines of Part XX.1.

(c) *The purpose of ss. 672.5(9), (10) and (13)*

[60] Turning now to the purpose of the legislation, the dual objectives of Part XX.1 of the *Criminal Code* are the protection of the public and the fair treatment of the NCR accused: *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [page497] [2006] 1 S.C.R. 326, [2006] S.C.J. No. 7, at paras. 26-29. In furtherance of these twin goals, the Board has wide latitude to make orders and conditions binding on the parties before it.

[61] As noted above, annual disposition hearings are central to this legislative scheme. They permit the Board to continuously ensure that the appropriate balance is struck between the protection of the public and the degree of restrictions on the liberty of the NCR accused.

[62] It is up to Parliament to define the outer limits of the Board's jurisdiction when it comes to the balance between the accused's procedural rights and the need for expediency. The statute is clear: there was no jurisdiction here.

[63] There are practical implications for this interpretation, but they do not rise to the level of absurdity. As Monahan J. observed at para. 42, the Board is entitled to delay its in-person hearings until it is appropriate to convene in person or it can do so in a safe manner. However, assuming an in-person hearing was truly impracticable, the proper way forward would have been to grant adjournments when an accused does not consent to a video hearing. As noted above, s. 672.81(1.1) of the *Criminal Code* accounts for irregularities in the timeline of annual dispositions. While this is by no means a long-term solution, it is up to Parliament to carve out an exception to the default rule entitling people under the Board's jurisdiction to in-person hearings.

[64] If concerns about the protection of the public arise in the interim, it remains open for the hospital to step in. Patients can be brought in under the *Mental Health Act* in the event of rapid decompensation. Pursuant to ss. 672.81(2) and (2.1), the Board is required to hold a review hearing as soon as practicable where the hospital seeks an early review hearing, or when the hospital has significantly increased restrictions on the accused's liberty for a period exceeding seven days. The hospital may request an early review hearing when there is reason to believe that the current disposition does not adequately protect public safety: *Strachan (Re)*, [2019] O.J. No. 3046, 2019 ONCA 481, at paras. 4-9.

[65] It is certainly foreseeable that an NCR accused might not consent to a video hearing in these circumstances, and that a delay could lead to an impractical and potentially dangerous result. But it is the role of the legislature, and not the Board, nor this court, to address this potential problem.

(d) *Conclusion on the interpretation of Part XX.1*

[66] In summary, the task of this court was to interpret the relevant provisions of Part XX.1 of the *Criminal Code* and determine whether the Board acted without statutory authority. I am [page498] of the view that the Board failed to remain within the proper bounds of its jurisdiction, as conferred by statute. I do not see any error in Monahan J.'s approach that would warrant this court's intervention.

D. *Ms. Woods' Appeal of her Disposition Order*

[67] The operation of rule 43.03(5) is automatic. Once counsel for Ms. Woods filed and served a notice of application to quash in the Superior Court, rule 43.03(5) suspended the proceedings before the Board. The Board erred in proceeding notwithstanding rule 43.03(5), without first seeking the approval of a judge, as is required by rule 43.03(6). Again, the Board does not have the authority to unilaterally override clear directions from the *Criminal Proceedings Rules for the Superior Court of Justice*.

[68] The Board's decision to proceed without the NCR accused or her counsel raises procedural fairness concerns that might have afforded an alternative basis for quashing the decision, but it is unnecessary to decide this point given that the Board had no authority to proceed with the hearing in any event.

E. *Conclusion and Disposition*

[69] I would dismiss the appeal of the *certiorari* order and allow the appeal of the Board's disposition. Further, I would return this matter to the Board for a new hearing before a differently constituted panel, to be heard as soon as practicable.

Appeal by Crown dismissed; appeal by accused allowed.

Notes

1 Rules 43.03(5) and (6) provide: "(5) Subject to subrule (6), service of a notice of application to quash under subrule (2) upon a provincial court judge, justice or justices, coroner, or as the case may be, suspends the proceedings which are the subject of the application. (6) A judge may, upon service of a notice of application therefor in such manner, if at all, as the judge may direct, order that the proceedings which are the subject of the application to quash shall continue upon such terms as appear just."

2 Subsection 672.5(13) provides: "If the accused so agrees, the court or the chairperson of the Review Board may permit the accused to appear by closed-circuit television or videoconference for any part of the hearing."

3 Subsection 672.81(1) provides: "A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(a)."

4 Subsection 672.5(10)(a) provides: "(10) The court or the chairperson of the Review Board may (a) permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or chairperson considers proper . . . ".

5 One of the members of the panel suffered a sudden illness that prevented him from sitting on the Board. The Board lost quorum and was reconstituted as a new panel.

6 The Law Society later informed counsel that it would not be proper for her to participate without instructions.

7 Subsection 672.5(9) provides: "(9) Subject to subsection (10), the accused has the right to be present during the whole of the hearing."

8 Subsection 672.5(10)(a) provides: "(10) The court or the chairperson of the Review Board may (a) permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or chairperson considers proper . . . ".

9 Again, s. 672.5(13) provides: "If the accused so agrees, the court or the chairperson of the Review Board may permit the accused to appear by closed-circuit television or videoconference for any part of the hearing."

10 Subsection 672.81(1) provides: "A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(a)."

11 Subsection 672.5(2) provides: "The hearing may be conducted in as informal a manner as is appropriate in the circumstances."

12 Section 672.53 provides: "Any procedural irregularity in relation to a disposition hearing does not affect the validity of the hearing unless it causes the accused substantial prejudice."

13 Subsection 672.81(1.1) provides: "Despite subsection (1), the Review Board may extend the time for holding a hearing to a maximum of twenty-four months after the making or reviewing of a disposition if the accused is represented by counsel and the accused and the Attorney General consent to the extension."

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Google Inc. *Appellant*

v.

Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Canadian Civil Liberties Association, OpenMedia Engagement Network, Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, The Center for Investigative Reporting, Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., New England First Amendment Coalition, News Media Alliance (formerly known as Newspaper Association of America), AOL Inc., California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, Online News Association, Society of Professional Journalists, Human Rights Watch, ARTICLE 19, Open Net (Korea), Software Freedom Law Centre, Center for Technology and Society, Wikimedia Foundation, British Columbia Civil Liberties Association, Electronic Frontier Foundation, International Federation of the Phonographic Industry, Music Canada, Canadian Publishers' Council, Association of Canadian Publishers, International Confederation of Societies of Authors and Composers, International Confederation of Music Publishers, Worldwide Independent Network

Google Inc. *Appelante*

c.

Equustek Solutions Inc., Robert Angus et Clarma Enterprises Inc. *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, Association canadienne des libertés civiles, OpenMedia Engagement Network, Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, The Center for Investigative Reporting, Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., New England First Amendment Coalition, News Media Alliance (anciennement connue sous le nom de Newspaper Association of America), AOL Inc., California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, Online News Association, Society of Professional Journalists, Human Rights Watch, ARTICLE 19, Open Net (Korea), Software Freedom Law Centre, Center for Technology and Society, Wikimedia Foundation, British Columbia Civil Liberties Association, Electronic Frontier Foundation, Fédération internationale de l'industrie phonographique, Music Canada, Canadian Publishers' Council, Association of Canadian Publishers, Confédération internationale des sociétés d'auteurs et compositeurs, Confédération internationale des éditeurs de musique, Worldwide Independent

and International Federation of Film Producers Associations *Interveners*

Network et Fédération internationale des associations de producteurs de films *Intervenants*

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2017 SCC 34

File No.: 36602.

2016: December 6; 2017: June 28.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Répertorié : Google Inc. *c.* Equustek Solutions Inc.

2017 CSC 34

N° du greffe : 36602.

2016 : 6 décembre; 2017 : 28 juin.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Injunctions — Interlocutory injunction — Non-party — Technology company bringing action against distributor for unlawful use and sale of its intellectual property through Internet — Company granted interlocutory injunction against Google, a non-party to underlying action, to cease indexing or referencing certain search results on its Internet search engine — Whether Google can be ordered, pending trial of action, to globally de-index websites of distributor which, in breach of several court orders, is using those websites to unlawfully sell intellectual property of another company — Whether Supreme Court of British Columbia had jurisdiction to grant injunction with extraterritorial effect — Whether, if it did, it was just and equitable to do so.

Injonctions — Injonction interlocutoire — Tiers — Entreprise de technologie intentant une action contre un distributeur pour utilisation et vente illégales de ses éléments de propriété intellectuelle au moyen d'Internet — Entreprise obtenant une injonction interlocutoire intimant à Google, un tiers à l'action sous-jacente, de cesser le listage et le référencement de certains résultats de son moteur de recherche sur Internet — Google peut-elle se voir ordonner, en attendant l'issue du procès sur l'action, de délister l'ensemble des sites Web d'un distributeur qui utilise, en contravention avec plusieurs ordonnances judiciaires, ces sites pour vendre illégalement les éléments de propriété intellectuelle d'une autre entreprise? — La Cour suprême de la Colombie-Britannique avait-elle compétence pour accorder une injonction ayant des effets extraterritoriaux? — Dans l'affirmative, était-il juste et équitable qu'elle le fasse?

E is a small technology company in British Columbia that launched an action against D. E claimed that D, while acting as a distributor of E's products, began to relabel one of the products and pass it off as its own. D also acquired confidential information and trade secrets belonging to E, using them to design and manufacture a competing product. D filed statements of defence disputing E's claims, but eventually abandoned the proceedings and left the province. Some of D's statements of defence were subsequently struck.

E est une petite entreprise de technologie de la Colombie-Britannique qui a intenté une action contre D. E a soutenu que D, pendant qu'il agissait comme distributeur de ses produits, avait commencé à réétiqueter un de ceux-ci et à le faire passer pour le sien. D a également acquis des renseignements confidentiels et des secrets commerciaux appartenant à E, et les a utilisés pour concevoir et fabriquer un produit concurrent. D a déposé des défenses dans lesquelles il conteste les allégations de E, mais a fini par abandonner les procédures et quitter la province. Certaines défenses de D ont par la suite été radiées.

Despite court orders prohibiting the sale of inventory and the use of E's intellectual property, D continues to carry on its business from an unknown location, selling its impugned product on its websites to customers all

Malgré les ordonnances judiciaires interdisant la vente de biens figurant dans l'inventaire et l'utilisation des éléments de propriété intellectuelle d'E, D a continué d'exercer ses activités à partir d'un endroit inconnu et a vendu

over the world. E approached Google and requested that it de-index D's websites. Google refused. E then brought court proceedings, seeking an order requiring Google to do so. Google asked E to obtain a court order prohibiting D from carrying on business on the Internet saying it would comply with such an order by removing specific webpages.

An injunction was issued by the Supreme Court of British Columbia ordering D to cease operating or carrying on business through any website. Between December 2012 and January 2013, Google advised E that it had de-indexed 345 specific webpages associated with D. It did not, however, de-index all of D's websites. De-indexing webpages but not entire websites proved to be ineffective since D simply moved the objectionable content to new pages within its websites, circumventing the court orders. Moreover, Google had limited the de-indexing to searches conducted on google.ca. E therefore obtained an interlocutory injunction to enjoin Google from displaying any part of D's websites on any of its search results worldwide. The Court of Appeal for British Columbia dismissed Google's appeal.

Held (Côté and Rowe JJ. dissenting): The appeal is dismissed and the worldwide interlocutory injunction against Google is upheld.

Per McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ.: The issue is whether Google can be ordered, pending a trial, to globally de-index D's websites which, in breach of several court orders, is using those websites to unlawfully sell the intellectual property of another company.

The decision to grant an interlocutory injunction is a discretionary one and entitled to a high degree of deference. Interlocutory injunctions are equitable remedies that seek to ensure that the subject matter of the litigation will be preserved so that effective relief will be available when the case is ultimately heard on the merits. Their character as "interlocutory" is not dependent on their duration pending trial. Ultimately, the question is whether granting the injunction is just and equitable in the circumstances of the case.

The test for determining whether the court should exercise its discretion to grant an interlocutory injunction against Google has been met in this case: there is a serious

le produit en cause sur ses sites Web à des clients partout dans le monde. E s'est adressé à Google et lui a demandé de délister les sites Web de D. Google a refusé. E a ensuite intenté une action visant à obtenir une ordonnance intimant à Google de le faire. Google a demandé à E d'obtenir une ordonnance judiciaire interdisant à D d'exercer des activités sur Internet et lui a dit qu'elle se conformerait à une telle ordonnance en supprimant des pages Web précises.

La Cour suprême de la Colombie-Britannique a décerné une injonction intimant à D de cesser d'exercer des activités sur tout site Web. Entre décembre 2012 et janvier 2013, Google a avisé E qu'elle avait délisté 345 pages Web précises liées à D. Elle n'a toutefois pas délisté tous les sites Web de D. Le délistage de pages Web plutôt que de sites Web au complet s'est révélé inefficace, puisque D avait simplement déplacé le contenu répréhensible vers de nouvelles pages de ses sites Web, contournant ainsi les ordonnances judiciaires. De plus, Google avait limité le délistage aux recherches effectuées sur google.ca. E a donc obtenu une injonction interlocutoire visant à interdire à Google d'afficher toute partie des sites Web de D dans ses résultats de recherche partout dans le monde. La Cour d'appel de la Colombie-Britannique a rejeté l'appel interjeté par Google.

Arrêt (les juges Côté et Rowe sont dissidents) : Le pourvoi est rejeté et l'injonction interlocutoire mondiale contre Google est confirmée.

La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon et Brown : La question est de savoir si Google peut se voir ordonner, en attendant la tenue d'un procès, de délister l'ensemble des sites Web de D, qui utilise, en contravention avec plusieurs ordonnances judiciaires, ces sites pour vendre illégalement les éléments de propriété intellectuelle d'une autre entreprise.

La décision d'accorder une injonction interlocutoire est une décision discrétionnaire qui commande un degré élevé de déférence. Les injonctions interlocutoires sont des réparations en equity qui visent à préserver l'objet du litige, de sorte qu'une réparation efficace sera possible lorsque l'affaire sera finalement jugée au fond. Leur caractère « interlocutoire » ne dépend pas de leur durée dans l'attente du procès. En définitive, il s'agit de déterminer s'il est juste et équitable d'accorder l'injonction eu égard aux circonstances de l'affaire.

On a satisfait en l'espèce au critère applicable pour déterminer si le tribunal devrait exercer son pouvoir discrétionnaire d'octroyer une injonction interlocutoire contre

issue to be tried; E is suffering irreparable harm as a result of D's ongoing sale of its competing product through the Internet; and the balance of convenience is in favour of granting the order sought.

Google does not dispute that there is a serious claim, or that E is suffering irreparable harm which it is inadvertently facilitating through its search engine. Nor does it suggest that it would be inconvenienced in any material way, or would incur any significant expense, in de-indexing D's websites. Its arguments are that the injunction is not necessary to prevent irreparable harm to E and is not effective; that as a non-party it should be immune from the injunction; that there is no necessity for the extraterritorial reach of the order; and that there are freedom of expression concerns that should have tipped the balance against granting the order.

Injunctive relief can be ordered against someone who is not a party to the underlying lawsuit. When non-parties are so involved in the wrongful acts of others that they facilitate the harm, even if they themselves are not guilty of wrongdoing, they can be subject to interlocutory injunctions. It is common ground that D was unable to carry on business in a commercially viable way without its websites appearing on Google. The injunction in this case flows from the necessity of Google's assistance to prevent the facilitation of D's ability to defy court orders and do irreparable harm to E. Without the injunctive relief, it was clear that Google would continue to facilitate that ongoing harm.

Where it is necessary to ensure the injunction's effectiveness, a court can grant an injunction enjoining conduct anywhere in the world. The problem in this case is occurring online and globally. The Internet has no borders — its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally. If the injunction were restricted to Canada alone or to google.ca, the remedy would be deprived of its intended ability to prevent irreparable harm, since purchasers outside Canada could easily continue purchasing from D's websites, and Canadian purchasers could find D's websites even if those websites were de-indexed on google.ca.

Google's argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating

Google : il existe une question sérieuse à juger, E subit un préjudice irréparable du fait que D continue de vendre son produit concurrent sur Internet et la prépondérance des inconvénients favorise l'octroi de l'ordonnance sollicitée.

Google ne conteste pas le fait qu'il existe une demande sérieuse ou que E subit un préjudice irréparable qu'elle facilite par inadvertance au moyen de son moteur de recherche. Elle ne soutient pas non plus qu'elle subirait des inconvénients appréciables ou qu'elle engagerait des dépenses importantes en délistant les sites Web de D. Ses arguments sont les suivants : l'injonction n'est pas nécessaire pour empêcher E de subir un préjudice irréparable et n'est pas efficace; en tant que tiers, elle devrait échapper à l'injonction; il n'est pas nécessaire que l'ordonnance ait une portée extraterritoriale; des questions relatives à la liberté d'expression auraient dû faire pencher la balance contre l'octroi de l'ordonnance.

Une injonction peut être décernée contre un tiers par rapport à l'action sous-jacente. Des tiers qui sont mêlés aux actes fautifs d'autres personnes à un point tel qu'ils facilitent le préjudice peuvent, même s'ils n'ont eux-mêmes commis aucun acte répréhensible, faire l'objet d'injonctions interlocutoires. Nul ne conteste que D ne pouvait pas exercer des activités d'une façon viable sur le plan commercial si ses sites Web n'apparaissaient pas sur Google. L'injonction en l'espèce découle du fait que le concours de Google est nécessaire pour ne pas faciliter la violation d'ordonnances judiciaires par D et causer un préjudice irréparable à E. Sans cette injonction, il était clair que Google continuerait de faciliter ce préjudice continu.

Lorsqu'il faut assurer l'efficacité de l'injonction, un tribunal peut accorder une injonction dictant une conduite à adopter n'importe où dans le monde. Le problème en l'espèce se pose en ligne et à l'échelle mondiale. L'Internet n'a pas de frontières — son habitat naturel est mondial. La seule façon de s'assurer que l'injonction interlocutoire atteint son objectif est de la faire appliquer là où Google exerce ses activités, c'est-à-dire mondialement. Si l'injonction se limitait au Canada seulement ou à google.ca, la réparation ne pourrait pas empêcher comme il se doit le préjudice irréparable, car les acheteurs à l'extérieur du Canada pourraient facilement continuer à acheter des produits sur les sites Web de D et les acheteurs canadiens pourraient trouver ces sites même si ceux-ci ont été délistés de google.ca.

L'argument de Google selon lequel une injonction mondiale contrevient au principe de la courtoisie internationale parce qu'il est possible que l'ordonnance ne puisse pas être accordée dans un autre pays ou que Google viole

the laws of that jurisdiction, is theoretical. If Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application. In the absence of an evidentiary foundation, and given Google's right to seek a rectifying order, it is not equitable to deny E the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally permissible.

D and its representatives have ignored all previous court orders made against them, have left British Columbia, and continue to operate their business from unknown locations outside Canada. E has made efforts to locate D with limited success. D is only able to survive — at the expense of E's survival — on Google's search engine which directs potential customers to D's websites. This makes Google the determinative player in allowing the harm to occur. On balance, since the world-wide injunction is the only effective way to mitigate the harm to E pending the trial, the only way, in fact, to preserve E itself pending the resolution of the underlying litigation, and since any countervailing harm to Google is minimal to non-existent, the interlocutory injunction should be upheld.

Per Côté and Rowe JJ. (dissenting): While the court had jurisdiction to issue the injunctive order against Google, it should have refrained from doing so. Numerous factors affecting the grant of an injunction strongly favour judicial restraint in this case.

First, the Google Order in effect amounts to a final determination of the action because it removes any potential benefit from proceeding to trial. In its original underlying claim, E sought injunctions modifying the way D carries out its website business. E has been given more injunctive relief than it sought in its originating claim, including requiring D to cease website business altogether. Little incentive remains for E to return to court to seek a lesser injunctive remedy. This is evidenced by E's choice to not seek default judgment during the roughly five years which have passed since it was given leave to do so. The Google Order provides E with more equitable relief than it sought

les lois de ce pays en se conformant à celle-ci est théorique. Si Google dispose d'éléments de preuve démontrant que, pour se conformer à une telle injonction, elle doit contrevenir aux lois d'un autre pays, et notamment porter atteinte à la liberté d'expression, elle peut toujours demander aux tribunaux de la Colombie-Britannique de modifier l'ordonnance interlocutoire en conséquence. Jusqu'à maintenant, Google n'a pas présenté une telle demande. En l'absence d'un fondement de preuve, et compte tenu du droit de Google de demander une ordonnance de rectification, il n'est pas équitable de refuser d'accorder à E la portée extraterritoriale dont elle a besoin pour rendre la réparation efficace, ou même de lui imposer le fardeau de démontrer où — pays par pays — une telle ordonnance est légalement autorisée.

D et ses représentants ont fait abstraction de toutes les ordonnances judiciaires antérieures prononcées contre eux, ont quitté la Colombie-Britannique et continuent d'exploiter leur entreprise à partir d'endroits inconnus à l'extérieur du Canada. E a cherché à localiser D, mais avec peu de succès. D ne doit sa survie — au détriment de celle d'E — qu'au moteur de recherche de Google, lequel dirige les clients potentiels vers ses sites Web. Ces circonstances font en sorte que Google a joué un rôle déterminant en permettant au préjudice de se produire. Tout bien considéré, puisqu'une injonction mondiale est la seule façon efficace de réduire le préjudice causé à E jusqu'à l'issue du procès — la seule façon, en fait, de préserver E elle-même jusqu'à ce que le litige sous-jacent soit réglé — et puisque le préjudice subi par Google en contrepoids est minime, voire inexistant, l'injonction interlocutoire devrait être confirmée.

Les juges Côté et Rowe (dissidents) : Même si le tribunal avait compétence pour prononcer l'injonction contre Google, il aurait dû s'abstenir de le faire. De nombreux facteurs à prendre en considération pour décider s'il y a lieu d'accorder ou non une injonction militent fortement en faveur de la retenue judiciaire en l'espèce.

Premièrement, l'ordonnance visant Google équivaut en fait au règlement final de l'action puisqu'il n'existe plus d'avantage possible à tirer d'un procès. Dans sa demande initiale sous-jacente, E a demandé des injonctions modifiant la façon dont D exerce ses activités au moyen de sites Web. E a obtenu une injonction supérieure à celle qu'elle avait sollicitée dans sa demande initiale, injonction prévoyant notamment que D cesse complètement ses activités au moyen de tout site Web. E n'a guère avantage à retourner devant le tribunal pour obtenir une injonction moins sévère, comme en témoigne son choix de ne pas demander de jugement par défaut pendant la période d'environ cinq

against D and gives E an additional remedy that is final in nature. The order against Google, while interlocutory in form, is final in effect. The test for interlocutory injunctions does not apply to an order that is effectively final. In these circumstances, an extensive review of the merits of this case was therefore required but was not carried out by the court below, contrary to caselaw. The Google Order does not meet the test for a permanent injunction. Although E's claims were supported by a good *prima facie* case, it was not established that D designed and sold counterfeit versions of E's product, or that this resulted in trademark infringement and unlawful appropriation of trade secrets.

Second, Google is a non-party to the proceedings between E and D. E alleged that Google's search engine was facilitating D's ongoing breach by leading customers to D's websites. However, the prior order that required D to cease carrying on business through any website was breached as soon as D established a website to conduct its business, regardless of how visible that website might be through Google searches. Google did not aid or abet the doing of the prohibited act.

Third, the Google Order is mandatory and requires ongoing modification and supervision because D is launching new websites to replace de-listed ones. Courts should avoid granting injunctions that require such cumbersome court-supervised updating.

Furthermore, the Google Order has not been shown to be effective in making D cease operating or carrying on business through any website. Moreover, the Google Order does not assist E in modifying D's websites, as E sought in its originating claim for injunctive relief. The most that can be said is the Google Order might reduce the harm to E. But it has not been shown that the Google Order is effective in doing so. D's websites can be found using other search engines, links from other sites, bookmarks, email, social media, printed material, word-of-mouth, or other indirect means. D's websites are open for business on the Internet whether Google searches list them or not.

ans qui s'est écoulée depuis qu'elle a obtenu l'autorisation de ce faire. L'ordonnance visant Google fournit à E une réparation en equity supérieure à celle sollicitée contre D et lui accorde une réparation additionnelle de nature finale. Bien que de forme interlocutoire, l'ordonnance visant Google a un effet final. Le critère relatif aux injonctions interlocutoires ne s'applique pas à une ordonnance qui est en fait finale. Dans ces circonstances, il fallait donc procéder à un examen approfondi sur le fond, lequel n'a pas été effectué par la juridiction inférieure, contrairement à la jurisprudence. L'ordonnance visant Google ne satisfait pas au critère applicable à l'octroi d'une injonction permanente. Même si les allégations d'E reposaient sur une preuve à première vue valable, il n'a pas été établi que D a conçu et vendu des versions contrefaites de son produit ou que cela a causé une contrefaçon de marque de commerce et une appropriation illégale de secrets commerciaux.

Deuxièmement, Google est un tiers à l'instance opposant E et D. E a soutenu qu'en dirigeant les clients vers les sites Web de D, le moteur de recherche de Google facilitait la perpétration continue par D de la violation reprochée. Cependant, il y a eu manquement à l'ordonnance antérieure intimant à D de cesser d'exercer des activités par l'entremise de tout site Web dès que D a créé un site Web pour exercer ses activités, peu importe à quel point ce site était visible lors de recherches sur Google. Google n'a pas aidé à la perpétration de l'acte prohibé ni encouragé celle-ci.

Troisièmement, l'ordonnance visant Google est une ordonnance mandatoire qui nécessite des modifications et une supervision continues parce que D met en service de nouveaux sites Web pour remplacer ceux qui sont délistés. Les tribunaux devraient éviter d'accorder des injonctions impliquant un processus aussi lourd de mise à jour sous supervision judiciaire.

En outre, il n'a pas été démontré que l'ordonnance visant Google constituait un moyen efficace pour empêcher D d'exercer des activités par l'entremise de tout site Web. De plus, l'ordonnance visant Google n'aide pas E à faire modifier les sites Web de D, comme E l'a demandé dans sa demande initiale d'injonction. Le plus que l'on puisse dire, c'est que l'ordonnance visant Google pourrait réduire le préjudice causé à E. Mais il n'a pas été démontré que cette ordonnance constitue un moyen efficace de ce faire. On peut trouver les sites Web de D à l'aide d'autres moteurs de recherche, de liens d'autres sites, de signets, de courriels, de médias sociaux, de documents imprimés, du bouche à oreille ou d'autres moyens indirects. Peu importe s'ils apparaissent ou non dans les résultats d'une recherche sur Google, les sites Web de D sont néanmoins accessibles aux clients potentiels sur Internet.

Finally, there are alternative remedies available to E. E sought a world-wide *Mareva* injunction to freeze D's assets in France, but the Court of Appeal for British Columbia urged E to pursue a remedy in French courts. There is no reason why E cannot do what the Court of Appeal urged it to do. E could also pursue injunctive relief against the ISP providers. In addition, E could initiate contempt proceedings in France or in any other jurisdiction with a link to the illegal websites. Therefore, the Google Order ought not to have been granted.

Cases Cited

By Abella J.

Applied: *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; **considered:** *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133; *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509; **referred to:** *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *Seaward v. Paterson*, [1897] 1 Ch. 545; *York University v. Bell Canada Enterprises* (2009), 311 D.L.R. (4th) 755; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658, [2017] 1 All E.R. 700; *Warner-Lambert Co. v. Actavis Group PTC EHF*, [2015] EWHC 485 (Pat.), 144 B.M.L.R. 194; *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2; *Impulsora Turistica de Occidente, S.A. de C.V. v. Transat Tours Canada Inc.*, 2007 SCC 20, [2007] 1 S.C.R. 867; *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318; *Babanaft International Co. S.A. v. Bassatne*, [1990] 1 Ch. 13; *Republic of Haiti v. Duvalier*, [1990] 1 Q.B. 202; *Derby & Co. v. Weldon*, [1990] 1 Ch. 48; *Derby & Co. v. Weldon (Nos. 3 and 4)*, [1990] 1 Ch. 65.

By Côté and Rowe JJ. (dissenting)

RJR — MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311; *Fourie v. Le Roux*, [2007] UKHL 1, [2007] 1 All E.R. 1087; *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Ch.), [2015] 1 All E.R. 949; *Mercedes Benz A.G. v. Leiduck*, [1996] 1 A.C. 284; *John Deere Ltd. v. Firdale Farms Ltd.* (1987), 45 D.L.R. (4th) 641; *Parkin v. Thorold* (1852), 16 Beav. 59, 51 E.R. 698; *Schooff v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680; *McIsaac v. Healthy Body*

Enfin, d'autres recours s'offrent à E. Cette dernière a demandé une injonction *Mareva* de portée mondiale pour geler les biens de D en France, mais la Cour d'appel de la Colombie-Britannique a recommandé avec insistance à E d'exercer un recours devant les tribunaux français. Il n'y a pas de raison qu'E ne puisse pas faire ce que la Cour d'appel lui a recommandé avec insistance de faire. E pourrait également demander une injonction contre les fournisseurs de services Internet. De plus, E pourrait intenter une procédure pour outrage en France ou dans tout autre pays ayant un lien avec les sites Web illégaux. En conséquence, l'ordonnance visant Google n'aurait pas dû être accordée.

Jurisprudence

Citée par la juge Abella

Arrêts appliqués : *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311; *MacMillan Bloedel Ltd. c. Simpson*, [1996] 2 R.C.S. 1048; **arrêts examinés :** *Norwich Pharmacal Co. c. Customs and Excise Commissioners*, [1974] A.C. 133; *Mareva Compania Naviera S.A. c. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509; **arrêts mentionnés :** *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110; *Seaward c. Paterson*, [1897] 1 Ch. 545; *York University c. Bell Canada Enterprises* (2009), 311 D.L.R. (4th) 755; *Cartier International AG c. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658, [2017] 1 All E.R. 700; *Warner-Lambert Co. c. Actavis Group PTC EHF*, [2015] EWHC 485 (Pat.), 144 B.M.L.R. 194; *Aetna Financial Services Ltd. c. Feigelman*, [1985] 1 R.C.S. 2; *Impulsora Turistica de Occidente, S.A. de C.V. c. Transat Tours Canada Inc.*, 2007 CSC 20, [2007] 1 R.C.S. 867; *Mooney c. Orr* (1994), 98 B.C.L.R. (2d) 318; *Babanaft International Co. S.A. c. Bassatne*, [1990] 1 Ch. 13; *Republic of Haiti c. Duvalier*, [1990] 1 Q.B. 202; *Derby & Co. c. Weldon*, [1990] 1 Ch. 48; *Derby & Co. c. Weldon (Nos. 3 and 4)*, [1990] 1 Ch. 65.

Citée par les juges Côté et Rowe (dissidents)

RJR — MacDonald Inc. c. Canada (Procureur général), [1994] 1 R.C.S. 311; *Fourie c. Le Roux*, [2007] UKHL 1, [2007] 1 All E.R. 1087; *Guaranty Trust Co. of New York c. Hannay & Co.*, [1915] 2 K.B. 536; *Cartier International AG c. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Ch.), [2015] 1 All E.R. 949; *Mercedes Benz A.G. c. Leiduck*, [1996] 1 A.C. 284; *John Deere Ltd. c. Firdale Farms Ltd.* (1987), 45 D.L.R. (4th) 641; *Parkin c. Thorold* (1852), 16 Beav. 59, 51 E.R. 698; *Schooff c. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680; *McIsaac c. Healthy*

Services Inc., 2009 BCSC 1716; *Plouffe v. Roy*, 2007 CanLII 37693; *Spiller v. Brown* (1973), 43 D.L.R. (3d) 140; *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, 371 D.L.R. (4th) 643; *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; *Seaward v. Paterson*, [1897] 1 Ch. 545; *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676; *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133; *National Commercial Bank of Jamaica Ltd. v. Olint Corp.*, [2009] 1 W.L.R. 1405; *Redland Bricks Ltd. v. Morris*, [1970] A.C. 652; *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.*, [1998] A.C. 1; *Attorney General v. Observer Ltd.*, [1990] 1 A.C. 109.

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B.C.J. No. 1193 (QL), 2015 CarswellBC 1590 (WL Can.), affirming a decision of Fenlon J., 2014 BCSC 1063, 63 B.C.L.R. (5th) 145, 28 B.L.R. (5th) 265, 374 D.L.R. (4th) 537, [2014] 10 W.W.R. 652, [2014] B.C.J. No. 1190 (QL), 2014 CarswellBC 1694 (WL Can.), granting an interlocutory injunction against Google. Appeal dismissed, Côté and Rowe JJ. dissenting.

William C. McDowell, *Marguerite F. Ethier* and *Scott M. J. Rollwagen*, for the appellant.

Robbie Fleming and *Michael Sobkin*, for the respondents.

Jeffrey G. Johnston, for the intervener the Attorney General of Canada.

Sandra Nishikawa, *John Corelli* and *Brent Kettles*, for the intervener the Attorney General of Ontario.

Mathew Good, for the intervener the Canadian Civil Liberties Association.

Cynthia Khoo, for the intervener the OpenMedia Engagement Network.

Written submissions only by *Iris Fischer* and *Helen Richards*, for the interveners the Reporters Committee for Freedom of the Press, the American Society of News Editors, the Association of Alternative Newsmedia, The Center for Investigative Reporting, Dow Jones & Company, Inc., the First Amendment Coalition, First Look Media Works, Inc., the New England First Amendment Coalition, the News Media Alliance (formerly known as the Newspaper Association of America), AOL Inc., the California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, the Online News Association and the Society of Professional Journalists.

Written submissions only by *Paul Schabas* and *Kaley Pulfer*, for the interveners Human Rights Watch, ARTICLE 19, Open Net (Korea), the Software Freedom Law Centre and the Center for Technology and Society.

45, [2015] B.C.J. No. 1193 (QL), 2015 CarswellBC 1590 (WL Can.), qui a confirmé une décision de la juge Fenlon, 2014 BCSC 1063, 63 B.C.L.R. (5th) 145, 28 B.L.R. (5th) 265, 374 D.L.R. (4th) 537, [2014] 10 W.W.R. 652, [2014] B.C.J. No. 1190 (QL), 2014 CarswellBC 1694 (WL Can.), accordant une injonction interlocutoire contre Google. Pourvoi rejeté, les juges Côté et Rowe sont dissidents.

William C. McDowell, *Marguerite F. Ethier* et *Scott M. J. Rollwagen*, pour l'appelante.

Robbie Fleming et *Michael Sobkin*, pour les intimés.

Jeffrey G. Johnston, pour l'intervenant le procureur général du Canada.

Sandra Nishikawa, *John Corelli* et *Brent Kettles*, pour l'intervenant le procureur général de l'Ontario.

Mathew Good, pour l'intervenante l'Association canadienne des libertés civiles.

Cynthia Khoo, pour l'intervenant OpenMedia Engagement Network.

Argumentation écrite seulement par *Iris Fischer* et *Helen Richards*, pour les intervenants Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, The Center for Investigative Reporting, Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., New England First Amendment Coalition, News Media Alliance (anciennement connue sous le nom de Newspaper Association of America), AOL Inc., California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, Online News Association et Society of Professional Journalists.

Argumentation écrite seulement par *Paul Schabas* et *Kaley Pulfer*, pour les intervenants Human Rights Watch, ARTICLE 19, Open Net (Korea), Software Freedom Law Centre et Center for Technology and Society.

Written submissions only by *David T. S. Fraser* and *Jane O'Neill*, for the intervener the Wikimedia Foundation.

Justin Safayeni and *Carlo Di Carlo*, for the intervener the British Columbia Civil Liberties Association.

David Wotherspoon and *Daniel Byma*, for the intervener the Electronic Frontier Foundation.

Barry B. Sookman, *Dan Glover* and *Miranda Lam*, for the interveners the International Federation of the Phonographic Industry, Music Canada, the Canadian Publishers' Council, the Association of Canadian Publishers, the International Confederation of Societies of Authors and Composers, the International Confederation of Music Publishers and the Worldwide Independent Network.

Gavin MacKenzie and *Brooke MacKenzie*, for the intervener the International Federation of Film Producers Associations.

The judgment of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

[1] Abella J. — The issue in this appeal is whether Google can be ordered, pending a trial, to globally de-index the websites of a company which, in breach of several court orders, is using those websites to unlawfully sell the intellectual property of another company. The answer turns on classic interlocutory injunction jurisprudence: is there a serious issue to be tried; would irreparable harm result if the injunction were not granted; and does the balance of convenience favour granting or refusing the injunction. Ultimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case.

Argumentation écrite seulement par *David T. S. Fraser* et *Jane O'Neill*, pour l'intervenante Wikimedia Foundation.

Justin Safayeni et *Carlo Di Carlo*, pour l'intervenante British Columbia Civil Liberties Association.

David Wotherspoon et *Daniel Byma*, pour l'intervenante Electronic Frontier Foundation.

Barry B. Sookman, *Dan Glover* et *Miranda Lam*, pour les intervenants la Fédération internationale de l'industrie phonographique, Music Canada, Canadian Publishers' Council, Association of Canadian Publishers, la Confédération internationale des sociétés d'auteurs et compositeurs, la Confédération internationale des éditeurs de musique et Worldwide Independent Network.

Gavin MacKenzie et *Brooke MacKenzie*, pour l'intervenante la Fédération internationale des associations de producteurs de films.

Version française du jugement de la juge en chef McLachlin et des juges Abella, Moldaver, Karakatsanis, Wagner, Gascon et Brown rendu par

[1] La juge Abella — La question en l'espèce est de savoir si Google peut se voir ordonner, en attendant la tenue d'un procès, de délister l'ensemble des sites Web d'une entreprise qui utilise, en contravention avec plusieurs ordonnances judiciaires, ces sites pour vendre illégalement les éléments de propriété intellectuelle d'une autre entreprise. La réponse repose sur la jurisprudence classique sur les injonctions interlocutoires : existe-t-il une question sérieuse à juger, le fait de ne pas accorder d'injonction causerait-il un préjudice irréparable et la prépondérance des inconvénients favorise-t-elle l'octroi ou le rejet de l'injonction? En définitive, il s'agit de déterminer s'il serait juste et équitable d'accorder l'injonction eu égard à l'ensemble des circonstances de l'affaire.

Background

[2] Equustek Solutions Inc. is a small technology company in British Columbia. It manufactures networking devices that allow complex industrial equipment made by one manufacturer to communicate with complex industrial equipment made by another manufacturer.

[3] The underlying action between Equustek and the Datalink defendants (Morgan Jack, Datalink Technology Gateways Inc., and Datalink Technologies Gateways LLC — "Datalink") was launched by Equustek on April 12, 2011. It claimed that Datalink, while acting as a distributor of Equustek's products, began to re-label one of the products and pass it off as its own. Datalink also acquired confidential information and trade secrets belonging to Equustek, using them to design and manufacture a competing product, the GW1000. Any orders for Equustek's product were filled with the GW1000. When Equustek discovered this in 2011, it terminated the distribution agreement it had with Datalink and demanded that Datalink delete all references to Equustek's products and trademarks on its websites.

[4] The Datalink defendants filed statements of defence disputing Equustek's claims.

[5] On September 23, 2011, Leask J. granted an injunction ordering Datalink to return to Equustek any source codes, board schematics, and any other documentation it may have had in its possession that belonged to Equustek. The court also prohibited Datalink from referring to Equustek or any of Equustek's products on its websites. It ordered Datalink to post a statement on its websites informing customers that Datalink was no longer a distributor of Equustek products and directing customers interested in Equustek's products to Equustek's website. In addition, Datalink was ordered to give Equustek a list of customers who had ordered an Equustek product from Datalink.

[6] On March 21, 2012, Fenlon J. found that Datalink had not properly complied with this order

Contexte

[2] Equustek Solutions Inc. est une petite entreprise de technologie de la Colombie-Britannique. Elle fabrique des dispositifs de réseautage qui permettent la communication entre des appareils industriels complexes produits par différents fabricants.

[3] L'action sous-jacente entre Equustek et le groupe défendeur Datalink (Morgan Jack, Datalink Technology Gateways Inc. et Datalink Technologies Gateways LLC — « Datalink ») a été intentée par Equustek le 12 avril 2011. Equustek a soutenu que Datalink, pendant qu'il agissait comme distributeur de ses produits, avait commencé à réétiqueter un de ceux-ci et à le faire passer pour le sien. Datalink a également acquis des renseignements confidentiels et des secrets commerciaux appartenant à Equustek, et les a utilisés pour concevoir et fabriquer un produit concurrent, le GW1000. Pour toute commande d'un produit d'Equustek, le produit GW1000 était envoyé. Lorsqu'Equustek a découvert cela en 2011, elle a mis fin à l'entente de distribution qu'elle avait avec Datalink et a exigé que celui-ci supprime toutes les mentions des produits et des marques de commerce d'Equustek sur ses sites Web.

[4] Le groupe Datalink a déposé des défenses dans lesquelles il conteste les allégations d'Equustek.

[5] Le 23 septembre 2011, le juge Leask a accordé une injonction ordonnant à Datalink de remettre à Equustek les codes sources, les schémas et tout autre document appartenant à Equustek qu'il pourrait avoir en sa possession. La cour a également interdit à Datalink de faire référence à Equustek ou à ses produits sur ses sites Web. Elle lui a ordonné d'afficher sur ses sites Web un avis informant les clients que Datalink ne distribuait plus les produits d'Equustek et dirigeant les clients intéressés par ces produits vers le site Web de cette entreprise. De plus, Datalink s'est vu ordonner de remettre à Equustek la liste des clients qui avaient commandé un produit d'Equustek auprès de Datalink.

[6] Le 21 mars 2012, la juge Fenlon a conclu que Datalink ne s'était pas dûment conformé à cette

and directed it to produce a new customer list and make certain changes to the notices on their websites.

[7] Datalink abandoned the proceedings and left the jurisdiction without producing any documents or complying with any of the orders. Some of Datalink's statements of defence were subsequently struck.

[8] On July 26, 2012, Punnett J. granted a *Mareva* injunction freezing Datalink's worldwide assets, including its entire product inventory. He found that Datalink had incorporated "a myriad of shell corporations in different jurisdictions", continued to sell the impugned product, reduced prices to attract more customers, and was offering additional services that Equustek claimed disclosed more of its trade secrets. He concluded that Equustek would suffer irreparable harm if the injunction were not granted, and that, on the balance of convenience and due to a real risk of the dissipation of assets, it was just and equitable to grant the injunction against Datalink.

[9] On August 3, 2012, Fenlon J. granted another interlocutory injunction prohibiting Datalink from dealing with broader classes of intellectual property, including "any use of whole categories of documents and information that lie at the heart of any business of a kind engaged in by both parties". She noted that Equustek's "earnings ha[d] fallen drastically since [Datalink] began [its] impugned activities" and concluded that "the effect of permitting [Datalink] to carry on [its] business [would] also cause irreparable harm to [Equustek]".

[10] On September 26, 2012, Equustek brought an application to have Datalink and its principal, Morgan Jack, found in contempt. No one appeared on behalf of Datalink. Groves J. issued a warrant for Morgan Jack's arrest. It remains outstanding.

ordonnance et lui a ordonné de produire une nouvelle liste de clients et d'apporter certaines modifications aux avis affichés sur ses sites Web.

[7] Datalink a abandonné les procédures et a quitté la province sans produire les documents et sans se conformer aux ordonnances. Certaines défenses de Datalink ont par la suite été radiées.

[8] Le 26 juillet 2012, le juge Punnett a accordé une injonction *Mareva* gelant l'actif global de Datalink, y compris son inventaire complet de produits. Il a conclu que Datalink avait incorporé [TRADUCTION] « une myriade de coquilles vides dans différents pays », avait continué de vendre le produit en cause et avait réduit les prix pour attirer plus de clients, et que ce groupe offrait des services additionnels qui, selon Equustek, entraînaient la divulgation d'autres secrets commerciaux de son entreprise. Il a conclu qu'Equustek subirait un préjudice irréparable si l'injonction n'était pas accordée, et que, selon la prépondérance des inconvénients et en raison d'un risque réel de dilapidation de l'actif, il était juste et équitable qu'une injonction soit prononcée contre Datalink.

[9] Le 3 août 2012, la juge Fenlon a décerné une autre injonction interlocutoire contre Datalink, lui interdisant d'utiliser des catégories plus larges d'éléments de propriété intellectuelle, ce qui comprenait [TRADUCTION] « l'utilisation de catégories entières de documents et de renseignements qui sont au cœur d'activités du type de celles auxquelles se livrent les deux parties ». Elle a souligné que les gains d'Equustek « ont chuté considérablement depuis que [. . .] Datalink [a] commencé à exercer les activités contestées », et a conclu que « le fait de permettre à [Datalink] d'exercer [ses] activités [causerait] aussi un préjudice irréparable à [Equustek] ».

[10] Le 26 septembre 2012, Equustek a présenté une demande pour faire déclarer coupables d'outrage au tribunal les sociétés Datalink et leur directeur, Morgan Jack. Personne n'a comparu pour Datalink. Le juge Groves a délivré un mandat d'arrestation contre Morgan Jack, mais celui-ci demeure non exécuté.

[11] Despite the court orders prohibiting the sale of inventory and the use of Equustek's intellectual property, Datalink continues to carry on its business from an unknown location, selling its impugned product on its websites to customers all over the world.

[12] Not knowing where Datalink or its suppliers were, and finding itself unable to have the websites removed by the websites' hosting companies, Equustek approached Google in September 2012 and requested that it de-index the Datalink websites. Google refused. Equustek then brought court proceedings seeking an order requiring Google to do so.

[13] When it was served with the application materials, Google asked Equustek to obtain a court order prohibiting Datalink from carrying on business on the Internet. Google told Equustek it would comply with such an order by removing specific webpages. Pursuant to its internal policy, Google only voluntarily de-indexes individual webpages, not entire websites. Equustek agreed to try this approach.

[14] On December 13, 2012, Equustek appeared in court with Google. An injunction was issued by Tindale J. ordering Datalink to "cease operating or carrying on business through any website". Between December 2012 and January 2013, Google advised Equustek that it had de-indexed 345 specific webpages associated with Datalink. It did not, however, de-index *all* of the Datalink websites.

[15] Equustek soon discovered that de-indexing webpages but not entire websites was ineffective since Datalink simply moved the objectionable content to new pages within its websites, circumventing the court orders.

[16] Google had limited the de-indexing to those searches that were conducted on google.ca. Google's search engine operates through dedicated websites all over the world. The Internet search services are

[11] Malgré les ordonnances judiciaires interdisant la vente de biens figurant dans l'inventaire et l'utilisation des éléments de propriété intellectuelle d'Equustek, Datalink a continué d'exercer ses activités à partir d'un endroit inconnu et a vendu le produit en cause sur ses sites Web à des clients partout dans le monde.

[12] Puisqu'elle ne savait pas où Datalink ou ses fournisseurs se trouvaient, et qu'elle était incapable de faire retirer les sites Web par les entreprises les hébergeant, Equustek s'est adressée à Google en septembre 2012 et lui a demandé de délister les sites Web de Datalink. Google a refusé. Equustek a ensuite intenté une action visant à obtenir une ordonnance intimant à Google de le faire.

[13] Lorsqu'elle s'est vu signifier les documents relatifs à la demande, Google a demandé à Equustek d'obtenir une ordonnance judiciaire interdisant à Datalink d'exercer des activités sur Internet. Google a dit à Equustek qu'elle se conformerait à une telle ordonnance en supprimant des pages Web précises. Selon sa politique interne, Google ne déliste volontairement que des pages Web déterminées, et non des sites complets. Equustek a accepté d'essayer cette approche.

[14] Le 13 décembre 2012, Equustek a comparu devant le tribunal avec Google. Le juge Tindale a décerné une injonction intimant à Datalink de [TRADUCTION] « cesser d'exercer des activités sur tout site Web ». Entre décembre 2012 et janvier 2013, Google a avisé Equustek qu'elle avait délisté 345 pages Web précises liées à Datalink. Elle n'a toutefois pas délisté *tous* les sites Web de Datalink.

[15] Equustek s'est vite aperçue que le délistage de pages Web plutôt que de sites Web au complet n'était pas efficace, puisque Datalink avait simplement déplacé le contenu répréhensible vers de nouvelles pages de ses sites Web, contournant ainsi les ordonnances judiciaires.

[16] Google avait limité le délistage aux recherches effectuées sur google.ca. Le moteur de recherche de Google fonctionne grâce à des sites Web spécialisés partout dans le monde. Les services de recherche sur

free, but Google earns money by selling advertising space on the webpages that display search results. Internet users with Canadian Internet Protocol addresses are directed to "google.ca" when performing online searches. But users can also access different Google websites directed at other countries by using the specific Uniform Resource Locator, or URL, for those sites. That means that someone in Vancouver, for example, can access the Google search engine as though he or she were in another country simply by typing in that country's Google URL. Potential Canadian customers could, as a result, find Datalink's websites even if they were blocked on google.ca. Given that the majority of the sales of Datalink's GW1000 were to purchasers outside of Canada, Google's de-indexing did not have the necessary protective effect.

[17] Equustek therefore sought an interlocutory injunction to enjoin Google from displaying any part of the Datalink websites on any of its search results worldwide. Fenlon J. granted the order (374 D.L.R. (4th) 537 (B.C.S.C.)). The operative part states:

> Within 14 days of the date of this order, Google Inc. is to cease indexing or referencing in search results on its internet search engines the [Datalink] websites . . ., including all of the subpages and subdirectories of the listed websites, *until the conclusion of the trial of this action or further order of this court*. [Emphasis added.]

[18] Fenlon J. noted that Google controls between 70-75 percent of the global searches on the Internet and that Datalink's ability to sell its counterfeit product is, in large part, contingent on customers being able to locate its websites through the use of Google's search engine. Only by preventing potential customers from accessing the Datalink websites, could Equustek be protected. Otherwise, Datalink would be able to continue selling its product online and the damages Equustek would suffer would not be recoverable at the end of the lawsuit.

Internet sont gratuits, mais Google gagne de l'argent en vendant de l'espace publicitaire sur les pages Web qui affichent les résultats de recherche. Les utilisateurs d'Internet ayant une adresse de protocole Internet canadien sont dirigés vers « google.ca » lorsqu'ils effectuent une recherche en ligne. Cependant, ceux-ci peuvent également avoir accès à différents sites Web de Google destinés à d'autres pays en utilisant le localisateur uniforme de ressources ou URL spécifique de ces sites. Cela signifie qu'une personne à Vancouver, par exemple, peut avoir accès au moteur de recherche de Google comme si elle était dans un autre pays simplement en tapant l'URL de Google de ce pays. Les clients canadiens potentiels pourraient donc trouver les sites Web de Datalink même s'ils étaient bloqués sur google.ca. Comme la majeure partie des ventes du GW1000 de Datalink étaient faites à des acheteurs à l'extérieur du Canada, le délistage effectué par Google n'a pas eu l'effet protecteur nécessaire.

[17] Equustek a donc demandé une injonction interlocutoire visant à interdire à Google d'afficher toute partie des sites Web de Datalink dans ses résultats de recherche partout dans le monde. La juge Fenlon a accordé l'ordonnance (374 D.L.R. (4th) 537 (C.S. C.-B.)). Le disposif se lit ainsi :

> [TRADUCTION] Dans les 14 jours suivant la date de la présente ordonnance, Google Inc. cessera le listage et le référencement des sites Web [de Datalink], y compris l'ensemble des sous-pages et des sous-répertoires des sites Web énumérés, dans les résultats de ses moteurs de recherche sur Internet, et ce, *jusqu'à l'issue du procès relativement à la présente action ou jusqu'à nouvelle ordonnance de la cour*. [Italiques ajoutés.]

[18] La juge Fenlon a souligné que Google contrôle entre 70 et 75 p. 100 des recherches mondiales dans Internet, et que la capacité de Datalink de vendre son produit contrefait dépend, en grande partie, du fait que les clients sont capables de trouver ses sites Web grâce au moteur de recherche de Google. Ce n'est qu'en empêchant les clients potentiels d'avoir accès aux sites Web de Datalink qu'Equustek pourrait être protégée. Autrement, Datalink pourrait continuer de vendre son produit en ligne et Equustek ne pourrait pas être indemnisée pour le préjudice subi à la fin de la poursuite.

[19] Fenlon J. concluded that this irreparable harm was being facilitated through Google's search engine; that Equustek had no alternative but to require Google to de-index the websites; that Google would not be inconvenienced; and that, for the order to be effective, the Datalink websites had to be prevented from being displayed on all of Google's search results, not just google.ca. As she said:

> On the record before me it appears that to be effective, even within Canada, Google must block search results on all of its websites. Furthermore, [Datalink's] sales originate primarily in other countries, so the Court's process cannot be protected unless the injunction ensures that searchers from any jurisdiction do not find [Datalink's] websites.[1]

[20] The Court of Appeal of British Columbia dismissed Google's appeal (386 D.L.R. (4th) 224). Groberman J.A. accepted Fenlon J.'s conclusion that she had *in personam* jurisdiction over Google and could therefore make an order with extraterritorial effect. He also agreed that courts of inherent jurisdiction could grant equitable relief against non-parties. Since ordering an interlocutory injunction against Google was the only practical way to prevent Datalink from flouting the court's several orders, and since there were no identifiable countervailing comity or freedom of expression concerns that would prevent such an order from being granted, he upheld the interlocutory injunction.

[21] For the following reasons, I agree with Fenlon J. and Groberman J.A. that the test for granting an interlocutory injunction against Google has been met in this case.

Analysis

[22] The decision to grant an interlocutory injunction is a discretionary one and entitled to a high

[1] Paragraph 148.

[19] La juge Fenlon a conclu que ce préjudice irréparable était facilité par le moteur de recherche de Google, qu'Equustek n'avait d'autre choix que d'exiger que Google déliste les sites Web de Datalink, que Google ne subirait pas d'inconvénient et que, pour que l'ordonnance soit efficace, il fallait empêcher que les sites de Datalink soient affichés dans tous les résultats de recherche de Google, et non seulement dans ceux de google.ca. Comme elle l'affirme :

> [TRADUCTION] D'après le dossier dont je suis saisie, j'estime que, pour être efficace, même à l'intérieur du Canada, Google doit bloquer les résultats de recherche sur tous ses sites Web. De plus, les ventes [de Datalink] ont lieu principalement dans d'autres pays, de sorte que le processus judiciaire ne peut être protégé que si l'injonction empêche les personnes qui effectuent des recherches à partir de quelques pays que ce soit de trouver les sites Web [de Datalink][1].

[20] La Cour d'appel de la Colombie-Britannique a rejeté l'appel interjeté par Google (386 D.L.R. (4th) 224). Le juge Groberman a souscrit à la conclusion de la juge Fenlon selon laquelle elle avait compétence personnelle à l'égard de Google et qu'elle pouvait donc rendre une ordonnance ayant des effets extraterritoriaux. Il a également reconnu que les tribunaux investis d'une compétence inhérente pouvaient accorder une réparation en equity contre des tiers. Puisqu'une injonction interlocutoire contre Google était la seule façon possible d'empêcher Datalink de faire fi des diverses ordonnances judiciaires, et, puisqu'aucune considération identifiable — en matière de courtoisie ou de liberté d'expression — susceptible de faire contrepoids n'empêchait l'octroi d'une telle ordonnance, il a confirmé l'injonction interlocutoire.

[21] Pour les motifs suivants, je suis d'accord avec la juge Fenlon et le juge Groberman pour dire qu'on a satisfait au critère applicable à l'octroi d'une injonction interlocutoire contre Google en l'espèce.

Analyse

[22] La décision d'accorder une injonction interlocutoire est une décision discrétionnaire qui

[1] Paragraphe 148.

degree of deference (*Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at pp. 155-56). In this case, I see no reason to interfere.

[23] Injunctions are equitable remedies. "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited" (Ian Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 333). Robert Sharpe notes that "[t]he injunction is a flexible and drastic remedy. Injunctions are not restricted to any area of substantive law and are readily enforceable through the court's contempt power" (*Injunctions and Specific Performance* (loose-leaf ed.), at para. 2.10).

[24] An interlocutory injunction is normally enforceable until trial or some other determination of the action. Interlocutory injunctions seek to ensure that the subject matter of the litigation will be "preserved" so that effective relief will be available when the case is ultimately heard on the merits (Jeffrey Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at pp. 24-25). Their character as "interlocutory" is not dependent on their duration pending trial.

[25] *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.

[26] Google does not dispute that there is a serious claim. Nor does it dispute that Equustek is suffering irreparable harm as a result of Datalink's ongoing

commande un degré élevé de déférence (*Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, p. 155-156). En l'espèce, je ne vois aucune raison de modifier cette décision.

[23] Les injonctions sont des réparations en equity. [TRADUCTION] « Les pouvoirs des tribunaux ayant compétence en equity pour accorder des injonctions sont, sous réserve de toute restriction législative pertinente, illimités » (Ian Spry, *The Principles of Equitable Remedies* (9e éd. 2014), p. 333). Robert Sharpe souligne que [TRADUCTION] « [l]'injonction est une réparation souple et draconienne. Les injonctions ne s'appliquent pas uniquement à un domaine de droit substantiel et elles peuvent être facilement exécutées au moyen du pouvoir judiciaire en matière d'outrage » (*Injunctions and Specific Performance* (éd. à feuilles mobiles), par. 2.10).

[24] Une injonction interlocutoire est normalement exécutoire jusqu'au procès ou jusqu'à tout autre règlement de l'action. De telles injonctions visent à « préserver » l'objet du litige, de sorte qu'une réparation efficace sera possible lorsque l'affaire sera finalement jugée au fond (Jeffrey Berryman, *The Law of Equitable Remedies* (2e éd. 2013), p. 24-25). Leur caractère « interlocutoire » ne dépend pas de leur durée dans l'attente du procès.

[25] L'arrêt *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311, établit le critère à trois volets suivant pour déterminer si un tribunal devrait exercer son pouvoir discrétionnaire d'octroyer une injonction interlocutoire : existe-t-il une question sérieuse à juger, la personne sollicitant l'injonction subirait-elle un préjudice irréparable si cette mesure n'était pas accordée et la prépondérance des inconvénients favorise-t-elle l'octroi ou le refus de l'injonction interlocutoire? Il s'agit essentiellement de savoir si l'octroi d'une injonction est juste et équitable eu égard à l'ensemble des circonstances de l'affaire. La réponse à cette question dépendra nécessairement du contexte.

[26] Google ne conteste pas le fait qu'il existe une demande sérieuse. L'entreprise ne conteste pas non plus qu'Equustek subit un préjudice irréparable

sale of the GW1000 through the Internet. And it acknowledges, as Fenlon J. found, that it inadvertently facilitates the harm through its search engine which leads purchasers directly to the Datalink websites.

[27] Google argues, however, that the injunction issued against it is not necessary to prevent that irreparable harm, and that it is not effective in so doing. Moreover, it argues that as a non-party, it should be immune from the injunction. As for the balance of convenience, it challenges the propriety and necessity of the extraterritorial reach of such an order, and raises freedom of expression concerns that it says should have tipped the balance against granting the order. These arguments go both to whether the Supreme Court of British Columbia had jurisdiction to grant the injunction and whether, if it did, it was just and equitable to do so in this case.

[28] Google's first argument is, in essence, that non-parties cannot be the subject of an interlocutory injunction. With respect, this is contrary to the jurisprudence. Not only can injunctive relief be ordered against someone who is not a party to the underlying lawsuit, the contours of the test are not changed. As this Court said in *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, injunctions may be issued "in all cases in which it appears to the court to be just or convenient that the order should be made . . . on terms and conditions the court thinks just" (para. 15, citing s. 36 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224). *MacMillan Bloedel* involved a logging company seeking to restrain protesters from blocking roads. The company obtained an interlocutory injunction prohibiting not only specifically named individuals, but also "John Doe, Jane Doe and Persons Unknown" and "all persons having notice of th[e] Order" from engaging in conduct which interfered with its operations at specific locations (para. 5). In upholding the injunction, McLachlin J. noted that

du fait que Datalink continue de vendre le GW1000 sur Internet. Elle reconnaît aussi, comme l'a conclu la juge Fenlon, qu'elle facilite par inadvertance le préjudice au moyen de son moteur de recherche, lequel dirige les acheteurs directement aux sites Web de Datalink.

[27] Google soutient, toutefois, que l'injonction décernée contre elle n'est pas nécessaire pour empêcher ce préjudice irréparable et qu'elle ne constitue pas un moyen efficace d'y parvenir. De plus, elle fait valoir qu'en tant que tiers, elle devrait échapper à l'injonction. En ce qui a trait à la prépondérance des inconvénients, elle conteste l'opportunité et la nécessité de la portée extraterritoriale d'une telle ordonnance, et soulève des questions relatives à la liberté d'expression qui, selon elle, auraient dû faire pencher la balance contre l'octroi de l'ordonnance. Ces arguments se rapportent à la question de savoir si la Cour suprême de la Colombie-Britannique avait compétence pour accorder l'injonction et, dans l'affirmative, s'il était juste et équitable qu'elle le fasse en l'espèce.

[28] Essentiellement, le premier argument de Google veut que les tiers ne puissent faire l'objet d'une injonction interlocutoire. Soit dit en tout respect, cette affirmation est contraire à la jurisprudence. Non seulement une injonction peut être décernée contre un tiers par rapport à l'action sous-jacente, mais les contours du critère applicable demeurent les mêmes. Comme la Cour l'a affirmé dans *MacMillan Bloedel Ltd. c. Simpson*, [1996] 2 R.C.S. 1048, en citant l'art. 36 de la *Law and Equity Act*, R.S.B.C. 1979, c. 224, les tribunaux peuvent accorder des injonctions [TRADUCTION] « dans tous les cas où il [leur] paraît juste ou opportun de le faire, [. . .] selon les modalités qu'[ils] juge[nt] équitables » (par. 15). Cet arrêt mettait en cause une entreprise d'exploitation forestière qui cherchait à empêcher des manifestants de barrer des chemins. L'entreprise a obtenu une injonction interlocutoire interdisant non seulement à des personnes nommément désignées, mais aussi à [TRADUCTION] « John Doe, Jane Doe et autres personnes inconnues » et à « toutes les personnes ayant connaissance de [l']ordonnance » de faire tout acte nuisant à ses activités dans les lieux spécifiés (par. 5). Confirmant l'injonction, la juge McLachlin a fait observer ce qui suit :

[i]t may be confidently asserted . . . *that both English and Canadian authorities support the view that non-parties are bound by injunctions*: if non-parties violate injunctions, they are subject to conviction and punishment for contempt of court. The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey. [Emphasis added; para. 31.]

See also Berryman, at pp. 57-60; Sharpe, at paras. 6.260 to 6.265.

[29] In other words, where a non-party violates a court order, there is a principled basis for treating the non-party as if it had been bound by the order. The non-party's obligation arises "not because [it] is bound by the injunction by being a party to the cause, but because [it] is conducting [itself] so as to obstruct the course of justice" (*MacMillan Bloedel*, at para. 27, quoting *Seaward v. Paterson*, [1897] 1 Ch. 545 (C.A.), at p. 555).

[30] The pragmatism and necessity of such an approach was concisely explained by Fenlon J. in the case before us when she offered the following example:

. . . a non-party corporation that warehouses and ships goods for a defendant manufacturing company might be ordered on an interim injunction to freeze the defendants' goods and refrain from shipping them. That injunction could affect orders received from customers around the world. Could it sensibly be argued that the Court could not grant the injunction because it would have effects worldwide? The impact of an injunction on strangers to the suit or the order itself is a valid consideration in deciding whether to exercise the Court's jurisdiction to grant an injunction. It does not, however, affect the Court's authority to make such an order.[2]

[31] *Norwich* orders are analogous and can also be used to compel non-parties to disclose information or documents in their possession required by a claimant (*Norwich Pharmacal Co. v. Customs and*

[2] Paragraph 147.

Il est [. . .] possible d'affirmer avec confiance *que la jurisprudence tant anglaise que canadienne appuie le point de vue que les injonctions sont opposables aux tiers* : si des tiers violent une injonction, ils s'exposent à une condamnation et à une peine pour outrage au tribunal. Les tribunaux ont compétence pour accorder des injonctions provisoires que tous, sous peine de condamnation pour outrage, doivent respecter. [Italiques ajoutés; par. 31.]

Voir également Berryman, p. 57-60; Sharpe, par. 6.260 à 6.265.

[29] En d'autres mots, lorsqu'un tiers contrevient à une ordonnance judiciaire, il existe un fondement rationnel au fait de traiter celui-ci comme s'il était lié par l'ordonnance. Une obligation incombe au tiers, [TRADUCTION] « non pas parce que l'injonction lui est opposable en tant que partie à l'action, mais parce que son acte est une entrave à la justice » (*MacMillan Bloedel*, par. 27, citant *Seaward c. Paterson*, [1897] 1 Ch. 545 (C.A.), p. 555).

[30] La juge Fenlon a, en l'espèce, expliqué de manière concise le pragmatisme et la nécessité d'une telle approche en donnant l'exemple suivant :

[TRADUCTION] . . . une entreprise tiers qui entrepose et expédie des biens pour une entreprise de fabrication défenderesse pourrait se voir imposer une injonction provisoire visant à geler les biens de la défenderesse et à lui interdire de les expédier. Une telle injonction pourrait avoir une incidence sur les commandes passées par des clients partout dans le monde. Peut-on raisonnablement soutenir que la cour ne peut pas accorder l'injonction parce que celle-ci aurait des effets partout dans le monde? L'effet d'une injonction sur des tiers par rapport à la poursuite ou à l'ordonnance elle-même est une considération dont la cour peut valablement tenir compte lorsqu'elle décide si elle exerce sa compétence pour accorder une injonction. Elle n'a pas toutefois aucune incidence sur le pouvoir de la cour de rendre une telle ordonnance[2].

[31] Les ordonnances de type *Norwich* sont semblables et peuvent également être utilisées pour obliger des tiers à communiquer des renseignements ou des documents qu'ils ont en leur possession et

[2] Paragraphe 147.

Excise Commissioners, [1974] A.C. 133 (H.L.), at p. 175). *Norwich* orders have increasingly been used in the online context by plaintiffs who allege that they are being anonymously defamed or defrauded and seek orders against Internet service providers to disclose the identity of the perpetrator (*York University v. Bell Canada Enterprises* (2009), 311 D.L.R. (4th) 755 (Ont. S.C.J.)). *Norwich* disclosure may be ordered against non-parties who are not themselves guilty of wrongdoing, but who are so involved in the wrongful acts of others that they facilitate the harm. In *Norwich*, this was characterized as a duty to assist the person wronged (p. 175; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2017] 1 All E.R. 700 (C.A.), at para. 53). *Norwich* supplies a principled rationale for granting injunctions against non-parties who facilitate wrongdoing (see *Cartier*, at paras. 51-55; and *Warner-Lambert Co. v. Actavis Group PTC EHF*, 144 B.M.L.R. 194 (Ch.)).

[32] This approach was applied in *Cartier*, where the Court of Appeal of England and Wales held that injunctive relief could be awarded against five non-party Internet service providers who had not engaged in, and were not accused of any wrongful act. The Internet service providers were ordered to block the ability of their customers to access certain websites in order to avoid facilitating infringements of the plaintiff's trademarks. (See also Jaani Riordan, *The Liability of Internet Intermediaries* (2016), at pp. 412 and 498-99.)

[33] The same logic underlies *Mareva* injunctions, which can also be issued against non-parties. *Mareva* injunctions are used to freeze assets in order to prevent their dissipation pending the conclusion of a trial or action (*Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.); *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2). A *Mareva* injunction that requires a defendant not to dissipate his or her assets sometimes requires the assistance of a non-party, which in turn can result in an injunction against the non-party if it is just and equitable to do so (Stephen Pitel and Andrew Valentine, "The Evolution of the

qu'un demandeur exige (*Norwich Pharmacal Co. c. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.), p. 175). Ces ordonnances sont de plus en plus utilisées dans le contexte numérique par des demandeurs qui prétendent être victimes de diffamation ou de fraude anonyme et qui cherchent à obtenir des ordonnances contre des fournisseurs de services Internet afin d'obliger ceux-ci à divulguer l'identité de l'auteur de l'infraction (*York University c. Bell Canada Enterprises* (2009), 311 D.L.R. (4th) 755 (C.S.J. Ont.)). Une divulgation de type *Norwich* peut être ordonnée contre des tiers qui n'ont eux-mêmes commis aucun acte répréhensible, mais qui sont mêlés aux actes fautifs d'autres personnes à un point tel qu'ils facilitent le préjudice. Ce principe a été décrit dans *Norwich* comme une obligation d'aider la personne lésée (p. 175; *Cartier International AG c. British Sky Broadcasting Ltd.*, [2017] 1 All E.R. 700 (C.A.), par. 53). *Norwich* fournit une justification rationnelle au fait d'accorder des injonctions à l'égard de tiers qui facilitent l'acte répréhensible (voir *Cartier*, par. 51-55; et *Warner-Lambert Co. c. Actavis Group PTC EHF*, 144 B.M.L.R. 194 (Ch.)).

[32] Cette approche a été appliquée dans *Cartier*, où la Cour d'appel d'Angleterre et du Pays de Galles a conclu qu'une injonction pouvait être décernée contre cinq tiers fournisseurs de services Internet qui n'avaient pris part à aucun acte fautif et qui n'étaient pas accusés de tels actes. Ceux-ci se sont vu ordonner de bloquer l'accès de leurs clients à certains sites Web pour éviter de faciliter la contrefaçon des marques de commerce du groupe demandeur. (Voir également Jaani Riordan, *The Liability of Internet Intermediaries* (2016), p. 412 et 498-499.)

[33] La même logique sous-tend les injonctions *Mareva*, lesquelles peuvent également être décernées contre des tiers. Ces injonctions sont utilisées pour geler l'actif afin d'empêcher sa dilapidation avant la conclusion du procès ou de l'action (*Mareva Compania Naviera S.A. c. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.); *Aetna Financial Services Ltd. c. Feigelman*, [1985] 1 R.C.S. 2). Une injonction *Mareva* qui exige que le défendeur ne dilapide pas son actif exige parfois le concours d'un tiers, ce qui peut ensuite donner lieu à une injonction contre le tiers si cela est juste et équitable (Stephen Pitel et Andrew Valentine, « The Evolution

Extra-territorial *Mareva* Injunction in Canada: Three Issues" (2006), 2 *J. Priv. Int'l L.* 339, at p. 370; Vaughan Black and Edward Babin, "Mareva Injunctions in Canada: Territorial Aspects" (1997), 28 *Can. Bus. L.J.* 430, at pp. 452-53; Berryman, at pp. 128-31). Banks and other financial institutions have, as a result, been bound by *Mareva* injunctions even when they are not a party to an underlying action.

[34] To preserve Equustek's rights pending the outcome of the litigation, Tindale J.'s order of December 13, 2012 required Datalink to cease carrying on business through the Internet. Google had requested and participated in Equustek's obtaining this order, and offered to comply with it voluntarily. It is common ground that Datalink was unable to carry on business in a commercially viable way unless its websites were in Google's search results. In the absence of de-indexing these websites, as Fenlon J. specifically found, Google was facilitating Datalink's breach of Tindale J.'s order by enabling it to continue carrying on business through the Internet. By the time Fenlon J. granted the injunction against Google, Google was aware that in not de-indexing Datalink's websites, it was facilitating Datalink's ongoing breach of Tindale J.'s order, the purpose of which was to prevent irreparable harm to Equustek.

[35] Much like a *Norwich* order or a *Mareva* injunction against a non-party, the interlocutory injunction in this case flows from the necessity of Google's assistance in order to prevent the facilitation of Datalink's ability to defy court orders and do irreparable harm to Equustek. Without the injunctive relief, it was clear that Google would continue to facilitate that ongoing harm.

[36] Google's next argument is the impropriety of issuing an interlocutory injunction with extraterritorial effect. But this too contradicts the existing jurisprudence.

of the Extra-territorial *Mareva* Injunction in Canada : Three Issues » (2006), 2 *J. Priv. Int'l L.* 339, p. 370; Vaughan Black et Edward Babin, « Mareva Injunctions in Canada : Territorial Aspects » (1997), 28 *Rev. can. dr. comm.* 430, p. 452-453; Berryman, p. 128-131). Des injonctions *Mareva* ont donc été déclarées opposables à des banques et à d'autres institutions financières même lorsque celles-ci n'étaient pas parties à l'action sous-jacente.

[34] Pour préserver les droits d'Equustek jusqu'à l'issue du litige, le juge Tindale a, dans une ordonnance rendue le 13 décembre 2012, exigé que Datalink cesse d'exercer des activités sur Internet. Google avait demandé à Equustek de solliciter cette ordonnance, a participé à l'obtention de celle-ci et a offert de s'y conformer volontairement. Nul ne conteste que Datalink ne pouvait exercer des activités d'une façon viable sur le plan commercial que si ses sites Web figuraient dans les résultats de recherche de Google. Comme l'a expressément conclu la juge Fenlon, en ne délistant pas ces sites, Google facilitait la violation par Datalink de l'ordonnance du juge Tindale, car elle lui permettait de continuer à exercer ses activités sur Internet. Au moment où elle s'est vu imposer une injonction par la juge Fenlon, Google savait qu'en ne délistant pas les sites Web de Datalink, elle facilitait la violation continue par Datalink de l'ordonnance du juge Tindale, ordonnance dont l'objet était d'empêcher qu'Equustek subisse un préjudice irréparable.

[35] Tout comme une ordonnance *Norwich* ou une injonction *Mareva* prononcée contre un tiers, l'injonction interlocutoire en l'espèce découle du fait que le concours de Google est nécessaire pour ne pas faciliter la violation d'ordonnances judiciaires par Datalink et causer un préjudice irréparable à Equustek. Sans cette injonction, il était clair que Google continuerait de faciliter ce préjudice continu.

[36] L'argument suivant de Google veut que l'octroi d'une injonction interlocutoire ayant des effets extraterritoriaux est inapproprié. Cependant, cette affirmation contredit également la jurisprudence actuelle.

[37] The British Columbia courts in these proceedings concluded that because Google carried on business in the province through its advertising and search operations, this was sufficient to establish the existence of *in personam* and territorial jurisdiction. Google does not challenge those findings. It challenges instead the global reach of the resulting order. Google suggests that if any injunction is to be granted, it should be limited to Canada (or google.ca) alone.

[38] When a court has *in personam* jurisdiction, and where it is necessary to ensure the injunction's effectiveness, it can grant an injunction enjoining that person's conduct anywhere in the world. (See *Impulsora Turistica de Occidente, S.A. de C.V. v. Transat Tours Canada Inc.*, [2007] 1 S.C.R. 867, at para. 6; Berryman, at p. 20; Pitel and Valentine, at p. 389; Sharpe, at para. 1.1190; Spry, at p. 37.) *Mareva* injunctions have been granted with worldwide effect when it was found to be necessary to ensure their effectiveness. (See *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 (S.C.); Berryman, at pp. 20 and 136; *Babanaft International Co. S.A. v. Bassatne*, [1990] 1 Ch. 13 (C.A.); *Republic of Haiti v. Duvalier*, [1990] 1 Q.B. 202 (C.A.); *Derby & Co. v. Weldon*, [1990] 1 Ch. 48 (C.A.); and *Derby & Co. v. Weldon (Nos. 3 and 4)*, [1990] 1 Ch. 65 (C.A.); Sharpe, at paras. 1.1190 to 1.1220.)

[39] Groberman J.A. pointed to the international support for this approach:

> I note that the courts of many other jurisdictions have found it necessary, in the context of orders against Internet abuses, to pronounce orders that have international effects. Several such cases are cited in the arguments of [International Federation of Film Producers Associations and International Federation of the Phonographic Industry], including *APC v. Auchan Telecom*, 11/60013, Judgment (28 November 2013) (Tribunal de Grande Instance de Paris); *McKeogh v. Doe* (Irish High Court, case no. 20121254P); *Mosley v. Google*, 11/07970, Judgment (6 November 2013) (Tribunal de Grande Instance de Paris); *Max Mosley v. Google* (see "Case Law, Hamburg District Court: *Max Mosley v. Google Inc.* online: Inform's Blog https://inforrm.wordpress.com/2014/02/05/

[37] Les tribunaux de la Colombie-Britannique dans la présente affaire ont conclu que, comme Google exploitait une entreprise dans la province au moyen d'activités de publicité et de recherche, cela était suffisant pour établir l'existence d'une compétence personnelle et territoriale. Google ne conteste pas ces conclusions; elle conteste plutôt la portée mondiale de l'ordonnance en résultant. Google suggère que, si une injonction est accordée, elle devrait se limiter au Canada (ou à google.ca) seulement.

[38] Lorsqu'un tribunal a une compétence personnelle et qu'il est nécessaire d'assurer l'efficacité de l'injonction, il peut accorder une injonction dictant la conduite de la personne visée n'importe où dans le monde. (Voir *Impulsora Turistica de Occidente, S.A. de C.V. c. Transat Tours Canada Inc.*, [2007] 1 R.C.S. 867, par. 6; Berryman, p. 20; Pitel et Valentine, p. 389; Sharpe, par. 1.1190; Spry, p. 37.) Des injonctions *Mareva* ayant des effets à l'échelle mondiale ont été octroyées lorsque cela a été jugé nécessaire pour assurer leur efficacité. (Voir *Mooney c. Orr* (1994), 98 B.C.L.R. (2d) 318 (C.S.); Berryman, p. 20 et 136; *Babanaft International Co. S.A. c. Bassatne*, [1990] 1 Ch. 13 (C.A.); *Republic of Haiti c. Duvalier*, [1990] 1 Q.B. 202 (C.A.); *Derby & Co. c. Weldon*, [1990] 1 Ch. 48 (C.A.); *Derby & Co. c. Weldon (Nos. 3 and 4)*, [1990] 1 Ch. 65 (C.A.); Sharpe, par. 1.1190 à 1.1220.)

[39] Le juge Groberman a souligné l'appui que reçoit cette approche à l'échelle internationale :

> [TRADUCTION] Je constate que les tribunaux de bien d'autres pays ont jugé nécessaire, dans le contexte d'ordonnances contre des abus commis sur Internet, de prononcer des ordonnances ayant des effets à l'échelle internationale. Plusieurs affaires de ce type sont citées dans les arguments de la [Fédération internationale des associations de producteurs de films et de la Fédération internationale de l'industrie phonographique], y compris *APC c. Auchan Telecom*, 11/60013, jugement (28 novembre 2013) (Tribunal de grande instance de Paris); *McKeogh c. Doe* (Irish High Court, affaire nº 20121254P); *Mosley c. Google*, 11/07970, jugement (6 novembre 2013) (Tribunal de grande instance de Paris); *Max Mosley c. Google* (voir « Case Law, Hamburg District Court: *Max Mosley*

case-law-hamburg-district-court-max-mosley-v-google-inc-google-go-down-again-this-time-in-hamburg-dominic-crossley/) and *ECJ Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*, C-131/12 [2014], CURIA.[3]

[40] Fenlon J. explained why Equustek's request that the order have worldwide effect was necessary as follows:

> The majority of GW1000 sales occur outside Canada. Thus, quite apart from the practical problem of endless website iterations, the option Google proposes is not equivalent to the order now sought which would compel Google to remove the [Datalink] websites from all search results generated by any of Google's websites worldwide. I therefore conclude that [Equustek does] not have an out-of-court remedy available to [it].[4]

. . .

> . . . to be effective, even within Canada, Google must block search results on all of its websites.[5]

As a result, to ensure that Google did not facilitate Datalink's breach of court orders whose purposes were to prevent irreparable harm to Equustek, she concluded that the injunction had to have worldwide effect.

[41] I agree. The problem in this case is occurring online and globally. The Internet has no borders — its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally. As Fenlon J. found, the majority of Datalink's sales take place outside Canada. If the injunction were restricted to Canada alone or to google.ca, as Google suggests it should have been, the remedy would be deprived of its intended ability to prevent

[3] Paragraph 95.
[4] Paragraph 76.
[5] Paragraph 148.

c. Google Inc. en ligne : Inform's Blog https://inforrm.wordpress.com/ 2014/02/05/case-law-hamburg-district-court-max-mosley-v-google-inc-google-go-down-again-this-time-in-hamburg-dominic-crossley/) et *ECJ Google Spain SL, Google Inc. c. Agencia Española de Protección de Datos, Mario Costeja González*, C-131/12 [2014], CURIA[3].

[40] La juge Fenlon a expliqué comme suit pourquoi il était nécessaire qu'Equustek demande que l'ordonnance ait des effets à l'échelle mondiale :

> [TRADUCTION] La majeure partie des ventes du GW1000 sont faites à l'extérieur du Canada. En conséquence, indépendamment du problème pratique que représentent les innombrables nouvelles versions des sites Web, la solution que propose Google n'équivaut pas à l'ordonnance que l'on sollicite maintenant et qui obligerait Google à retirer les sites Web de [Datalink] de tous les résultats de recherche générés par l'un des sites Web de Google à travers le monde. Je conclus donc que [Equustek ne] dispose pas d'une réparation extrajudiciaire[4].

. . .

> . . . pour être efficace, même à l'intérieur du Canada, Google doit bloquer les résultats de recherche sur tous ses sites Web[5].

En conséquence, pour faire en sorte que Google ne facilite pas la violation par Datalink d'ordonnances judiciaires dont l'objet était d'empêcher qu'Equustek subisse un préjudice irréparable, elle a conclu que l'injonction devait avoir des effets à l'échelle mondiale.

[41] Je suis d'accord. Le problème en l'espèce se pose en ligne et à l'échelle mondiale. L'Internet n'a pas de frontières — son habitat naturel est mondial. La seule façon de s'assurer que l'injonction interlocutoire atteint son objectif est de la faire appliquer là où Google exerce ses activités, c'est-à-dire mondialement. Comme l'a conclu la juge Fenlon, la majeure partie des ventes de Datalink a lieu à l'extérieur du Canada. Si l'injonction se limitait au Canada seulement ou à google.ca, ce qui aurait dû être

[3] Paragraphe 95.
[4] Paragraphe 76.
[5] Paragraphe 148.

irreparable harm. Purchasers outside Canada could easily continue purchasing from Datalink's websites, and Canadian purchasers could easily find Datalink's websites even if those websites were de-indexed on google.ca. Google would still be facilitating Datalink's breach of the court's order which had prohibited it from carrying on business on the Internet. There is no equity in ordering an interlocutory injunction which has no realistic prospect of preventing irreparable harm.

[42] The interlocutory injunction in this case is necessary to prevent the irreparable harm that flows from Datalink carrying on business on the Internet, a business which would be commercially impossible without Google's facilitation. The order targets Datalink's websites — the list of which has been updated as Datalink has sought to thwart the injunction — and prevents them from being displayed where they do the most harm: on Google's global search results.

[43] Nor does the injunction's worldwide effect tip the balance of convenience in Google's favour. The order does not require that Google take any steps around the world, it requires it to take steps only where its search engine is controlled. This is something Google has acknowledged it can do — and does — with relative ease. There is therefore no harm to Google which can be placed on its "inconvenience" scale arising from the global reach of the order.

[44] Google's argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction is, with respect, theoretical. As Fenlon J. noted, "Google acknowledges that most countries will

le cas selon Google, la réparation ne pourrait pas empêcher comme il se doit le préjudice irréparable. Les acheteurs à l'extérieur du Canada pourraient facilement continuer à acheter des produits sur les sites Web de Datalink et les acheteurs canadiens pourraient facilement trouver les sites Web de Datalink même si ceux-ci ont été délistés de google.ca. Google faciliterait toujours la violation par Datalink de l'ordonnance judiciaire lui interdisant d'exercer des activités sur Internet. Une injonction interlocutoire n'offrant aucune possibilité réaliste d'empêcher le préjudice irréparable ne constitue pas une réparation en equity.

[42] L'injonction interlocutoire en l'espèce est nécessaire pour empêcher le préjudice irréparable qui découle du fait que Datalink exploite une entreprise sur Internet, ce qui lui serait impossible de faire sur le plan commercial sans l'aide de Google. L'ordonnance vise les sites Web de Datalink — dont la liste a été mise à jour lorsque Datalink a voulu contrecarrer l'injonction — et interdit que ceux-ci soient affichés là où ils sont le plus dommageables, c'est-à-dire dans les résultats de recherche de Google à travers le monde.

[43] Les effets de l'injonction à l'échelle mondiale ne font pas non plus en sorte que la prépondérance des inconvénients favorise Google. L'ordonnance n'exige pas que Google prenne des mesures partout dans le monde; elle oblige l'entreprise à en prendre uniquement à l'endroit où son moteur de recherche est contrôlé. Google a reconnu que c'est quelque chose qu'elle peut faire — et qu'elle fait — assez facilement. La portée mondiale de l'ordonnance ne cause donc pas à Google un préjudice susceptible de faire partie des « inconvénients ».

[44] L'argument de Google selon lequel une injonction mondiale contrevient au principe de la courtoisie internationale parce qu'il est possible que l'ordonnance ne puisse pas être accordée dans un autre pays ou que Google viole les lois de ce pays en se conformant à celle-ci est, en toute déférence, théorique. Comme l'a souligné la juge Fenlon,

likely recognize intellectual property rights and view the selling of pirated products as a legal wrong".[6]

[45] And while it is always important to pay respectful attention to freedom of expression concerns, particularly when dealing with the core values of another country, I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case. As Groberman J.A. concluded:

> In the case before us, there is no realistic assertion that the judge's order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs' core rights are respected.
>
> . . . the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem.[7]

[46] If Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application.

[47] In the absence of an evidentiary foundation, and given Google's right to seek a rectifying order, it hardly seems equitable to deny Equustek the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally

[6] Paragraph 144.
[7] Paragraphs 93-94.

[TRADUCTION] « Google convient que la plupart des pays reconnaîtront probablement les droits de propriété intellectuelle et considéreront la vente de produits piratés comme une transgression du droit positif »[6].

[45] Et, bien qu'il soit toujours important d'accorder une attention respectueuse aux questions liées à la liberté d'expression, en particulier lorsque des valeurs fondamentales d'un autre pays sont en cause, je ne crois que de telles questions font pencher la balance en faveur de Google en l'espèce. Comme l'a conclu le juge Groberman :

> [TRADUCTION] Dans le cas qui nous occupe, il n'est pas réaliste d'affirmer que l'ordonnance rendue par la juge heurtera les sensibilités d'une autre nation. Personne n'a prétendu que l'ordonnance interdisant aux défendeurs d'annoncer des marchandises qui contreviennent aux droits de propriété intellectuelle des demandeurs porte atteinte aux valeurs fondamentales d'une nation. L'ordonnance prononcée contre Google est une ordonnance accessoire très limitée visant à assurer le respect des droits fondamentaux des demandeurs.
>
> . . . l'ordonnance en l'espèce est une ordonnance interlocutoire pouvant être modifiée par un tribunal. Dans le cas improbable où un pays jugerait que l'ordonnance porte atteinte à ses valeurs fondamentales, une demande de modification de l'ordonnance pourrait être présentée au tribunal afin d'éviter le problème[7].

[46] Si Google dispose d'éléments de preuve démontrant que, pour se conformer à une telle injonction, elle doit contrevenir aux lois d'un autre pays, et notamment porter atteinte à la liberté d'expression, elle peut toujours demander aux tribunaux de la Colombie-Britannique de modifier l'ordonnance interlocutoire en conséquence. Jusqu'à maintenant, Google n'a pas présenté une telle demande.

[47] En l'absence d'un fondement de preuve, et compte tenu du droit de Google de demander une ordonnance de rectification, il ne semble guère équitable de refuser d'accorder à Equustek la portée extraterritoriale dont elle a besoin pour rendre la réparation efficace, ou même de lui imposer le fardeau

[6] Paragraphe 144.
[7] Paragraphes 93-94.

permissible. We are dealing with the Internet after all, and the balance of convenience test has to take full account of its inevitable extraterritorial reach when injunctive relief is being sought against an entity like Google.

[48] This is not an order to remove speech that, on its face, engages freedom of expression values, it is an order to de-index websites that are in violation of several court orders. We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods.

[49] And I have trouble seeing how this interferes with what Google refers to as its content neutral character. The injunction does not require Google to monitor content on the Internet, nor is it a finding of any sort of liability against Google for facilitating access to the impugned websites. As for the balance of convenience, the only obligation the interlocutory injunction creates is for Google to de-index the Datalink websites. The order is, as Fenlon J. observed, "only a slight expansion on the removal of individual URLs, which Google agreed to do voluntarily".[8] Even if it could be said that the injunction engages freedom of expression issues, this is far outweighed by the need to prevent the irreparable harm that would result from Google's facilitating Datalink's breach of court orders.

[50] Google did not suggest that it would be inconvenienced in any material way, or would incur any significant expense, in de-indexing the Datalink websites. It acknowledges, fairly, that it can, and often does, exactly what is being asked of it in this case, that is, alter search results. It does so to avoid generating links to child pornography and websites containing "hate speech". It also complies with notices it receives under the US *Digital Millennium*

[8] Paragraph 137.

de démontrer où — pays par pays — une telle ordonnance est légalement autorisée. Après tout, la présente affaire porte sur l'Internet et le critère de la prépondérance des inconvénients doit tenir pleinement compte de son inévitable portée extraterritoriale lorsqu'une injonction est demandée contre une entité comme Google.

[48] L'ordonnance ne vise pas la suppression de propos qui, à première vue, font intervenir des valeurs liées à la liberté d'expression; elle vise plutôt le délistage de sites Web qui contreviennent à plusieurs ordonnances judiciaires. Jusqu'à maintenant, nous n'avons pas reconnu que la liberté d'expression exige qu'on facilite la vente illégale de biens.

[49] De plus, j'ai de la difficulté à voir comment cela compromet ce que Google appelle son caractère neutre sur le plan du contenu. L'injonction n'exige pas que Google surveille le contenu sur Internet et elle ne constitue pas non plus une conclusion selon laquelle Google est responsable de quelque façon que ce soit d'avoir facilité l'accès aux sites Web en cause. En ce qui a trait à la prépondérance des inconvénients, la seule obligation qu'impose à Google l'injonction interlocutoire est celle de délister les sites Web de Datalink. Comme l'a constaté la juge Fenlon, l'ordonnance ne prévoit [TRADUCTION] « qu'un peu plus que le retrait d'adresses URL données, ce que Google a accepté de faire volontairement »[8]. Même si on pouvait dire que l'injonction soulève des questions relatives à la liberté d'expression, celles-ci sont largement contrebalancées par la nécessité d'empêcher le préjudice irréparable qui découlerait du fait que Google facilite la violation par Datalink des ordonnances judiciaires.

[50] Google n'a pas soutenu qu'elle subirait des inconvénients appréciables ou qu'elle engagerait des dépenses importantes en délistant les sites Web de Datalink. Elle reconnaît, objectivement, qu'elle peut faire, et qu'elle fait souvent, exactement ce qui lui est demandé en l'espèce, c'est-à-dire modifier des résultats de recherche. Elle le fait pour éviter de générer des liens vers des sites de pornographie juvénile ou renfermant des « propos haineux ». Elle

[8] Paragraphe 137.

Copyright Act, Pub. L. No. 105-304, 112 Stat. 2680 (1998), to de-index content from its search results that allegedly infringes copyright, and removes websites that are subject to court orders.

[51] As for the argument that this will turn into a permanent injunction, the length of an interlocutory injunction does not, by itself, convert its character from a temporary to a permanent one. As previously noted, the order requires that the injunction be in place "until the conclusion of the trial of this action or further order of this court". There is no reason not to take this order at face value. Where an interlocutory injunction has been in place for an inordinate amount of time, it is always open to a party to apply to have it varied or vacated. Google has brought no such application.

[52] Datalink and its representatives have ignored all previous court orders made against them, have left British Columbia, and continue to operate their business from unknown locations outside Canada. Equustek has made efforts to locate Datalink with limited success. Datalink is only able to survive — at the expense of Equustek's survival — on Google's search engine which directs potential customers to its websites. In other words, Google is how Datalink has been able to continue harming Equustek in defiance of several court orders.

[53] This does not make Google liable for this harm. It does, however, make Google the determinative player in allowing the harm to occur. On balance, therefore, since the interlocutory injunction is the only effective way to mitigate the harm to Equustek pending the resolution of the underlying litigation, the only way, in fact, to preserve Equustek itself pending the resolution of the underlying litigation, and since any countervailing harm to Google is minimal to non-existent, the interlocutory injunction should be upheld.

se conforme aux avis qu'elle reçoit en application de la loi américaine intitulée *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2680 (1998) — avis sollicitant le délistage du contenu de ses résultats de recherche qui porterait atteinte à des droits d'auteur —, et elle retire les sites Web assujettis à des ordonnances judiciaires.

[51] En ce qui a trait à l'argument selon lequel l'injonction deviendra permanente, la durée d'une injonction interlocutoire n'a pas, en soi, pour effet de transformer une injonction provisoire en une injonction permanente. Comme il a déjà été mentionné, l'ordonnance exige que l'injonction soit en vigueur [TRADUCTION] « jusqu'à l'issue du procès relativement à la présente action ou jusqu'à nouvelle ordonnance de la cour ». Il n'y a aucune raison de mettre en doute cette ordonnance. Lorsqu'une injonction interlocutoire est en vigueur pendant une période excessivement longue, les parties peuvent toujours demander qu'elle soit modifiée ou annulée. Google n'a présenté aucune demande en ce sens.

[52] Datalink et ses représentants ont fait abstraction de toutes les ordonnances judiciaires antérieures prononcées contre eux, ont quitté la Colombie-Britannique et continuent d'exploiter leur entreprise à partir d'endroits inconnus à l'extérieur du Canada. Equustek a cherché à localiser Datalink, mais avec peu de succès. Datalink ne doit sa survie — au détriment de celle d'Equustek — qu'au moteur de recherche de Google, lequel dirige les clients potentiels vers ses sites Web. Autrement dit, c'est Google qui a permis à Datalink de continuer de causer un préjudice à Equustek au mépris de plusieurs ordonnances judiciaires.

[53] Google n'est pas pour autant responsable de ce préjudice. Toutefois, ces circonstances font en sorte que Google a joué un rôle déterminant en l'espèce en permettant au préjudice de se produire. Tout bien considéré, puisque l'injonction interlocutoire est la seule façon efficace de réduire le préjudice causé à Equustek jusqu'à ce que le litige sous-jacent soit réglé — la seule façon, en fait, de préserver Equustek elle-même jusqu'à ce que le litige sous-jacent soit réglé — et puisque le préjudice subi par Google en contrepoids est minime, voire inexistant, l'injonction interlocutoire devrait donc être confirmée.

[54] I would dismiss the appeal with costs in this Court and in the Court of Appeal for British Columbia.

The following are the reasons delivered by

[55] CÔTÉ AND ROWE JJ. (dissenting) — Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. ("Equustek") seek a novel form of equitable relief — an effectively permanent injunction, against an innocent third party, that requires court supervision, has not been shown to be effective, and for which alternative remedies are available. Our response calls for judicial restraint. While the court had jurisdiction to issue the June 13, 2014 order against Google Inc. ("Google Order") (2014 BCSC 1063, 374 D.L.R. (4th) 537, per Fenlon J.), in our view, it should have refrained from doing so. The authority to grant equitable remedies has always been constrained by doctrine and practice. In our view, the Google Order slipped too easily from these constraints.

[56] As we will explain, the Google Order is effectively final redress against a non-party that has neither acted unlawfully, nor aided and abetted illegal action. The test for interlocutory injunctions established in *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, does not apply to an order that is effectively final, and the test for a permanent injunction has not been satisfied. The Google Order is mandatory and requires court supervision. It has not been shown to be effective, and there are alternative remedies available to Equustek.

I. Judicial Restraint

[57] The power of a court to grant injunctive relief is derived from that of the Chancery courts of England (*Fourie v. Le Roux*, [2007] UKHL 1, [2007] 1 All E.R. 1087, at para. 30), and has been confirmed

[54] Je suis d'avis de rejeter le pourvoi avec dépens devant notre Cour et devant la Cour d'appel de la Colombie-Britannique.

Version française des motifs rendus par

[55] LES JUGES CÔTÉ ET ROWE (dissidents) — Le groupe intimé, Equustek Solutions Inc., Robert Angus et Clarma Enterprises Inc. (« Equustek »), sollicite une nouvelle forme de réparation en equity — une injonction qui, dans les faits, est permanente, contre un tiers innocent, qui requiert la supervision du tribunal et dont l'efficacité n'a pas été démontrée, et ce, malgré l'existence d'autres recours. Notre réponse commande la retenue judiciaire. Même si le tribunal avait compétence pour prononcer l'ordonnance du 13 juin 2014 contre Google Inc. (« ordonnance visant Google ») (2014 BCSC 1063, 374 D.L.R. (4th) 537, la juge Fenlon), nous estimons qu'il aurait dû s'abstenir de le faire. Le pouvoir d'accorder une réparation en equity a toujours été limité par la doctrine et la pratique. À notre avis, l'ordonnance visant Google a évité trop facilement ces restrictions.

[56] Comme nous l'expliquerons, l'ordonnance visant Google constitue dans les faits une réparation finale contre un tiers qui n'a pas agi illégalement, ni aidé à la perpétration d'un acte illégal ni encouragé celle-ci. Le critère relatif aux injonctions interlocutoires établi dans *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311, ne s'applique pas à une ordonnance qui est en fait finale, et il n'a pas été satisfait au critère applicable à l'octroi d'une injonction permanente. L'ordonnance visant Google est une ordonnance mandatoire nécessitant la supervision du tribunal. Il n'a pas été démontré qu'elle était efficace et d'autres recours s'offrent à Equustek.

I. Retenue judiciaire

[57] Le pouvoir des tribunaux d'accorder une injonction est issu de celui des Cours de chancellerie d'Angleterre (*Fourie c. Le Roux*, [2007] UKHL 1, [2007] 1 All E.R. 1087, par. 30), et il a été confirmé

in British Columbia by the *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39(1):

39 (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

[58] In *Fourie*, Lord Scott explained that "provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it" (para. 30). However, simply because a court has the jurisdiction to grant an injunction does not mean that it should. A court "will not according to its settled practice do so except in a certain way and under certain circumstances" (Lord Scott, at para. 25, quoting from *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536, at p. 563; see also *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Ch.), [2015] 1 All E.R. 949, at paras. 98-100). Professor Spry comes to similar conclusions (I. C. F. Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 333):

> The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. [Footnote omitted.]

[59] The importance of appropriately modifying judicial restraint to meet the needs of justice was summarized by Lord Nicholls in *Mercedes Benz A.G. v. Leiduck*, [1996] 1 A.C. 284 (P.C.), at p. 308: "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice."

en Colombie-Britannique par le par. 9(1) de la loi intitulée *Law and Equity Act*, R.S.B.C. 1996, c. 253 :

[TRADUCTION]

39 (1) Le tribunal peut, dans tous les cas où il lui paraît juste ou opportun de le faire, accorder une injonction ou une ordonnance de la nature d'un mandamus, ou nommer un séquestre ou un séquestre-gérant par ordonnance interlocutoire.

[58] Dans *Fourie*, lord Scott a expliqué que, [TRADUCTION] « si le tribunal a compétence personnelle à l'égard de la personne contre laquelle l'injonction — interlocutoire ou permanente — est demandée, il a compétence, au sens strict, pour l'accorder » (par. 30). Cependant, le seul fait qu'un tribunal ait compétence pour accorder une injonction ne signifie pas qu'il devrait le faire. Un tribunal « ne le fera, selon sa pratique établie, que d'une certaine façon et dans certaines circonstances » (lord Scott, par. 25, citant *Guaranty Trust Co. of New York c. Hannay & Co.*, [1915] 2 K.B. 536, p. 563; voir aussi *Cartier International AG c. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Ch.), [2015] 1 All E.R. 949, par. 98-100). Le professeur Spry est arrivé à des conclusions semblables (I. C. F. Spry, *The Principles of Equitable Remedies* (9e éd. 2014), p. 333) :

> [TRADUCTION] Les pouvoirs des tribunaux ayant compétence en equity pour décerner des injonctions sont, sous réserve de toute restriction législative pertinente, illimités. Les injonctions sont prononcées seulement lorsque cela est conforme aux principes d'equity; cette restriction implique non pas une absence de pouvoirs, mais l'adoption de doctrines et de pratiques dont l'application diffère de temps à autre. [Note en bas de page omise.]

[59] Lord Nicholls a résumé l'importance d'adapter la retenue judiciaire aux besoins de la justice dans *Mercedes Benz A.G. c. Leiduck*, [1996] 1 A.C. 284 (C.P.), p. 308 : [TRADUCTION] « Tout comme la situation dans le monde évolue, il doit en être de même des situations où les tribunaux peuvent exercer à bon droit leur compétence pour accorder des injonctions. L'exercice de la compétence doit reposer sur des principes, mais le critère applicable est celui de l'injustice. »

[60] Changes to "settled practice" must not overshoot the mark of avoiding injustice. In our view, granting the Google Order requires changes to settled practice that are not warranted in this case: neither the test for an interlocutory nor a permanent injunction has been met; court supervision is required; the order has not been shown to be effective; and alternative remedies are available.

II. Factors Suggesting Restraint in This Case

A. *The Effects of the Google Order Are Final*

[61] In *RJR — MacDonald*, this Court set out the test for interlocutory injunctions — a serious question to be tried, irreparable harm, and the balance of convenience — but also described an exception (at pp. 338-39):

> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. . . .
>
> . . .
>
> The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind. [Emphasis added.]

[62] In our view, the Google Order "in effect amount[s] to a final determination of the action" because it "remove[s] any potential benefit from proceeding to trial". In order to understand this conclusion, it is useful to review Equustek's underlying claim. Equustek sought, in its Further Amended Notice of Civil Claim against Datalink, damages, declarations, and:

[60] Les changements à la « pratique établie » ne doivent pas aller au-delà de l'objectif d'éviter une injustice. À notre avis, accorder l'ordonnance visant Google exige des changements à la pratique établie qui ne sont pas justifiés en l'espèce : ni le critère applicable à l'octroi d'une injonction interlocutoire ni celui applicable à l'octroi d'une injonction permanente ne sont respectés; la supervision du tribunal est requise; il n'a pas été démontré que l'ordonnance était efficace; et d'autres recours sont possibles.

II. Facteurs commandant la retenue en l'espèce

A. *Les effets de l'ordonnance visant Google sont finaux*

[61] Dans *RJR — MacDonald*, la Cour a établi le critère applicable à l'octroi des injonctions interlocutoires — question sérieuse à juger, préjudice irréparable et prépondérance des inconvénients —, mais elle a aussi prévu une exception (p. 338-339) :

> Il existe deux exceptions à la règle générale selon laquelle un juge ne devrait pas procéder à un examen approfondi sur le fond. La première est le cas où le résultat de la demande interlocutoire équivaudra en fait au règlement final de l'action. Ce sera le cas, d'une part, si le droit que le requérant cherche à protéger est un droit qui ne peut être exercé qu'immédiatement ou pas du tout, ou, d'autre part, si le résultat de la demande aura pour effet d'imposer à une partie un tel préjudice qu'il n'existe plus d'avantage possible à tirer d'un procès. . .
>
> . . .
>
> Les circonstances justifiant l'application de cette exception sont rares. Lorsqu'elle s'applique, le tribunal doit procéder à un examen plus approfondi du fond de l'affaire. Puis, au moment de l'application des deuxième et troisième étapes de l'analyse, il doit tenir compte des résultats prévus quant au fond. [Nous soulignons.]

[62] À notre avis, l'ordonnance visant Google « équivau[t] en fait au règlement final de l'action » puisqu'il « n'existe plus d'avantage possible à tirer d'un procès ». Pour comprendre cette conclusion, il est utile d'examiner la demande sous-jacente d'Equustek. Dans son avis de poursuite civile modifié déposé contre Datalink, Equustek a demandé des dommages-intérêts, des jugements déclaratoires et :

A temporary and permanent injunction restraining the Defendants from:

a. using the Plaintiffs' trademarks and free-riding on the goodwill of any Equustek products on any website;

b. making statements disparaging or in any way referring to the Equustek products;

c. distributing the offending manuals and displaying images of the Plaintiff's products on any website; and

d. selling the GW1000 line of products which were created by the theft of the Plaintiff's trade secrets;

and obliging them to:

e. immediately disclose all hidden websites;

f. display a page on all websites correcting [their] misrepresentations about the source and continuing availability of the Equustek products and directing customers to Equustek.

In short, Equustek sought injunctions modifying the way in which Datalink carries out its website business, along with damages and declarations. On June 20, 2012, Datalink's response was struck and Equustek was given leave to apply for default judgment. It has not done so. On December 13, 2012, Justice Tindale ordered that

[t]he Defendants Morgan Jack, Datalink Technologies Gateways Inc. and Datalink Technologies Gateways LLC (the "Datalink Defendants") cease operating or carrying on business through any website, including those contained in Schedule "A" and all associated pages, subpages and subdirectories, and that these Defendants immediately take down all such websites, until further order of this court. ["December 2012 Order"]

The December 2012 Order gives Equustek *more* than the injunctive relief it sought in its originating claim. Rather than simply ordering the modification of Datalink websites, the December 2012 Order requires the ceasing of website business altogether. In our view, little incentive remains for Equustek

[TRADUCTION] Une injonction provisoire et permanente interdisant aux défendeurs les actes suivants :

a. utiliser les marques de commerce des demandeurs et bénéficier sans contrepartie de l'achalandage attaché aux produits d'Equustek sur tout site Web;

b. faire des déclarations dépréciant les produits d'Equustek ou renvoyant de quelque façon que ce soit à ceux-ci;

c. distribuer les manuels en cause et afficher des images des produits des demandeurs sur tout site Web; et

d. vendre la gamme de produits GW1000 créés par suite du vol des secrets commerciaux des demandeurs;

et leur imposant les obligations suivantes :

e. divulguer immédiatement tous les sites Web cachés; et

f. afficher une page sur tous les sites Web corrigeant [leurs] déclarations inexactes concernant la source et la disponibilité continue des produits d'Equustek et qui dirige les clients vers Equustek.

En résumé, Equustek a demandé des injonctions modifiant la façon dont Datalink exerce ses activités de sites Web, ainsi que des dommages-intérêts et des jugements déclaratoires. Le 20 juin 2012, la réponse de Datalink a été radiée et Equustek a été autorisée à solliciter un jugement par défaut, mais elle ne l'a pas fait. Le 13 décembre 2012, le juge Tindale a ordonné que

[TRADUCTION] [l]es défendeurs Morgan Jack, Datalink Technologies Gateways Inc. et Datalink Technologies Gateways LLC (les « défendeurs Datalink ») cessent d'exercer des activités par l'entremise de tout site Web, y compris ceux mentionnés à l'annexe « A » ainsi que l'ensemble des pages, des sous-pages et des sous-répertoires connexes, et ferment immédiatement tous ces sites, jusqu'à ce que la cour rende une nouvelle ordonnance. [« ordonnance de décembre 2012 »]

L'ordonnance de décembre 2012 accorde à Equustek *plus* que l'injonction qu'elle sollicitait dans sa demande initiale. Plutôt que de simplement exiger la modification des sites Web de Datalink, cette ordonnance prévoit la cessation complète de ses activités au moyen de tout site Web. À notre avis, Equustek

to return to court to seek a lesser injunctive remedy. This is evidenced by Equustek's choice to not seek default judgment during the roughly five years which have passed since it was given leave to do so.

[63] As for the Google Order, it provides Equustek with an additional remedy, beyond the December 2012 Order and beyond what was sought in its original claim. In our view, granting of the Google Order further erodes any remaining incentive for Equustek to proceed with the underlying action. The effects of the Google Order are final in nature. Respectfully, the pending litigation assumed by our colleague Abella J. is a fiction. The Google Order, while interlocutory in form, is final in effect. Thus, it gives Equustek more relief than it sought.

[64] Procedurally, Equustek requested an interlocutory order in the course of its litigation with Datalink. While Equustek's action against Datalink could technically endure indefinitely (P. G. Fraser, J. W. Horn and S. A. Griffin, *The Conduct of Civil Litigation in British Columbia* (2nd ed. (loose-leaf)), at § 14.1) — and thus the interlocutory status of the injunction could technically endure indefinitely — it does not follow that the Google Order should be considered interlocutory. Courts of equity look to substance over form, because "a dogged devotion to form has often resulted in injustice" (*John Deere Ltd. v. Firdale Farms Ltd.* (1987), 45 D.L.R. (4th) 641 (Man. C.A.), at p. 645). In *Parkin v. Thorold* (1852), 16 Beav. 59, 51 E.R. 698, at p. 701, Lord Romilly explained it thus:

> . . . Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if [they do] find that by insisting on the form, the substance will be defeated, [they hold] it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.

n'a guère avantage à retourner devant le tribunal pour obtenir une injonction moins sévère, comme en témoigne le choix d'Equustek de ne pas demander de jugement par défaut pendant la période d'environ cinq ans qui s'est écoulée depuis qu'elle a obtenu l'autorisation de ce faire.

[63] En ce qui a trait à l'ordonnance visant Google, elle accorde une réparation additionnelle à Equustek, réparation allant au-delà de l'ordonnance de décembre 2012 et de ce qu'elle réclamait dans sa demande initiale. À notre avis, le fait d'accorder cette ordonnance érode davantage toute motivation que pourrait encore avoir Equustek à donner suite à l'action sous-jacente. Les effets de l'ordonnance visant Google sont de nature finale. Avec égards, le litige pendant que prend pour acquis notre collègue la juge Abella est une fiction. Bien que de forme interlocutoire, l'ordonnance visant Google a un effet final. En conséquence, elle accorde à Equustek une réparation supérieure à celle qu'elle demandait.

[64] Sur le plan procédural, Equustek a demandé une ordonnance interlocutoire dans le cadre du litige l'opposant à Datalink. Même si l'action d'Equustek contre Datalink pourrait théoriquement durer indéfiniment (P. G. Fraser, J. W. Horn et S. A. Griffin, *The Conduct of Civil Litigation in British Columbia* (2e éd. (feuilles mobiles)), § 14.1) — et que la nature interlocutoire de l'injonction pourrait donc théoriquement durer indéfiniment —, il ne s'ensuit pas que l'ordonnance visant Google devrait être considérée comme une ordonnance interlocutoire. Les tribunaux d'equity privilégient l'examen du fond plutôt que de la forme, parce que [TRADUCTION] « un attachement inébranlable à la forme a souvent entraîné une injustice » (*John Deere Ltd. c. Firdale Farms Ltd.* (1987), 45 D.L.R. (4th) 641 (C.A. Man.), p. 645). Dans *Parkin c. Thorold* (1852), 16 Beav. 59, 51 E.R. 698, p. 701, lord Romilly a expliqué cela de la façon suivante :

> [TRADUCTION] . . . Les tribunaux d'equity font dans tous les cas une distinction entre une question de fond et une question de forme, et, s'ils concluent que le fait d'insister sur une question de forme ira à l'encontre du fond, ils jugeront inéquitable de permettre à une personne d'insister sur une telle question et d'aller ainsi à l'encontre du fond.

In our view, the substance of the Google Order amounts to a final remedy. As such, it provides Equustek with more equitable relief than it sought against Datalink, and amounts to final resolution via Google. It is, in effect, a permanent injunction.

[65] Following *RJR — MacDonald* (at pp. 338-39), an extensive review of the merits is therefore required at the first stage of the analysis (*Schooff v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680, at paras. 26-27). Yet this was not done. When Justice Fenlon considered Equustek's application for an interim injunction enjoining Google to cease indexing or referencing Datalink's websites, she did not conduct an extensive review of the merits. She did however note that Equustek had raised an arguable case, and that Datalink was presumed to have admitted the allegations when its defenses were struck (para. 151). The rule is not immutable that if a statement of defense is struck, the defendant is deemed to have admitted the allegations contained in the statement of claim. While the facts relating to Datalink's liability are deemed to be admitted, the court can still exercise its discretion in assessing Equustek's claims (*McIsaac v. Healthy Body Services Inc.*, 2009 BCSC 1716, at paras. 42 and 44 (CanLII); *Plouffe v. Roy*, 2007 CanLII 37693 (Ont. S.C.J.), at para. 53; *Spiller v. Brown* (1973), 43 D.L.R. (3d) 140 (Alta. S.C. (App. Div.)), at p. 143). Equustek has avoided such an assessment. Thus, an extensive review of the merits was not carried out.

[66] The Google Order also does not meet the test for a permanent injunction. To obtain a permanent injunction, a party is required to establish: (1) its legal rights; (2) that damages are an inadequate remedy; and (3) that there is no impediment to the court's discretion to grant an injunction (*1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, 371 D.L.R. (4th) 643, at paras. 74-80; Spry, at pp. 395 and 407-8). Equustek has shown the inadequacy of damages (damages are ascertainable but unlikely to be recovered, and the wrong is continuing). However, in our view, it is unclear whether

Nous sommes d'avis que la substance de l'ordonnance visant Google équivaut à une réparation finale. Cette ordonnance fournit donc à Equustek une réparation en equity supérieure à celle sollicitée contre Datalink et équivaut au règlement final de l'action par l'entremise de Google. Il s'agit, dans les faits, d'une injonction permanente.

[65] Selon l'arrêt *RJR — MacDonald* (p. 338-339), il faut, à la première étape de l'analyse, procéder à un examen approfondi sur le fond (*Schooff c. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680, par. 26-27). Cependant, cela n'a pas été fait. Lorsque la juge Fenlon s'est penchée sur la demande d'injonction interlocutoire présentée par Equustek dans le but d'obliger Google à cesser le listage ou le référencement des sites Web de Datalink, elle n'a pas effectué un tel examen. Elle a toutefois souligné qu'Equustek avait présenté une cause défendable et que Datalink était présumée avoir admis les allégations lorsque ses moyens de défense avaient été radiés (par. 151). La règle selon laquelle le défendeur est réputé avoir admis les allégations contenues dans la déclaration lorsque sa défense est radiée n'est pas immuable. Bien que les faits relatifs à la responsabilité de Datalink soient réputés avoir été admis, le tribunal peut toujours exercer son pouvoir discrétionnaire lorsqu'il évalue les allégations d'Equustek (*McIsaac c. Healthy Body Services Inc.*, 2009 BCSC 1716, par. 42 et 44 (CanLII); *Plouffe c. Roy*, 2007 CanLII 37693 (C.S.J. Ont.), par. 53; *Spiller c. Brown* (1973), 43 D.L.R. (3d) 140 (C.S. Alb. (Div. app.)), p. 143). Equustek a évité une telle évaluation. Un examen approfondi sur le fond n'a donc pas eu lieu.

[66] De plus, l'ordonnance visant Google ne satisfait pas au critère applicable à l'octroi d'une injonction permanente. Pour obtenir une telle injonction, une partie doit établir que : (1) des droits lui sont reconnus, (2) des dommages-intérêts ne constituent pas une réparation adéquate et (3) rien n'empêche le tribunal d'exercer son pouvoir discrétionnaire d'accorder une injonction (*1711811 Ontario Ltd. c. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, 371 D.L.R. (4th) 643, par. 74-80; Spry, p. 395 et 407-408). Equustek a démontré le caractère inadéquat des dommages-intérêts (le montant

the first element of the test has been met. Equustek's claims were supported by a good *prima facie* case, but it was not established that Datalink designed and sold counterfeit versions of its product, or that this resulted in trademark infringement and unlawful appropriation of trade secrets.

[67] In any case, the discretionary factors affecting the grant of an injunction strongly favour judicial restraint. As we will outline below, the Google Order enjoins a non-party, yet Google has not aided or abetted Datalink's wrongdoing; it holds no assets of Equustek's, and has no information relevant to the underlying proceedings. The Google Order is mandatory and requires court supervision. It has not been shown to be effective, and Equustek has alternative remedies.

B. *Google Is a Non-Party*

[68] A court order does not "technically" bind non-parties, but "anyone who disobeys the order or interferes with its purpose may be found to have obstructed the course of justice and hence be found guilty of contempt of court" (*MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, at paras. 23 and 27). In *MacMillan Bloedel*, the injunction prohibiting named individuals from blocking a logging road also caused non-parties to face contempt proceedings for doing the act prohibited by the injunction.

[69] The instant case is not one where a non-party with knowledge of a court order deliberately disobeyed it and thereby deprecated the court's authority. Google did not carry out the act prohibited by the December 2012 Order. The act prohibited by the December 2012 Order is Datalink "carrying on business through any website". That act occurs

de ceux-ci est déterminable, mais a peu de chances d'être recouvré, et l'acte répréhensible se poursuit). Cependant, à notre avis, on ne sait pas avec certitude si le premier élément du test est respecté. Les allégations d'Equustek reposaient sur une preuve à première vue valable, mais il n'a pas été établi que Datalink a conçu et vendu des versions contrefaites de son produit ou que cela a causé une contrefaçon de marque de commerce et une appropriation illégale de secrets commerciaux.

[67] Quoi qu'il en soit, les facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire d'accorder ou non une injonction militent fortement en faveur de la retenue judiciaire. Comme nous l'indiquerons plus loin, l'ordonnance visant Google oblige un tiers à faire quelque chose; pourtant, Google n'a pas aidé ni encouragé Datalink à commettre l'acte répréhensible en cause, ne détient aucun élément d'actif d'Equustek et ne dispose d'aucun renseignement pertinent à l'égard de la procédure sous-jacente. L'ordonnance visant Google est une ordonnance mandatoire nécessitant la supervision du tribunal. Son efficacité n'a pas été démontrée et d'autres recours s'offrent à Equustek.

B. *Google est un tiers*

[68] Une ordonnance judiciaire n'est pas, « strictement parlant », opposable aux tiers, mais « quiconque enfreint l'ordonnance ou en gêne l'application peut se voir reprocher une entrave à la justice et donc se rendre coupable d'outrage au tribunal » (*MacMillan Bloedel Ltd. c. Simpson*, [1996] 2 R.C.S. 1048, par. 23 et 27). Dans l'arrêt *MacMillan Bloedel*, l'injonction qui interdisait à des personnes nommément désignées de bloquer un chemin d'exploitation a également entraîné l'introduction de procédures pour outrage contre des tiers du fait que ceux-ci avaient posé l'acte que l'injonction interdisait.

[69] Il ne s'agit pas en l'espèce d'un cas où un tiers ayant connaissance d'une ordonnance judiciaire y a délibérément désobéi, faisant ainsi fi de l'autorité du tribunal. Google n'a pas posé l'acte prohibé par l'ordonnance de décembre 2012. Cette dernière interdit à Datalink [TRADUCTION] « d'exercer des activités par l'entremise de tout site Web ».

whenever Datalink launches websites to carry out business — not when other parties, such as Google, make it known that such websites exist.

[70] There is no doubt that non-parties also risk contempt proceedings by aiding and abetting the doing of a prohibited act (*Seaward v. Paterson*, [1897] 1 Ch. 545 (C.A.); D. Bean, A. Burns and I. Parry, *Injunctions* (11th ed. 2012), at para. 9-08). Lord Denning said in *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676 (C.A.), at p. 1682:

> It has long been held that the court has jurisdiction to commit for contempt a person, not a party to the action, who, knowing of an injunction, aids and abets the defendant in breaking it. The reason is that by aiding and abetting the defendant, he is obstructing the course of justice.

[71] In our view, Google did not aid or abet the doing of the prohibited act. Equustek alleged that Google's search engine was facilitating Datalink's ongoing breach by leading customers to Datalink websites (Fenlon J.'s reasons, at para. 10). However, the December 2012 Order was to cease carrying on business through any website. That Order was breached as soon as Datalink established a website to conduct its business, regardless of how visible that website might be through Google searches. If Equustek's argument were accepted, the scope of "aids and abets" would, in our view, become overbroad. It might include the companies supplying Datalink with the material to produce the derivative products, the companies delivering the products, or as Google argued in its factum, it might also include the local power company that delivers power to Datalink's physical address. Critically, Datalink breached the December 2012 Order simply by launching websites to carry out business, regardless of whether Google searches ever reveal the websites.

Datalink pose un tel acte chaque fois qu'elle met en service des sites Web pour exercer ses activités — et non lorsque d'autres parties, comme Google, font connaître l'existence de ces sites.

[70] Il n'y a aucun doute que des tiers risquent aussi de faire l'objet de procédures pour outrage s'ils aident à la perpétration de l'acte prohibé ou encouragent celle-ci (*Seaward c. Paterson*, [1897] 1 Ch. 545 (C.A.); D. Bean, A. Burns et I. Parry, *Injunctions* (11e éd. 2012), par. 9-08). Lord Denning a affirmé ce qui suit dans *Acrow (Automation) Ltd. c. Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676 (C.A.), p. 1682 :

> [TRADUCTION] Il est établi depuis longtemps que le tribunal a le pouvoir de condamner pour outrage une personne qui n'est pas partie à l'action et qui, sachant qu'une injonction existe, aide et encourage le défendeur à y contrevenir. La raison est qu'en aidant et en encourageant le défendeur, cette personne entrave le cours de la justice.

[71] À notre avis, Google n'a pas aidé à la perpétration de l'acte prohibé ni encouragé celle-ci. Equustek a soutenu qu'en dirigeant les clients vers les sites Web de Datalink, le moteur de recherche de Google facilitait la perpétration continue par Datalink de la violation reprochée (motifs de la juge Fenlon, par. 10). Cependant, l'ordonnance de décembre 2012 visait la cessation des activités par l'entremise de tout site Web. Il y a eu manquement à cette ordonnance dès que Datalink a créé un site Web pour exercer ses activités, peu importe à quel point ce site était visible lors de recherches sur Google. Si l'argument d'Equustek était retenu, la portée de l'expression « aide et encourage » deviendrait, à notre avis, excessive. Elle pourrait permettre d'inclure les entreprises qui fournissent à Datalink les matériaux nécessaires à la production des produits dérivés, celles qui livrent les produits ou, comme Google l'a fait valoir dans son mémoire, l'entreprise locale d'électricité qui fournit de l'électricité à l'adresse physique de Datalink. Fait crucial, Datalink a contrevenu à l'ordonnance de décembre 2012 simplement en mettant en service des sites Web pour exercer ses activités, peu importe si les recherches sur Google révélaient ceux-ci.

[72] We agree with our colleague Justice Abella that *Mareva* injunctions and *Norwich* orders can operate against non-parties. However, we respectfully disagree that the Google Order is similar in nature to those remedies. *Mareva* injunctions are granted to freeze assets until the completion of a trial — they do not enforce a plaintiff's substantive rights (*Mercedes Benz*, at p. 302). In contrast, the Google Order enforces Equustek's asserted intellectual property rights by seeking to minimize harm to those rights. It does not freeze Datalink's assets (and, in fact, may erode those assets).

[73] *Norwich* orders are made to compel information from third parties. In *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.), at p. 175, Lord Reid identified

> a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

Lord Reid found that "without certain action on [Customs'] part the infringements could never have been committed" (p. 174). In spite of this finding, the court did not require Customs to take specific action to prevent importers from infringing the patent of Norwich Pharmacal; rather the court issued a limited order compelling Customs to disclose the names of importers. In *Cartier*, the court analogized from *Norwich* to support an injunction requiring Internet service providers ("ISPs") to block access to trademark-infringing websites because "it is via the ISPs' services" that customers view and purchase the infringing material (para. 155). That injunction did not extend to parties merely assisting in finding the websites.

[72] Nous convenons avec notre collègue la juge Abella que les injonctions *Mareva* et les ordonnances de type *Norwich* sont opposables aux tiers. Cependant, avec égards, nous croyons que l'ordonnance visant Google n'est pas de nature semblable à ces réparations. Les injonctions *Mareva* visent à geler des actifs jusqu'à la fin du procès, et non pas à assurer le respect des droits substantiels du demandeur (*Mercedes Benz*, p. 302). En revanche, l'ordonnance visant Google assure le respect des droits de propriété intellectuelle revendiqués par Equustek en cherchant à réduire au minimum l'atteinte à ces droits. Elle ne gèle pas certains actifs de Datalink (et, en réalité, elle pourrait les amoindrir).

[73] Les ordonnances de type *Norwich* visent à obliger des tiers à fournir des renseignements. Dans *Norwich Pharmacal Co. c. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.), p. 175, lord Reid a fait ressortir

> [TRADUCTION] un principe très raisonnable voulant que si, sans que ce soit sa faute, une personne est mêlée aux actes délictueux d'autres personnes de manière à faciliter l'acte répréhensible qui leur est reproché, elle n'engage peut-être pas sa responsabilité personnelle, mais elle est tenue d'aider la personne lésée en lui donnant des renseignements complets et en lui révélant l'identité des malfaiteurs.

Lord Reid a conclu que [TRADUCTION] « si les [autorités douanières] n'avaient pas accompli certains actes, une partie des violations n'aurait jamais pu être commise » (p. 174). Malgré cette conclusion, la cour n'a pas exigé que les autorités douanières prennent des mesures précises pour empêcher les importateurs de contrefaire le brevet de Norwich Pharmacal; la cour a plutôt rendu une ordonnance limitée obligeant les autorités douanières à révéler les noms des importateurs. Dans *Cartier*, la cour a établi une analogie avec l'affaire *Norwich* pour justifier une injonction intimant à des fournisseurs de services Internet (« FSI ») de bloquer l'accès à des sites Web contrefaisant des marques de commerce parce que [TRADUCTION] « c'est par l'entremise des services des FSI » que les clients voient et achètent les produits contrefaits (par. 155). Cette injonction ne s'appliquait pas aux parties qui ne faisaient qu'aider à localiser les sites Web.

[74] In the case at bar, we are of the view that Google does not play a role in Datalink's breach of the December 2012 Order. Whether or not the December 2012 Order is violated does not hinge on the degree of success of the prohibited website business. Rather, the December 2012 Order is violated merely by Datalink conducting business through a website, regardless of the visibility of that website or the number of customers that visit the website. Thus Google does not play a role analogous to Customs in *Norwich* nor the ISPs in *Cartier*. And unlike the order in *Norwich*, the Google Order compels positive action aimed at the illegal activity rather than simply requiring the provision of information to the court.

C. *The Google Order Is Mandatory*

[75] While the distinction between mandatory and prohibitive injunctions has been questioned (see *National Commercial Bank of Jamaica Ltd. v. Olint Corp.*, [2009] 1 W.L.R. 1405 (P.C.), at para. 20), courts have rightly, in our view, proceeded cautiously where an injunction requires the defendant to incur additional expenses to take positive steps (*Redland Bricks Ltd. v. Morris*, [1970] A.C. 652 (H.L.), at pp. 665-66; J. Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at pp. 199-200). Also relevant to the decision of whether to grant a mandatory injunction is whether it might require continued supervision by the courts, especially where the terms of the order cannot be precisely drawn and where it may result in wasteful litigation over compliance (*Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.*, [1998] A.C. 1 (H.L.)).

[76] The Google Order requires ongoing modification and supervision because Datalink is launching new websites to replace de-listed ones. In fact, the Google Order has been amended at least seven times to capture Datalink's new sites (orders

[74] En l'espèce, nous sommes d'avis que Google ne joue aucun rôle dans la violation par Datalink de l'ordonnance de décembre 2012. La question de savoir s'il y a violation de l'ordonnance de décembre 2012 ne dépend pas du degré de succès des activités prohibées exercées par l'entremise de sites Web. Il y a manquement à cette ordonnance du simple fait que Datalink exerce des activités par l'entremise d'un site Web, peu importe la visibilité de ce site ou le nombre de clients qui le visitent. En conséquence, Google ne joue pas un rôle analogue à celui des autorités douanières dans *Norwich* ni à celui des FSI dans *Cartier*. Et, contrairement à l'ordonnance prononcée dans *Norwich*, l'ordonnance visant Google requiert la prise de mesures concrètes à l'égard de l'activité illégale plutôt que de simplement exiger que des renseignements soient fournis au tribunal.

C. *L'ordonnance visant Google est une ordonnance mandatoire*

[75] Bien que la distinction entre les injonctions mandatoires et les injonctions prohibitives ait été mise en doute (voir *National Commercial Bank of Jamaica Ltd. c. Olint Corp.*, [2009] 1 W.L.R. 1405 (C.P.), par. 20), les tribunaux ont, à juste titre selon nous, procédé avec prudence lorsqu'une injonction exigeait que le défendeur engage des dépenses additionnelles pour prendre des mesures concrètes (*Redland Bricks Ltd. c. Morris*, [1970] A.C. 652 (H.L.), p. 665-666; J. Berryman, *The Law of Equitable Remedies* (2e éd. 2013), p. 199-200). Pour décider s'il convient ou non d'accorder une injonction mandatoire, il est également pertinent de se demander si celle-ci nécessiterait une supervision judiciaire continue, en particulier lorsque les modalités de l'ordonnance ne peuvent être définies avec précision et lorsque le respect de l'ordonnance pourrait donner lieu à des litiges onéreux (*Co-operative Insurance Society Ltd. c. Argyll Stores (Holdings) Ltd.*, [1998] A.C. 1 (H.L.)).

[76] L'ordonnance visant Google nécessite des modifications et une supervision continues parce que Datalink met en service de nouveaux sites Web pour remplacer ceux qui sont délistés. En fait, cette ordonnance a été modifiée au moins sept fois

dated November 27, 2014; April 22, 2015; June 4, 2015; July 3, 2015; September 15, 2015; January 12, 2016 and March 30, 2016). In our view, courts should avoid granting injunctions that require such cumbersome court-supervised updating.

D. *The Google Order Has Not Been Shown to Be Effective*

[77] A court may decline to grant an injunction on the basis that it would be futile or ineffective in achieving the purpose for which it is sought (Spry, at pp. 419-20; Berryman, at p. 113). For example, in *Attorney General v. Observer Ltd.*, [1990] 1 A.C. 109 (H.L.), the *Spycatcher* memoirs of an M.I.5 agent were already readily available, thus making a perpetual injunction against publication by the defendant newspapers ineffective.

[78] In our view, the Google Order is not effective in enforcing the December 2012 Order. It is recalled that the December 2012 Order requires that Datalink "cease operating or carrying on business through any website" — it says nothing about the visibility or success of the website business. The December 2012 Order is violated as soon as Datalink launches websites to carry on business, regardless of whether those websites appear in a Google search. Moreover, the Google Order does not assist Equustek in modifying the Datalink websites, as Equustek sought in its originating claim for injunctive relief.

[79] The most that can be said is that the Google Order might reduce the harm to Equustek which Fenlon J. found "Google is inadvertently facilitating" (para. 152). But it has not been shown that the Google Order is effective in doing so. As Google points out, Datalink's websites can be found using other search engines, links from other sites, bookmarks, email, social media, printed material, word-of-mouth, or other indirect means. Datalink's websites are open for business on the Internet whether Google searches list them or not. In our

pour permettre d'englober les nouveaux sites de Datalink (ordonnances datées du 27 novembre 2014, du 22 avril 2015, du 4 juin 2015, du 3 juillet 2015, du 15 septembre 2015, du 12 janvier 2016 et du 30 mars 2016). À notre avis, les tribunaux devraient éviter d'accorder des injonctions impliquant un processus aussi lourd de mise à jour sous supervision judiciaire.

D. *L'efficacité de l'ordonnance visant Google n'a pas été démontrée*

[77] Un tribunal peut refuser d'accorder une injonction au motif qu'elle serait inutile ou inefficace pour atteindre l'objectif recherché (Spry, p. 419-420; Berryman, p. 113). Par exemple, dans *Attorney General c. Observer Ltd.*, [1990] 1 A.C. 109 (H.L.), les mémoires d'un agent du MI-5, intitulés *Spycatcher*, étaient déjà facilement accessibles, ce qui rendait inefficace l'octroi d'une injonction permanente de non-publication contre les journaux défendeurs.

[78] À notre avis, l'ordonnance visant Google est inefficace pour assurer le respect de l'ordonnance de décembre 2012. Il importe de rappeler que l'ordonnance de décembre 2012 exige que Datalink « cess[e] d'exercer des activités par l'entremise de tout site Web »; elle ne prévoit rien à l'égard de la visibilité ou du succès de ces activités. Il y a manquement à cette ordonnance dès que Datalink met en service des sites Web pour exercer ses activités, peu importe si ceux-ci apparaissent dans les résultats d'une recherche sur Google. De plus, l'ordonnance visant Google n'aide pas Equustek à faire modifier les sites Web de Datalink, comme Equustek l'a demandé dans sa demande initiale d'injonction.

[79] Le plus que l'on puisse dire, c'est que l'ordonnance visant Google pourrait réduire le préjudice causé à Equustek, préjudice que [TRADUCTION] « Google facilite par inadvertance », selon la juge Fenlon (par. 152). Mais il n'a pas été démontré que cette ordonnance constitue un moyen efficace de ce faire. Comme le souligne Google, on peut trouver les sites Web de Datalink à l'aide d'autres moteurs de recherche, de liens d'autres sites, de signets, de courriels, de médias sociaux, de documents imprimés, du bouche à oreille ou d'autres moyens indirects.

view, this lack of effectiveness suggests restraint in granting the Google Order.

[80] Moreover, the quest for elusive effectiveness led to the Google Order having worldwide effect. This effect should be taken into consideration as a factor in exercising discretion. Spry explains that territorial limitations to equitable jurisdiction are "to some extent determined by reference to questions of effectiveness and of comity" (p. 37). While the worldwide effect of the Google Order does not make it more effective, it could raise concerns regarding comity.

E. *Alternatives Are Available*

[81] Highlighting the lack of effectiveness are the alternatives available to Equustek. An equitable remedy is not required unless there is no other appropriate remedy at law (Spry, at pp. 402-3). In our view, Equustek has an alternative remedy in law. Datalink has assets in France. Equustek sought a world-wide *Mareva* injunction to freeze those assets, but the Court of Appeal for British Columbia urged Equustek to pursue a remedy in French courts: "At present, it appears that the proposed defendants reside in France. . . . The information before the Court is that French courts will assume jurisdiction and entertain an application to freeze the assets in that country" (2016 BCCA 190, 88 B.C.L.R. (5th) 168, at para. 24). We see no reason why Equustek cannot do what the Court of Appeal urged it to do. Equustek could also pursue injunctive relief against the ISPs, as was done in *Cartier*, in order to enforce the December 2012 Order. In addition, Equustek could initiate contempt proceedings in France or in any other jurisdiction with a link to the illegal websites.

Peu importe s'ils apparaissent ou non dans les résultats d'une recherche sur Google, les sites Web de Datalink sont néanmoins accessibles aux clients potentiels sur Internet. À notre avis, l'absence d'efficacité commande la retenue relativement à l'octroi de l'ordonnance visant Google.

[80] De plus, la recherche d'une efficacité illusoire a conféré à l'ordonnance des effets à l'échelle mondiale, effets qui devraient constituer un facteur à prendre en considération dans l'exercice du pouvoir discrétionnaire. Le professeur Spry explique que les limites territoriales de la compétence en equity sont [TRADUCTION] « dans une certaine mesure établies en fonction de questions d'efficacité et de courtoisie » (p. 37). Bien qu'ils ne rendent pas l'ordonnance visant Google plus efficace, les effets à l'échelle mondiale de cette ordonnance pourraient soulever des préoccupations relatives à la courtoisie.

E. *D'autres solutions sont possibles*

[81] Les alternatives à la disposition d'Equustek démontrent l'inefficacité de l'ordonnance. Une réparation en equity n'est requise que s'il n'existe aucun autre recours juridique approprié (Spry, p. 402-403). À notre avis, Equustek dispose d'un tel autre recours. Datalink possède des biens en France. Equustek a demandé une injonction *Mareva* de portée mondiale pour geler ces biens, mais la Cour d'appel de la Colombie-Britannique a recommandé avec insistance à Equustek d'exercer un recours devant les tribunaux français : [TRADUCTION] « À l'heure actuelle, il semble que les défendeurs proposés résident en France. [. . .] Selon les renseignements soumis à la Cour, les tribunaux français se déclareront compétents et entendront la demande visant le gel des biens dans ce pays » (2016 BCCA 190, 88 B.C.L.R. (5th) 168, par. 24). Nous ne voyons pas pourquoi Equustek ne peut pas faire ce que la Cour d'appel lui a recommandé avec insistance de faire. Equustek pourrait également — comme ce fut le cas dans *Cartier* — demander une injonction contre les FSI afin de faire respecter l'ordonnance de décembre 2012. De plus, Equustek pourrait intenter une procédure pour outrage en France ou dans tout autre pays ayant un lien avec les sites Web illégaux.

III. Conclusion

[82] For these reasons, we are of the view that the Google Order ought not to have been granted. We would allow the appeal and set aside the June 13, 2014 order of the Supreme Court of British Columbia.

Appeal dismissed with costs, CÔTÉ *and* ROWE JJ. *dissenting.*

Solicitors for the appellant: Lenczner Slaght Royce Smith Griffin, Toronto.

Solicitors for the respondents: Robert Fleming Lawyers, Vancouver; Michael Sobkin, Ottawa.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Blake, Cassels & Graydon, Vancouver.

Solicitor for the intervener the OpenMedia Engagement Network: Cynthia Khoo, Vancouver.

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Solicitors for the interveners Human Rights Watch, ARTICLE 19, Open Net (Korea), the Software

III. Conclusion

[82] Pour ces motifs, nous estimons que l'ordonnance visant Google n'aurait pas dû être accordée. Nous sommes d'avis d'accueillir le pourvoi et d'annuler l'ordonnance prononcée le 13 janvier 2014 par la Cour suprême de la Colombie-Britannique.

Pourvoi rejeté avec dépens, les juges CÔTÉ *et* ROWE *sont dissidents.*

Procureurs de l'appelante : Lenczner Slaght Royce Smith Griffin, Toronto.

Procureurs des intimés : Robert Fleming Lawyers, Vancouver; Michael Sobkin, Ottawa.

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Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Blake, Cassels & Graydon, Vancouver.

Procureure de l'intervenant OpenMedia Engagement Network : Cynthia Khoo, Vancouver.

Procureurs des intervenants Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, The Center for Investigative Reporting, Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., New England First Amendment Coalition, News Media Alliance (anciennement connue sous le nom de Newspaper Association of America), AOL Inc., California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, Online News Association et Society of Professional Journalists : Blake, Cassels & Graydon, Toronto.

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Solicitors for the intervener the British Columbia Civil Liberties Association: Stockwoods, Toronto.

Solicitors for the intervener the Electronic Frontier Foundation: MacPherson Leslie & Tyerman, Vancouver; Fasken Martineau DuMoulin, Vancouver.

Solicitors for the interveners the International Federation of the Phonographic Industry, Music Canada, the Canadian Publishers' Council, the Association of Canadian Publishers, the International Confederation of Societies of Authors and Composers, the International Confederation of Music Publishers and the Worldwide Independent Network: McCarthy Tétrault, Toronto.

Solicitors for the intervener the International Federation of Film Producers Associations: MacKenzie Barristers, Toronto.

Freedom Law Centre et Center for Technology and Society : Blake, Cassels & Graydon, Toronto.

Procureurs de l'intervenante Wikimedia Foundation : McInnes Cooper, Halifax.

Procureurs de l'intervenante British Columbia Civil Liberties Association : Stockwoods, Toronto.

Procureurs de l'intervenante Electronic Frontier Foundation : MacPherson Leslie & Tyerman, Vancouver; Fasken Martineau DuMoulin, Vancouver.

Procureurs des intervenants la Fédération internationale de l'industrie phonographique, Music Canada, Canadian Publishers' Council, Association of Canadian Publishers, la Confédération internationale des sociétés d'auteurs et compositeurs, la Confédération internationale des éditeurs de musique et Worldwide Independent Network : McCarthy Tétrault, Toronto.

Procureurs de l'intervenante la Fédération internationale des associations de producteurs de films : MacKenzie Barristers, Toronto.

Philip Furtney, Scott Furtney, Diane Roy, Hugh Chamney and Diamond Bingo Inc. (62394) *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney General for Alberta, the Attorney General for Saskatchewan and the Attorney General of Newfoundland *Interveners*

INDEXED AS: R. *v.* FURTNEY

File No.: 21759.

1991: June 20; 1991: September 26.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Delegation — Criminal law – Lotteries — Criminal Code prohibiting lotteries except those conducted in accordance with terms and conditions of licence issued by Lieutenant Governor in Council of province — Whether lottery provisions in Code improperly delegating criminal law power — Criminal Code, R.S.C., 1985, c. C-46, s. 207(1)(b), (2), (3).

Constitutional law — Colourability — Criminal law – Lotteries — Criminal Code prohibiting lotteries except those conducted in accordance with terms and conditions of licence issued by Lieutenant Governor in Council of province — Whether lottery provisions in Code create invalid discretionary regulatory regime — Criminal Code, R.S.C., 1985, c. C-46, s. 207(1)(b), (2), (3).

Constitutional law — Charter of Rights — Right not to be found guilty unless act or omission constituted offence in law — Criminal Code prohibiting lotteries except those in accordance with terms and conditions of licence issued by Lieutenant Governor in Council of province — Terms and conditions of licence not pub-

Philip Furtney, Scott Furtney, Diane Roy, Hugh Chamney et Diamond Bingo Inc. (62394) *Appelants*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général du Canada, le procureur général du Québec, le procureur général de l'Alberta, le procureur général de la Saskatchewan et le procureur général de Terre-Neuve *Intervenants*

RÉPERTORIÉ: R. *c.* FURTNEY

N° du greffe: 21759.

1991: 20 juin; 1991: 26 septembre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Stevenson et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Délégation — Droit criminel – Loteries — Loteries interdites par le Code criminel sauf celles tenues conformément aux modalités d'une licence délivrée par le lieutenant-gouverneur en conseil d'une province — Les dispositions du Code relatives aux loteries constituent-elles une délégation irrégulière d'un pouvoir en matière de droit criminel? — Code criminel, L.R.C. (1985), ch. C-46, art. 207(1)b), (2), (3).

Droit constitutionnel — Législation déguisée — Droit criminel – Loteries — Loteries interdites par le Code criminel sauf celles tenues conformément aux modalités d'une licence délivrée par le lieutenant-gouverneur en conseil d'une province — Les dispositions du Code relatives aux loteries créent-elles un régime de réglementation discrétionnaire invalide? — Code criminel, L.R.C. (1985), ch. C-46, art. 207(1)b), (2), (3).

Droit constitutionnel — Charte des droits — Droit de ne pas être reconnu coupable si un acte ou une omission ne constitue pas une infraction en droit — Loteries interdites par le Code criminel sauf celles tenues conformément aux modalités d'une licence délivrée par le lieutenant-gouverneur en conseil d'une province — Moda-

lished in official gazette — Accused convicted of counselling conduct of lottery in manner not authorized by terms and conditions of licence — Whether non-publication of terms and conditions infringes s. 11(g) of the Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C., 1985, c. C-46, s. 207.

Criminal law — Lotteries — Criminal Code prohibiting lotteries except those conducted in accordance with terms and conditions of licence issued by Lieutenant Governor in Council of province — Accused convicted of counselling conduct of lottery in manner not authorized by terms and conditions of licence — Whether non-publication of terms and conditions of licence in official gazette bar to conviction — Criminal Code, R.S.C., 1985, c. C-46, s. 207 — Statutory Instruments Act, R.S.C., 1985, c. S-22, ss. 2(1), 11(2).

The appellants were charged with counselling bingo licensees to violate the terms and conditions of their licences, contrary to ss. 22 and 207(3) of the *Criminal Code*. The provincial terms and conditions for bingo lotteries are set out in provincial orders-in-council, regulations or directions which, while not published in the Canada or Ontario Gazettes, are provided to each licensee when the licence is issued. The appellants were acquitted in the Provincial Court on the ground that ss. 207(1)(*b*) and 207(2) of the *Code* were *ultra vires* Parliament as an improper delegation of criminal law. The impugned sections contemplate the development of a defined licensing lottery scheme with licences to be issued by or under the authority of the Lieutenant Governor in Council. That scheme may be established by provincial legislation. Ontario has no legislative lottery scheme. The summary conviction appeal court allowed the Crown's appeal, set aside the acquittals and ordered a new trial. The appellants' appeal to the Court of Appeal was dismissed. This appeal is to determine (1) whether ss. 207(1)(*b*), 207(2) or 207(3) of the *Code* are *ultra vires* Parliament as improper delegation to a provincial body of a matter within the exclusive competence of the federal government; (2) whether ss. 207(1)(*b*), 207(2) and 207(3) create a discretionary administrative regulatory regime to govern lotteries; and (3) whether the non-publication of the terms and conditions imposed under ss. 207(1)(*b*) and 207(2) infringes

lités de la licence non publiées dans la gazette officielle — Accusés reconnus coupables d'avoir conseillé de tenir une loterie d'une manière non permise par les modalités de la licence — La non-publication des modalités contrevient-elle à l'art. 11g) de la Charte canadienne des droits et libertés? — Code criminel, L.R.C. (1985), ch. C-46, art. 207.

Droit criminel — Loteries — Loteries interdites par le Code criminel sauf celles tenues conformément aux modalités d'une licence délivrée par le lieutenant-gouverneur en conseil d'une province — Accusés reconnus coupables d'avoir conseillé de tenir une loterie d'une manière non permise par les modalités de la licence — La non-publication des modalités dans la gazette officielle empêche-t-elle toute déclaration de culpabilité? — Code criminel, L.R.C. (1985), ch. C-46, art. 207 — Loi sur les textes réglementaires, L.R.C. (1985), ch. S-22, art. 2(1), 11(2).

Les appelants ont été accusés d'avoir conseillé à des titulaires de licences de bingo de ne pas respecter les conditions de leurs licences, contrairement à l'art. 22 et au par. 207(3) du *Code criminel*. Les conditions provinciales de ces jeux de bingo sont énoncées dans des décrets, directives ou règlements provinciaux et, bien qu'elles ne soient pas publiées dans la gazette officielle du Canada ou celle de l'Ontario, elles sont fournies à chaque titulaire au moment de la délivrance de la licence. Les appelants ont été acquittés en Cour provinciale pour le motif que l'al. 207(1)*b*) et le par. 207(2) du *Code* excédaient la compétence du Parlement étant donné que ces dispositions constituaient une délégation irrégulière de pouvoir en matière de droit criminel. Les dispositions contestées envisagent l'établissement d'un régime d'autorisation de loterie défini comportant des licences à délivrer par le lieutenant-gouverneur en conseil ou par la personne ou l'autorité qu'il désigne. Ce régime peut être établi au moyen d'une loi provinciale. L'Ontario n'a pas de régime législatif en matière de loteries. La cour d'appel des poursuites sommaires a accueilli l'appel interjeté par le ministère public, annulé les acquittements et ordonné la tenue d'un nouveau procès. L'appel interjeté par les appelants devant la Cour d'appel a été rejeté. Le présent pourvoi vise à déterminer (1) si l'al. 207(1)*b*) ou les par. 207(2) ou 207(3) du *Code* excèdent la compétence du Parlement à titre de délégation irrégulière à un organisme provincial d'une matière relevant de la compétence exclusive du gouvernement fédéral; (2) si l'al. 207(1)*b*) ou les par. 207(2) ou 207(3) créent un régime d'administration et de réglementation discrétionnaire applicable aux loteries; et (3) si la non-publication des modalités prescrites en vertu de l'al. 207(1)*b*) et du par. 207(2) porte atteinte aux droits

the rights guaranteed under s. 11(*g*) of the *Canadian Charter of Rights and Freedoms*.

Held: The appeal should be dismissed.

While Parliament cannot delegate its legislative authority to a provincial legislature, there is no prohibition against delegating such authority to any other body. Parliament may also incorporate provincial legislation by reference or limit the reach of its legislation by a condition, namely the existence of provincial legislation. That is not a delegation. In the exercise of its powers, Parliament is free to define the area in which it chooses to act and, in so doing, may leave other areas open to valid provincial legislation. If a province legislates in respect of an open area, it is not doing so as a delegate, but in the exercise of its powers under s. 92 of the *Constitution Act, 1867*. The regulation of gaming activities has a clear provincial aspect under s. 92 subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation.

The Lieutenant Governor in Council has capacity or status to receive a delegated power. He is not subject to any constitutional prohibition against the acceptance of delegated authority. While in some instances a delegation to the Lieutenant Governor would be tantamount to a delegation to a legislature, that question need not be resolved here because the essential elements of the federal lottery scheme are spelled out in the *Code* and the Lieutenant Governor only made administrative decisions relating to matters of essentially provincial concern. These decisions fall within the ambit of *Re Peralta and The Queen* (1985), 49 O.R. (2d) 705.

Sections 207(1)(*b*) and 207(2) of the *Code* do not fall within the constitutional prohibition of inter-delegation of legislative powers. Section 207(1)(*b*) does not impose any right or duty on a provincial legislature. It gives authority to the Lieutenant Governor in Council or a person or authority specified by him. Section 207(2) similarly does not impose any right or duty on a provincial legislature, with the exception of the last phrase, which provides that a licence issued by or under the authority of the Lieutenant Governor in Council may contain such relevant terms and conditions as "any law enacted by the legislature of that province may prescribe". This provision should not be read as a delegation of legislative authority by Parliament but as incorporating by reference provincial legislation authorizing the Lieutenant Governor in Council to issue licences

garantis à l'al. 11*g*) de la *Charte canadienne des droits et libertés*.

Arrêt: Le pourvoi est rejeté.

Bien que le Parlement ne puisse déléguer son pouvoir législatif à une législature provinciale, il n'est pas interdit de déléguer ce pouvoir à un autre organisme. Le Parlement peut également incorporer une loi provinciale par renvoi ou limiter la portée de sa loi au moyen d'une condition, à savoir l'existence d'une loi provinciale. Il n'y a pas là délégation. Dans l'exercice de ses pouvoirs, le Parlement est libre de définir le domaine dans lequel il choisit d'agir et, ce faisant, il peut permettre que d'autres aspects soient régis par une loi provinciale valide. Si une province légifère dans un domaine où elle est autorisée à le faire, elle le fait non pas à titre de délégataire, mais dans l'exercice des pouvoirs que lui confère l'art. 92 de la *Loi constitutionnelle de 1867*. La réglementation des activités de jeu a un aspect provincial manifeste en vertu de l'art. 92, sous réserve de la compétence prépondérante du Parlement en cas de conflit entre la loi fédérale et la loi provinciale.

Le lieutenant-gouverneur en conseil a la capacité ou le statut requis pour recevoir un pouvoir délégué. La Constitution ne lui interdit nullement d'accepter un pouvoir délégué. Bien que, dans certains cas, une délégation en faveur du lieutenant-gouverneur équivaille à une délégation en faveur d'une législature, il n'est pas nécessaire de résoudre cette question en l'espèce puisque les éléments essentiels du régime fédéral de loterie sont énoncés dans le *Code* et que le lieutenant-gouverneur n'a fait que prendre des décisions administratives concernant des matières d'intérêt essentiellement provincial. L'arrêt *Re Peralta and The Queen* (1985), 49 O.R. (2d) 705 s'applique à ces décisions.

L'alinéa 207(1)*b*) et le par. 207(2) du *Code* ne sont pas visés par l'interdiction faite par la Constitution de déléguer des pouvoirs législatifs. L'alinéa 207(1)*b*) ne confère aucun droit ni n'impose aucune obligation à une législature provinciale. Il confère un pouvoir au lieutenant-gouverneur en conseil ou encore à la personne ou à l'autorité que ce dernier désigne. De même, le par. 207(2) ne confère aucun droit ni n'impose aucune obligation à une législature provinciale, sauf la partie qui prévoit qu'une licence délivrée par le lieutenant-gouverneur en conseil ou par la personne ou l'autorité qu'il désigne peut être assortie des conditions pertinentes qu'«une loi provinciale peut fixer». Cette disposition doit s'interpréter non pas comme une délégation d'un pouvoir législatif par le Parlement, mais comme incorporant par renvoi une loi provinciale qui autorise le

containing relevant terms and conditions or as excluding from the reach of the criminal law prohibition lotteries licensed under provincial law so long as that licensing is by or under the authority of the Lieutenant Governor in Council.

Sections 207(1)(*b*), 207(2) and 207(3) do not create a discretionary administrative regulatory regime to govern lotteries. Parliament did not attempt to use its criminal law power as a colourable means of regulating matters within provincial jurisdiction. The decriminalization of lotteries licensed under prescribed conditions constitutes a definition of the crime, defining the reach of the offence. This is a constitutionally permissive exercise of the criminal law power, reducing the area subject to criminal law prohibition where certain conditions exist.

The non-publication of the terms and conditions of the lottery licences did not infringe s. 11(*g*) of the *Charter*. The section is directed toward the need that impugned conduct be criminal at the time of its commission and has nothing to do with the question of how the law is to be made known. However, assuming that s. 11(*g*) embraces some concept of availability, the most that can be said is that the law should be ascertainable by those affected by it. Since the terms and conditions are furnished to every licensee, this requirement has been met.

The non-publication of the terms and conditions under which the licences were issued is not a bar to a conviction. While there is an order-in-council, not published as a statutory instrument, setting out some terms and conditions, the offence charged relates to the terms and conditions of specified licences and involves an allegation that those terms and conditions are an express provision of the licences, a matter to be proven, rather than an allegation that the terms and conditions are imposed by law. The terms and conditions of individual licences are not within the definition of "statutory instruments" in the federal *Statutory Instruments Act*.

Cases Cited

Applied: *Re Peralta and The Queen* (1985), 49 O.R. (2d) 705 (C.A.), aff'd [1988] 2 S.C.R. 1045; *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569; **distinguished:** *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31; *Johnson*

lieutenant-gouverneur en conseil à délivrer des licences contenant des conditions pertinentes ou qui soustrait à l'interdiction faite par le droit criminel les loteries autorisées en vertu d'une loi provinciale pourvu que les licences les autorisant soient délivrées par le lieutenant-gouverneur en conseil ou par la personne ou l'autorité qu'il désigne.

L'alinéa 207(1)*b*) et les par. 207(2) et 207(3) ne créent pas un régime d'administration et de réglementation discrétionnaire applicable aux loteries. Le Parlement n'a pas tenté de se servir de son pouvoir en matière de droit criminel comme moyen déguisé de réglementer des matières relevant de la compétence des provinces. La décriminalisation des loteries exploitées en vertu de licences assorties de certaines conditions précises constitue une définition de l'acte criminel, qui fixe la portée de l'infraction. C'est un exercice constitutionnellement acceptable du pouvoir en matière de droit criminel, qui réduit le champ de l'interdiction du droit criminel lorsqu'il existe certaines conditions.

La non-publication des modalités des licences de loterie ne contrevient pas à l'al. 11*g*) de la *Charte*. Cet alinéa exige que la conduite reprochée soit de nature criminelle au moment où elle est adoptée et il n'a rien à voir avec la question de savoir comment la loi doit être publicisée. Toutefois, en admettant que l'al. 11*g*) comprend une certaine notion d'accessibilité, la loi doit pouvoir, tout au plus, être vérifiée par ceux qu'elle touche. Vu que les conditions sont fournies à chaque titulaire d'une licence, il a été satisfait à cette exigence.

La publication des conditions auxquelles les licences ont été délivrées n'est pas essentielle à toute culpabilité. Bien qu'il y ait un décret, non publié en tant que texte réglementaire, qui énonce certaines conditions, l'infraction reprochée a trait aux conditions de licences spécifiées et comporte une allégation que ces conditions constituent une disposition expresse des licences, ce qui est matière de preuve, plutôt qu'une allégation que les conditions sont prescrites par la loi. Les conditions des licences particulières ne sont pas visées par la définition de «textes réglementaires» contenue dans la *Loi sur les textes réglementaires* fédérale.

Jurisprudence

Arrêts appliqués: *Re Peralta and The Queen* (1985), 49 O.R. (2d) 705 (C.A.), conf. [1988] 2 R.C.S. 1045; *Coughlin v. Ontario Highway Transport Board*, [1968] R.C.S. 569; **distinction d'avec les arrêts:** *Attorney General of Nova Scotia v. Attorney General of Canada*,

v. Attorney General of Alberta, [1954] S.C.R. 127; **referred to:** *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497; *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384; *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1; *R. v. Wilson* (1980), 119 D.L.R. (3d) 558; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328; *Re Board of Commerce Act*, [1922] 1 A.C. 191; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(*g*), 15.
Constitution Act, 1867, ss. 92(7), (9), (13).
Criminal Code, R.S.C. 1970, c. C-34, ss. 22 [rep. & sub. 1985, c. 19, s. 7], 190 [am. 1974-75-76, c. 93, s. 12; am. 1985, c. 19, s. 31; rep. & sub. *idem*, c. 52, s. 3].
Criminal Code, R.S.C., 1985, c. C-46, s. 207 [am. c. 27 (1st Supp.), s. 31; rep. & sub. c. 52 (1st Supp.), s. 3].
Statutory Instruments Act, R.S.C., 1985, c. S-22, ss. 2(1) "regulation", 11(2).

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Dreidger, Elmer A. "The Interaction of Federal and Provincial Laws" (1976), 54 *Can. Bar Rev.* 695.

APPEAL from a judgment of the Ontario Court of Appeal (1989), 52 C.C.C. (3d) 467, 73 C.R. (3d) 242, affirming the judgment of a summary conviction appeal court (1988), 44 C.C.C. (3d) 261, 66 C.R. (3d) 121, ordering a new trial on charges of counselling the conduct of a lottery in a manner not authorized by s. 190 of the *Criminal Code*. Appeal dismissed.

Peter E. Harvey, *Trevor Whiffen* and *John O'Kane*, for the appellants.

Scott C. Hutchison, for the respondent.

[1951] R.C.S. 31; *Johnson v. Attorney General of Alberta*, [1954] R.C.S. 127; **arrêts mentionnés:** *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] R.C.S. 497; *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384; *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] R.C.S. 1; *R. v. Wilson* (1980), 119 D.L.R. (3d) 558; *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616; *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328; *Re Board of Commerce Act*, [1922] 1 A.C. 191; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *R. c. Turpin*, [1989] 1 R.C.S. 1296; *Renvoi relatif à la Workers' Compensation Act, 1983 (T.-N.)*, [1989] 1 R.C.S. 922.

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Charte canadienne des droits et libertés, art. 1, 7, 11*g*), 15.
Code criminel, S.R.C. 1970, ch. C-34, art. 22 [abr. & rempl. 1985, ch. 19, art. 7], 190 [mod. 1974-75-76, ch. 93, art. 12; mod. 1985, ch. 19, art. 31; abr. & rempl. *idem*, ch. 52, art. 3].
Code criminel, L.R.C. (1985), ch. C-46, art. 207 [mod. ch. 27 (1er suppl.), art. 31; abr. & rempl. ch. 52 (1er suppl.), art. 3].
Loi constitutionnelle de 1867, art. 92(7), (9), (13).
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Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswell, 1985.
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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1989), 52 C.C.C. (3d) 467, 73 C.R. (3d) 242, qui a confirmé la décision d'une cour d'appel des poursuites sommaires (1988), 44 C.C.C. (3d) 261, 66 C.R. (3d) 121, qui avait ordonné la tenue d'un nouveau procès relativement à des accusations d'avoir conseillé de tenir une loterie d'une manière non permise par l'art. 190 du *Code criminel*. Pourvoi rejeté.

Peter E. Harvey, *Trevor Whiffen* et *John O'Kane*, pour les appelants.

Scott C. Hutchison, pour l'intimée.

I. G. Whitehall, Q.C., and *Kimberly Prost*, for the intervener the Attorney General of Canada.

Gilles Laporte and *Monique Rousseau*, for the intervener the Attorney General of Quebec.

Peter V. Teasdale, for the intervener the Attorney General for Alberta.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

B. Gale Welsh, for the intervener the Attorney General of Newfoundland.

The judgment of the Court was delivered by

STEVENSON J.—The appellants appeal, by leave of this Court, a decision of the Ontario Court of Appeal, affirming the decision of a summary conviction appeal court directing a new trial on charges that the appellants counselled the violation of terms and conditions of licences relating to bingo lotteries.

The issues before us relate to the constitutionality of the provisions of the *Criminal Code* permitting certain licensed gambling and whether the non-publication of the conditions under which the licences were issued is a bar to conviction.

Facts

The appellants were charged in an information that, on five occasions, they counselled licensees of bingo lottery schemes to violate the terms and conditions of their licences relating to bingo lotteries, contrary to s. 190(3) of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 207(3)). In particular, they were accused of counselling the breaking of the so-called 15%-20% rule (a maximum of 15% of the revenues can go to management costs and a minimum of 20% of the revenues must go to the charity). The terms and conditions for such lotteries are set out in Order-in-Council 2797/82 and other rules, regulations and

I. G. Whitehall, c.r., et *Kimberly Prost*, pour l'intervenant le procureur général du Canada.

Gilles Laporte et *Monique Rousseau*, pour l'intervenant le procureur général du Québec.

Peter V. Teasdale, pour l'intervenant le procureur général de l'Alberta.

P. Mitch McAdam, pour l'intervenant le procureur général de la Saskatchewan.

B. Gale Welsh, pour l'intervenant le procureur général de Terre-Neuve.

Version française du jugement de la Cour rendu par

LE JUGE STEVENSON — Les appelants se pourvoient, avec l'autorisation de notre Cour, contre un arrêt de la Cour d'appel de l'Ontario qui a confirmé la décision d'une cour d'appel des poursuites sommaires d'ordonner la tenue d'un nouveau procès relativement à des accusations selon lesquelles les appelants auraient conseillé à d'autres personnes de ne pas respecter les conditions de licences relatives au jeu de bingo.

Les points en litige devant nous ont trait à la constitutionnalité des dispositions du *Code criminel* autorisant certains jeux en vertu d'une licence et à la question de savoir si la publication des conditions auxquelles les licences ont été délivrées est essentielle à toute culpabilité.

Les faits

Les appelants ont été accusés, selon une dénonciation, d'avoir conseillé, à cinq reprises, à des titulaires de licences de bingo de ne pas respecter les conditions de leurs licences relatives au jeu de bingo, contrairement au par. 190(3) du *Code criminel*, S.R.C. 1970, ch. C-34 (maintenant le par. 207(3)). Ils ont été accusés tout particulièrement d'avoir conseillé d'enfreindre la règle dite des 15 et 20 pour 100 (attribution d'un maximum de 15 pour 100 des revenus aux frais de gestion et d'un minimum de 20 pour 100 de ces mêmes revenus aux œuvres de charité). Les conditions de ces loteries sont énoncées dans le décret

directions issued by the Ministry of Consumer and Commercial Relations of Ontario. The allegation was that the substantive offence of breaching the terms and conditions of the licences was an offence under s. 190(3) of the *Code* and that, therefore, s. 22 applied (counselling an offence).

The appellants challenged the provisions of ss. 190(1)(*b*) and 190(2) (now ss. 207(1)(*b*) and 207(2)). They submitted that Parliament exceeded its powers of delegation in permitting exemptions from criminality for charitable or religious organizations operating a lottery pursuant to a licence issued by the Lieutenant Governor in Council of a province. They further argued that, even if there were a proper delegation of power to the provincial authority, Order-in-Council 2797/82 was not passed in accordance with provincial legislation and that the order, together with the other rules and directions, were not published and, therefore, did not create an offence known to law. Finally, they contended that the legislative scheme set out in ss. 190(1)(*b*) and 190(2) violated s. 15 of the *Canadian Charter of Rights and Freedoms* by reason of the unequal effect of those provisions throughout the country. The trial judge, finding that the provisions of the *Code* purporting to delegate power to the Lieutenant Governor in Council were *ultra vires* Parliament as an improper delegation of criminal law, dismissed the charges against the appellants.

The Crown appealed the summary conviction acquittals to the Supreme Court of Ontario (Weekly Court). Campbell J., allowing the appeal, set aside the acquittals and ordered a new trial for the appellants: (1988), 44 C.C.C. (3d) 261, 66 C.R. (3d) 121.

The appellants' appeal to the Court of Appeal for Ontario was dismissed: (1989), 52 C.C.C. (3d) 467, 73 C.R. (3d) 242.

nº 2797/82 et d'autres règles, directives et règlements établis par le ministère de la Consommation et du Commerce de l'Ontario. On a allégué que l'infraction matérielle du non-respect des conditions des licences était une infraction visée au par. 190(3) du *Code* et que, par conséquent, l'art. 22 s'appliquait (conseiller à une autre personne de commettre une infraction).

Les appelants ont contesté les dispositions de l'al. 190(1)*b*) et du par. 190(2) (maintenant l'al. 207(1)*b*) et le par. 207(2)). Ils ont soutenu que le Parlement outrepassait son pouvoir de délégation en autorisant des exemptions de l'application du droit criminel dans le cas des organismes de charité ou des organismes religieux qui exploitent une loterie conformément à une licence délivrée par le lieutenant-gouverneur en conseil d'une province. Ils ont en outre fait valoir que, même s'il y avait une délégation régulière de pouvoir aux autorités provinciales, le décret 2797/82 n'a pas été adopté conformément à la loi provinciale et que le décret ainsi que les autres règles et directives ne créent pas d'infraction reconnue en droit du fait qu'ils n'ont pas été publiés. Ils ont enfin prétendu que le régime législatif énoncé à l'al. 190(1)*b*) et au par. 190(2) violait l'art. 15 de la *Charte canadienne des droits et libertés* pour le motif que ces dispositions n'avaient pas le même effet partout au Canada. Après avoir conclu que les dispositions du *Code* censées déléguer un pouvoir au lieutenant-gouverneur en conseil excédaient la compétence du Parlement parce qu'elles constituaient une délégation irrégulière de pouvoir en matière de droit criminel, le juge du procès a rejeté les accusations portées contre les appelants.

Le ministère public a interjeté appel devant la Cour suprême de l'Ontario (cour des sessions hebdomadaires) contre les acquittements prononcés à l'égard des poursuites sommaires. Le juge Campbell, qui a accueilli l'appel, a annulé les acquittements et ordonné la tenue d'un nouveau procès pour les appelants: (1988), 44 C.C.C. (3d) 261, 66 C.R. (3d) 121.

L'appel interjeté par les appelants devant la Cour d'appel de l'Ontario a été rejeté: (1989), 52 C.C.C. (3d) 467, 73 C.R. (3d) 242.

Judgments

Provincial Court of Ontario

The trial judge observed that:

The problem of inter-delegation in the case at bar has to do with a direct delegation of what the provincial prosecutor argues are administrative powers only, that is a delegation from the Criminal Code which is strictly within the competence of Parliament to an administrative body totally under the control of the Provincial cabinet. The defence argues that this is an indirect conferring of legislative power to the Province in the absence of any provincial legislation.

Noting that criminal law must be construed strictly, he queried whether a breach of one of the regulations or directives of the Provincial Lotteries Branch constituted an offence to bring into play the full force of the criminal law. He stated that:

One must assume that the reason for non-publication [of the order, regulations and directives] was the perception by the Provincial Government that the Order-in-Council and other policy directives were simply administrative, which of course is the Crown's position. This places the Province in a dilemma. The sanctions are strictly under the Criminal Code, yet it is sought to impose criminal sanctions pursuant to a perceived administrative act of a provincial authority.

I must come to the conclusion that the Order-in-Council and other directives of the Provincial authority under which the present charges are laid are in essence legislative in that they purport to create offences punishable under the Criminal Code and as such are not offences known to law.

With some reluctance, I must find that the provisions of Section 190(1)(b) and 190(2) of the Criminal Code purporting to delegate power to the Lieutenant Governor in Council of a province with respect to the conduct and management of lotteries as therein set out are ultra vires Parliament as an improper delegation of criminal law.

Les jugements

La Cour provinciale de l'Ontario

Le juge du procès a fait remarquer que:

[TRADUCTION] Le problème de délégation en l'espèce a trait à une délégation directe de ce qui, selon le procureur provincial, constitue des pouvoirs administratifs seulement, c'est-à-dire une délégation à partir du Code criminel qui relève strictement de la compétence du Parlement à un organisme administratif qui relève entièrement du cabinet provincial. La défense soutient que cela a pour effet de conférer indirectement un pouvoir législatif à la province en l'absence de toute loi provinciale.

Constatant que le droit criminel doit être interprété de façon stricte, il s'est demandé si le manquement à l'un des règlements ou directives de la Direction générale des loteries provinciales constituait une infraction donnant lieu à pleine application du droit criminel. Il a déclaré que:

[TRADUCTION] Il faut présumer que la non-publication [du décret, du règlement et des directives] s'expliquait par le fait que le gouvernement provincial considérait que le décret et les autres directives étaient de nature purement administrative, ce qui naturellement est la thèse du ministère public. Cela place la province dans un dilemme. Les peines sont formellement prescrites par le Code criminel, et pourtant on tente de faire infliger des peines criminelles en vertu de ce qui est perçu comme un acte administratif de la part d'autorités provinciales.

Je dois en arriver à la conclusion que le décret et les autres directives des autorités provinciales en vertu desquels les présentes accusations ont été portées sont des mesures essentiellement législatives en ce qu'elles sont censées créer des infractions punissables en vertu du Code criminel et ne constituent pas, comme telles, des infractions reconnues en droit.

Je dois conclure, avec un certain regret, que les dispositions de l'alinéa 190(1)b) et du paragraphe 190(2) du Code criminel qui sont censées déléguer un pouvoir au lieutenant-gouverneur en conseil d'une province relativement à la mise sur pied et à l'exploitation de loteries, de la manière qui y est prévue, excèdent la compétence du Parlement pour le motif qu'elles constituent une délégation irrégulière de pouvoir en matière de droit criminel.

The trial judge found it unnecessary to deal with the argument under s. 15 of the *Charter*.

Supreme Court of Ontario (Weekly Court)

The summary conviction appeal judge noted that the charge against the appellants was not that they had violated the conditions of a licence but rather that they had counselled a lottery which was not authorized by or pursuant to s. 190 of the *Criminal Code*.

The summary conviction appeal judge observed that the Ontario Court of Appeal in *Re Peralta and The Queen* (1985), 49 O.R. (2d) 705, upheld the delegation in the federal Fisheries Regulations of the power to a provincial minister to issue fishing licences and to impose terms and conditions. In that case, the Court held that the effect of the federal regulations was to set general policy and that, in setting individual fishing quotas within those policy guidelines, the provincial minister was acting in a manner consistent with the regulations. In the opinion of Campbell J., that is exactly what was done in the present case. In decriminalizing and, in fact legalizing, certain forms of gambling in s. 190, Parliament was creating a regulated industry. It set the general guidelines for the regulated industry and left it to the provinces to provide the details of the scheme of regulation. The trial judge, in his view, erred in law in distinguishing *Re Peralta*. *Re Peralta* was affirmed by this Court, [1988] 2 S.C.R. 1045 (*sub nom. Peralta v. Ontario*), "substantially for the reasons given by MacKinnon A.C.J.O.".

Campbell J. did not agree with the appellants' contention that the charges did not disclose an offence known to law. He observed that neither the order-in-council nor the terms and conditions of the licence are regulations or statutory instruments and that there is no requirement that they be "gazetted". In his view, s. 11(*g*) of the *Charter* has nothing to do with publication of laws or statutory instruments. It provides that no one should be convicted of an offence unless

Le juge du procès a estimé qu'il n'était pas nécessaire d'examiner l'argument fondé sur l'art. 15 de la *Charte*.

La Cour suprême de l'Ontario (cour des sessions hebdomadaires)

Le juge d'appel des poursuites sommaires a souligné que les appelants étaient accusés non pas d'avoir violé les conditions d'une licence, mais plutôt d'avoir conseillé de tenir une loterie qui n'était pas autorisée par l'art. 190 du *Code criminel* ou conformément à cet article.

Le juge d'appel des poursuites sommaires a fait remarquer que, dans *Re Peralta and The Queen* (1985), 49 O.R. (2d) 705, la Cour d'appel de l'Ontario a maintenu la délégation, prévue en faveur du ministre d'une province dans le règlement fédéral sur les pêcheries, du pouvoir de délivrer des licences de pêche et de les assortir de conditions. Dans cette affaire, la cour a statué que le règlement fédéral avait pour effet d'établir une politique générale et qu'en fixant des limites de prises par personne dans le cadre de ces lignes directrices, le ministre provincial agissait d'une manière compatible avec le règlement. De l'avis du juge Campbell, c'est exactement ce qui s'est produit en l'espèce. En décriminalisant et, de fait en légalisant, certaines formes de jeu à l'art. 190, le Parlement a créé une industrie réglementée. Il a établi des lignes directrices générales relativement à l'industrie réglementée et a laissé aux provinces le soin de prescrire les détails du régime de réglementation. Le juge du procès, à son avis, a commis une erreur de droit en faisant une distinction d'avec l'arrêt *Re Peralta*. Ce dernier arrêt a été confirmé par notre Cour, [1988] 2 R.C.S. 1045 (*sub. nom. Peralta c. Ontario*), «essentiellement pour les motifs donnés par le juge en chef adjoint de l'Ontario MacKinnon».

Le juge Campbell n'a pas accepté l'argument des appelants selon lequel les accusations portées ne révélaient pas l'existence d'une infraction reconnue en droit. Il a fait remarquer que ni le décret ni les conditions de la licence ne constituent des règlements ou des textes réglementaires et qu'il n'est pas nécessaire qu'ils soient «publiés dans le journal officiel». Selon lui, l'al. 11*g*) de la *Charte* n'a rien à voir avec la publication des lois ou des textes réglementaires. Il

the law is actually in force at the time of the offence but does not speak of the manner in which the law is to be made known. He added that, if there is a constitutional requirement in s. 11(*g*) or s. 7 that the content of criminal sanctions should be accessible to the general public, the requirement has been met as the licensing conditions are provided to each licensee when the licence is issued.

In the opinion of the summary appeal judge, the impugned provisions do not offend s. 15 of the *Charter*.

Court of Appeal

The Court of Appeal was of the view that the essential elements of the offence are found not in the terms and conditions of the licences but, rather, in the wording of s. 207(3) of the *Criminal Code*, R.S.C., 1985, c. C-46 (formerly s. 190(3)). In other words, it was incumbent upon the Crown to establish that the appellants counselled the licensees, for the purpose of a lottery scheme, to do something not authorized by a provision of s. 207 in connection with the conduct, management or operation of the lottery scheme.

The Court of Appeal rejected the argument that s. 207 and the scheme created by it are unconstitutional because they contravene the equality provisions of s. 15 of the *Charter*. In its opinion, the authoritative analyses of the Supreme Court of Canada in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, *R. v. Turpin*, [1989] 1 S.C.R. 1296, and *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922, have made it clear that no equality rights of the appellants have been infringed in the present case and that s. 15 of the *Charter* therefore has no application.

The Court of Appeal was not persuaded that s. 207 of the *Code* and the scheme created by it amount to a delegation by Parliament of the exercise of the criminal law power to provincial authorities. It agreed with the summary appeal judge that the trial judge erred in distinguishing *Re Peralta* and that the reasoning of

prévoit que nul ne devrait être déclaré coupable d'une infraction à moins que la loi ne soit vraiment en vigueur au moment de la perpétration de l'infraction, mais il ne mentionne pas comment la loi doit être publicisée. Il a ajouté que, si l'al. 11*g*) ou l'art. 7 contient une obligation constitutionnelle de rendre accessible au grand public la teneur des peines criminelles, on a satisfait à cette obligation car les conditions d'autorisation sont fournies à chaque titulaire au moment de la délivrance de la licence.

D'après le juge d'appel des poursuites sommaires, les dispositions contestées ne vont pas à l'encontre de l'art. 15 de la *Charte*.

La Cour d'appel

La Cour d'appel était d'avis que les éléments essentiels de l'infraction ne se trouvent pas dans les conditions des licences mais plutôt dans le texte du par. 207(3) du *Code criminel*, L.R.C. (1985), ch. C-46 (auparavant le par. 190(3)). En d'autres mots, il incombait au ministère public de prouver que les appelants ont conseillé aux titulaires des licences, aux fins d'une loterie, de faire quelque chose qui n'était pas permis par une disposition de l'art. 207 relativement à la mise sur pied, à la gestion ou à l'exploitation de cette loterie.

La Cour d'appel a rejeté l'argument selon lequel l'art. 207 et le régime créé par celui-ci sont inconstitutionnels pour le motif qu'ils vont à l'encontre des dispositions de l'art. 15 de la *Charte* relatives à l'égalité. À son avis, les analyses faisant autorité auxquelles s'est livrée la Cour suprême du Canada dans les arrêts *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, *R. c. Turpin*, [1989] 1 R.C.S. 1296, et *Renvoi relatif à la Workers' Compensation Act, 1983 (T.-N.)*, [1989] 1 R.C.S. 922, ont fait ressortir clairement qu'il n'y a pas eu violation des droits à l'égalité des appelants en l'espèce et que l'art. 15 de la *Charte* ne s'applique donc pas.

La Cour d'appel n'était pas convaincue que l'art. 207 du *Code* et le régime créé par celui-ci équivalent à une délégation du Parlement aux autorités provinciales de l'exercice de son pouvoir en matière de droit criminel. Elle était d'accord avec le juge d'appel des poursuites sommaires pour dire que le

the Court of Appeal in that case dictated the result in the present case.

The court rejected, as well, the appellants' submission that the information disclosed no offence known to law. That argument depended upon their submission that the terms and conditions of the bingo licences are the essential elements of the substantive offence, a submission which was rejected by the court. In the court's view, it was impossible to obtain a bingo licence without becoming aware of its terms and conditions.

Relevant Legislation Provisions

Canadian Charter of Rights and Freedoms

11. Any person charged with an offence has the right

. . .

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

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

207. (1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

. . .

(*b*) for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose;

. . .

(2) Subject to this Act, a licence issued by or under the authority of the Lieutenant Governor in Council of a province as described in paragraph (1)(*b*), (*c*), (*d*) or (*f*) may contain such terms and conditions relating to the

juge du procès a commis une erreur en faisant une distinction d'avec la décision *Re Peralta* et que le raisonnement suivi par la Cour d'appel dans cette affaire dictait l'issue de la présente affaire.

La cour a rejeté également la prétention des appelants selon laquelle la dénonciation ne révélait aucune infraction reconnue en droit. Cet argument reposait sur leur prétention que les conditions des licences de bingo sont les éléments essentiels de l'infraction matérielle, laquelle prétention a été rejetée par la cour. D'après la cour, il était impossible d'obtenir une licence de bingo sans être mis au courant de ses conditions.

Les dispositions législatives pertinentes

Charte canadienne des droits et libertés

11. Tout inculpé a le droit:

. . .

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

Code criminel, L.R.C. (1985), ch. C-46

207. (1) Par dérogation aux autres dispositions de la présente partie en matière de jeux et de paris, les règles qui suivent s'appliquent aux personnes et organismes mentionnés ci-après:

. . .

b) un organisme de charité ou un organisme religieux peut, en vertu d'une licence délivrée par le lieutenant-gouverneur en conseil d'une province ou par la personne ou l'autorité qu'il désigne, mettre sur pied et exploiter une loterie dans la province si le produit de la loterie est utilisé à des fins charitables ou religieuses;

. . .

(2) Sous réserve des autres dispositions de la présente loi, une licence délivrée en vertu de l'un des alinéas (1)*b*), *c*), *d*) ou *f*) par le lieutenant-gouverneur en conseil d'une province ou par la personne ou l'autorité

conduct, management and operation of or participation in the lottery scheme to which the licence relates as the Lieutenant Governor in Council of that province, the person or authority in the province designated by the Lieutenant Governor in Council thereof or any law enacted by the legislature of that province may prescribe.

(3) Every one who, for the purposes of a lottery scheme, does anything that is not authorized by or pursuant to a provision of this section

(*a*) in the case of the conduct, management or operation of that lottery scheme,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, or

(ii) is guilty of an offence punishable on summary conviction; or

(*b*) in the case of participating in that lottery scheme, is guilty of an offence punishable on summary conviction.

Issues

The following constitutional questions were stated by Lamer C.J. on September 17, 1990:

1. Do sections 207(1)(*b*), 207(2) and 207(3) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, create a discretionary administrative regulatory regime to govern lotteries, and if so, is it thereby *ultra vires* Parliament?

2. Are sections 207(1)(*b*), 207(2) or 207(3) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, or any combination thereof, *ultra vires* Parliament as improper delegation to a provincial body of a matter within the exclusive competence of the Federal Government?

3. Does the non-publication of the terms and conditions imposed under ss. 207(1)(*b*) and 207(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, infringe or deny the rights guaranteed under ss. 7 or 11(*g*) of the *Canadian Charter of Rights and Freedoms*? If so, is such non-publication a reasonable limit prescribed by law demonstrably justified in a free and democratic society and thereby saved by s. 1 of the *Canadian Charter of Rights and Freedoms*?

qu'il désigne peut être assortie des conditions que celui-ci, la personne ou l'autorité en question ou une loi provinciale peut fixer à l'égard de la mise sur pied, de l'exploitation ou de la gestion de la loterie autorisée par la licence ou à l'égard de la participation à celle-ci.

(3) Quiconque, dans le cadre d'une loterie, commet un acte non autorisé par une autre disposition du présent article ou en vertu de celle-ci est coupable:

a) dans le cas de la mise sur pied, de l'exploitation ou de la gestion de cette loterie:

(i) soit d'un acte criminel et est passible d'un emprisonnement maximal de deux ans,

(ii) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire;

b) dans le cas de la participation à cette loterie, d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Les questions en litige

Les questions constitutionnelles suivantes ont été formulées par le juge en chef Lamer le 17 septembre 1990:

1. L'alinéa 207(1)*b*) et les par. 207(2) et (3) du *Code criminel* du Canada, L.R.C. (1985), ch. C-46, créent-ils un régime d'administration et de réglementation discrétionnaire applicable aux loteries et, dans l'affirmative, excèdent-ils la compétence du Parlement?

2. L'alinéa 207(1)*b*) ou les par. 207(2) ou (3) du *Code criminel* du Canada, L.R.C. (1985), ch. C-46, ou toute combinaison de ces dispositions, excèdent-ils la compétence du Parlement à titre de délégation irrégulière à un organisme provincial d'une matière relevant de la compétence exclusive du gouvernement fédéral?

3. La non-publication des modalités prescrites en vertu de l'al. 207(1)*b*) et du par. 207(2) du *Code criminel* du Canada, L.R.C. (1985), ch. C-46, porte-t-elle atteinte aux droits garantis à l'art. 7 ou à l'al. 11*g*) de la *Charte canadienne des droits et libertés*? Dans l'affirmative, pareille non-publication est-elle une limite raisonnable, prescrite par une règle de droit, dont la justification peut se démontrer dans le cadre d'une société libre et démocratique et qui est, de ce fait, sauvegardée par l'article premier de la *Charte canadienne des droits et libertés*?

Discussion

The appellants were acquitted at trial as a result of their seeking and obtaining, on an agreed statement of facts, a determination that there was an *ultra vires* delegation of criminal law. As there is a direction that there be a new trial, which I conclude should be affirmed, it is necessary to restrict the discussion to the issues before us as some questions touched upon in argument may properly have to be canvassed at that new trial.

I begin by addressing the second constitutional question as it was that which appears to found the trial judgment. Does the *Code* invalidly delegate to the province the authority to make criminal law?

The sections under consideration contemplate the development of a defined licensing scheme with licences to be issued by or under the authority of the Lieutenant Governor in Council. That scheme may be established by provincial legislation, but nothing in the sections requires the existence of provincial legislation. If there is provincial legislation then, as I shall explain, there may be no question of delegation. If, however, there is no provincial legislation, provincial authorities may be said to be exercising a delegated power in defining the circumstances giving rise to an exemption from the reach of the criminal law. The Ontario Court of Appeal characterized any delegation as a delegation of administrative powers.

All parties agree that the prohibition of gaming is an exercise of the criminal law power.

The leading authority on what is best described as prohibited inter-delegation is *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31. It establishes that Parliament cannot delegate its legislative authority to a provincial legislature. We must, then, ask whether the impugned provisions of the *Code* delegate legislative authority over

Analyse

Les appelants ont été acquittés à leur procès après avoir demandé et obtenu, sur production d'un exposé conjoint des faits, un jugement selon lequel il y a eu une délégation inconstitutionnelle de pouvoir en matière de droit criminel. Comme il existe une ordonnance enjoignant de tenir un nouveau procès, laquelle, selon moi, devrait être confirmée, il faut limiter l'examen aux questions dont nous sommes saisis, car certaines questions soulevées au cours des plaidoiries peuvent, à juste titre, faire l'objet de débat dans le cadre de ce nouveau procès.

J'aborderai d'abord la deuxième question constitutionnelle, puisque c'est sur elle que paraît reposer le jugement du procès. Est-ce que le *Code* délègue irrégulièrement à la province le pouvoir de légiférer en matière criminelle?

Les dispositions en cause envisagent l'établissement d'un régime d'autorisation défini comportant des licences à délivrer par le lieutenant-gouverneur en conseil ou par la personne ou l'autorité qu'il désigne. Ce régime peut être établi au moyen d'une loi provinciale, mais rien dans les dispositions en cause n'exige l'existence d'une telle loi provinciale. S'il existe une loi provinciale, il ne peut, comme je vais l'expliquer, être question de délégation. Si, cependant, il n'y a pas de loi provinciale, on peut dire que les autorités provinciales exercent un pouvoir délégué en définissant les circonstances qui donnent naissance à une exemption de l'application du droit criminel. La Cour d'appel de l'Ontario a qualifié toute délégation de délégation de pouvoirs administratifs.

Toutes les parties sont d'accord pour dire que l'interdiction du jeu constitue un exercice de pouvoir en matière de droit criminel.

L'arrêt de principe visant ce qu'on qualifie de délégation interdite est *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] R.C.S. 31. On y statue que le Parlement ne peut déléguer son pouvoir législatif à une législature provinciale. Nous devons alors nous demander si les dispositions contestées du *Code* délèguent à la législature provinciale

some aspect of the criminal law to the provincial legislature.

On the other hand, if what Parliament does is not characterized as a delegation of a legislative power to a provincial legislature, this authority does not govern.

The issue may be described as one of characterization. The trial judge described the provincial order-in-council and directives governing licensing as actions of "the Provincial authority", and "in essence legislative". The Ontario Court of Appeal characterized it as an administrative delegation. In my view no matter how characterized the scheme is constitutionally unimpeachable.

In *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, this Court recognized that Parliament may incorporate by reference provincial legislation as it may from time to time exist. That is not a delegation. There, federal legislation gave the provincial transport board authority to license extra-provincial undertakings upon like terms and conditions as if the undertaking were a local one within the province. Cartwright J., for the majority, upholding the legislation said, at p. 575:

> . . . there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist. . . .

Thus, in the exercise of its powers generally, and the criminal law specifically, Parliament is free to define the area in which it chooses to act and, in so doing, may leave other areas open to valid provincial legislation.

If a province legislates in respect of an open area, it is not doing so as a delegate, but in the exercise of its powers under s. 92 of the *Constitution Act, 1867*. That proposition is discussed in the context of the exercise of the criminal law power in *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497. There the federal

un pouvoir législatif sur un aspect quelconque du droit criminel.

Par ailleurs, si ce que fait le Parlement n'est pas considéré comme une délégation d'un pouvoir législatif à une législature provinciale, cet arrêt ne s'applique pas.

La question en litige peut être décrite comme une question de qualification. Le juge du procès a décrit le décret provincial ainsi que les directives régissant la délivrance de licences comme étant des actes des [TRADUCTION] «autorités provinciales» qui sont «essentiellement législati[fs]». La Cour d'appel de l'Ontario l'a qualifié de délégation administrative. À mon avis, peu importe comment on le qualifie, le régime est inattaquable sur le plan constitutionnel.

Dans l'arrêt *Coughlin v. Ontario Highway Transport Board*, [1968] R.C.S. 569, notre Cour a reconnu que le Parlement peut incorporer par renvoi une loi provinciale selon qu'elle est en vigueur en aucun temps. Il n'y a pas là délégation. Dans cette affaire, la loi fédérale donnait à la commission des transports d'une province le pouvoir de délivrer des licences à des entreprises extra-provinciales aux mêmes conditions que s'il s'agissait d'une entreprise locale située à l'intérieur de la province. Le juge Cartwright a, au nom de la majorité, reconnu la validité de cette loi, affirmant à la p. 575:

> [TRADUCTION] . . . le Parlement n'a délégué aucun pouvoir de faire des lois; il s'est contenté d'adopter, en exerçant son pouvoir exclusif, la législation d'un autre corps telle qu'elle peut exister à l'occasion. . .

Ainsi, dans l'exercice de ses pouvoirs en général, et en matière de droit criminel plus précisément, le Parlement est libre de définir le domaine dans lequel il choisit d'agir et, ce faisant, il peut permettre que d'autres aspects soient régis par une loi provinciale valide.

Si une province légifère dans un domaine où elle est autorisée à le faire, elle le fait non pas à titre de délégataire, mais dans l'exercice des pouvoirs que lui confère l'art. 92 de la *Loi constitutionnelle de 1867*. Cette thèse est analysée dans le contexte de l'exercice du pouvoir en matière de droit criminel dans l'arrêt *Lord's Day Alliance of Canada v. Attorney General*

Lord's Day Act made it unlawful to engage in public games or contests "except as provided in any provincial Act or law now or hereafter in force". This Court held that provincial laws permitting the otherwise prohibited conduct were not *ultra vires*, but rather provided a condition of fact that Parliament had provided as a limitation on its own statute. The permissive legislation fell within s. 92 and there was no delegation to the province. In *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384, the Privy Council had recognized that Parliament was free to prohibit and to forbear from prohibiting in the exercise of its legislative authority over criminal law.

of British Columbia, [1959] R.C.S 497. Dans cette affaire, la loi fédérale sur le dimanche interdisait de prendre part à des concours ou à des jeux publics «[s]auf les dispositions d'une loi provinciale actuellement ou désormais en vigueur». Notre Cour a statué que les lois provinciales autorisant ce comportement par ailleurs interdit n'étaient pas inconstitutionnelles, mais prescrivaient plutôt une condition de fait que le Parlement avait prévue comme limite à sa propre loi. La loi créant la faculté relevait de l'art. 92 et ne constituait pas une délégation en faveur de la province. Dans l'arrêt *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*, [1925] A.C. 384, le Conseil privé avait reconnu que le Parlement était libre de formuler des interdictions et de s'abstenir d'en formuler dans l'exercice de son pouvoir législatif en matière de droit criminel.

In my view, the regulation of gaming activities has a clear provincial aspect under s. 92 of the *Constitution Act, 1867* subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation. The appellants claim the contrary, citing *Johnson v. Attorney General of Alberta*, [1954] S.C.R. 127. That case does not decide that the province cannot legislate in relation to gaming activities; it decides that the province cannot prohibit and punish in the interest of public morality because such legislation is, in pith and substance, criminal law. The legislation in question there could find no legitimate anchor in s. 92. Altogether apart from features of gaming which attract criminal prohibition, lottery activities are subject to the legislative authority of the province under various heads of s. 92, including, I suggest, property and civil rights (13), licensing (9), and maintenance of charitable institutions (7) (specifically recognized by the *Code* provisions). Provincial licensing and regulation of gaming activities is not *per se* legislation in relation to criminal law.

À mon avis, la réglementation des activités de jeu a un aspect provincial manifeste en vertu de l'art. 92 de la *Loi constitutionnelle de 1867*, sous réserve de la compétence prépondérante du Parlement en cas de conflit entre la loi fédérale et la loi provinciale. Les appelants prétendent le contraire, en citant l'arrêt *Johnson v. Attorney General of Alberta*, [1954] R.C.S. 127. Cet arrêt ne conclut pas que la province ne peut pas légiférer en matière de jeux; on y statue que la province ne peut pas interdire et punir dans l'intérêt de la moralité publique parce qu'une telle loi constitue, de par son caractère véritable, du droit criminel. La loi alors en question dans cette affaire ne pouvait reposer légitimement sur l'art. 92. Outre les aspects des jeux susceptibles d'interdiction en matière criminelle, les loteries sont soumises au pouvoir législatif de la province en vertu de divers chefs de compétence énoncés à l'art. 92, y compris, selon moi, la propriété et les droits civils (13), la délivrance de licences (9), l'entretien des institutions de charité (7) (précisément reconnues par les dispositions du *Code*). La délivrance de licences et la réglementation des activités de jeu par la province ne constituent pas en soi de la législation en matière de droit criminel.

If the licensing scheme were grounded in a provincial statute there would , therefore, be no delegation. The provincial legislation would be valid as falling within provincial heads of power. Where there is no provincial legislative base the exercise of authority

Si le régime d'autorisation reposait sur une loi provinciale, il n'y aurait pas alors de délégation. La loi provinciale serait valide comme relevant de chefs de compétence provinciale. Même en l'absence de fondement législatif provincial, l'exercice du pouvoir

might still be valid as an exercise of the prerogative power. That point need not be pursued as the question was not argued before us.

I now turn to the question of whether the alleged delegation is to a legislature. The Nova Scotia inter-delegation case is the governing authority. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at pp. 295 to 298, questions whether there is an acceptable rationale for the rule, but the parties here do not challenge it.

I agree with Dreidger in "The Interaction of Federal and Provincial Laws" (1976), 54 *Can. Bar Rev.* 695, when he concludes that inter-delegation is constitutionally impermissible because there is a constitutional prohibition founded upon the granting of exclusive powers to the Parliament on one hand, and the provincial legislatures on the other.

The prohibition is against delegation to a legislature. There is no prohibition against delegating to any other body. The power of Parliament to delegate its legislative powers has been unquestioned, at least since the *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1. The delegate is, of course, always subordinate in that the delegation can be circumscribed and withdrawn. The Lieutenant Governor in Council has capacity or status to receive a delegated power: *R. v. Wilson* (1980), 119 D.L.R. (3d) 558 (B.C.C.A.), at p. 568. He is not subject to any constitutional prohibition against the acceptance of delegated authority. It may be that in some instances a delegation to the Lieutenant Governor would be tantamount to a delegation to a legislature. That question need not be resolved in this case because the essential elements of the substantial federal scheme are spelled out in the Code and what was done by the Lieutenant Governor was to make administrative decisions relating to matters of essentially provincial concern. These decisions fall within the ambit of the decision in *Re Peralta*, *supra*.

Thus Parliament may delegate legislative authority to bodies other than provincial legislatures, it may incorporate provincial legislation by reference and it

pourrait encore être valide à titre d'exercice d'une prérogative. Il n'est pas nécessaire de s'attarder sur ce point puisqu'il n'a pas été débattu devant nous.

Je passe maintenant à la question de savoir si la prétendue délégation est faite en faveur d'une législature. L'arrêt qui fait autorité est l'affaire de la délégation en faveur de la Nouvelle-Écosse. Dans son ouvrage intitulé *Constitutional Law of Canada* (2e éd. 1985), Hogg se demande, aux pp. 295 à 298, si la règle est justifiable, mais les parties en l'espèce ne la contestent pas.

Je suis d'accord avec Dreidger lorsqu'il conclut, dans «The Interaction of Federal and Provincial Laws» (1976), 54 *R. du B. can.* 695, que la délégation est constitutionnellement inacceptable car il existe une interdiction constitutionnelle fondée sur l'attribution de pouvoirs exclusifs au Parlement, d'une part, et aux législatures provinciales, d'autre part.

Cette interdiction vise la délégation en faveur d'une législature. Il n'est pas interdit de déléguer un pouvoir à un autre organisme. Le pouvoir du Parlement de déléguer ses pouvoirs législatifs n'a pas été mis en doute, au moins depuis *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] R.C.S. 1. Le délégataire est naturellement toujours subordonné parce que la délégation peut être limitée et retirée. Le lieutenant-gouverneur en conseil a la capacité ou le statut requis pour recevoir un pouvoir délégué: *R. v. Wilson* (1980), 119 D.L.R. (3d) 558 (C.A.C.-B.), à la p. 568. La Constitution ne lui interdit nullement d'accepter un pouvoir délégué. Il se peut que, dans certains cas, une délégation en faveur du lieutenant-gouverneur équivaille à une délégation en faveur d'une législature. Il n'est pas nécessaire de résoudre cette question en l'espèce puisque les éléments essentiels de l'important régime fédéral sont énoncés dans le *Code* et que le lieutenant-gouverneur n'a fait que prendre des décisions administratives concernant des matières d'intérêt essentiellement provincial. L'arrêt *Re Peralta*, précité, s'applique à ces décisions.

Ainsi, le Parlement peut déléguer un pouvoir législatif à des organismes autres que les législatures provinciales, il peut incorporer une loi provinciale par

may limit the reach of its legislation by a condition, namely the existence of provincial legislation.

I now analyze and characterize the sections in question here.

Section 207(1)(*b*) does not impose any right or duty on a provincial legislature. It gives authority to the Lieutenant Governor in Council or a person or authority specified by him. Regardless of the nature of the delegation, it is not a prohibited inter-delegation.

Section 207(2) similarly does not impose any right or duty on a provincial legislature, with the exception of the last phrase which provides that a licence issued by or under the authority of the Lieutenant Governor in Council may contain such relevant terms and conditions as "any law enacted by the legislature of that province may prescribe".

I do not read that provision as a delegation of legislative authority by Parliament. In my view, the provision may be read as incorporating by reference provincial legislation authorizing the Lieutenant Governor in Council to issue licences containing relevant terms and conditions or as excluding from the reach of the criminal law prohibition, lotteries licensed under provincial law so long as that licensing is by or under the authority of the Lieutenant Governor in Council. Dreidger, in the article to which I have referred, notes that the *Criminal Code* exemption for lotteries conducted in accordance with a provincial statute is not a delegation. I agree.

I note that these very provisions were referred to as valid by Laskin C.J. in his dissenting judgment (the majority not addressing the matter) in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616. The Chief Justice (at p. 627) referred to Parliament's authority to introduce dispensations or exemptions from criminal law in determining what is and what is not criminal.

renvoi et il peut limiter la portée de sa loi au moyen d'une condition, à savoir l'existence d'une loi provinciale.

Je vais maintenant analyser et qualifier les articles dont il est question dans la présente affaire.

L'alinéa 207(1)*b*) ne confère aucun droit ni n'impose aucune obligation à une législature provinciale. Il confère un pouvoir au lieutenant-gouverneur en conseil ou encore à la personne ou à l'autorité que ce dernier désigne. Indépendamment de la nature de la délégation, ce n'est pas une délégation interdite.

De même, le par. 207(2) ne confère aucun droit ni n'impose aucune obligation à une législature provinciale, sauf la partie qui prévoit qu'une licence délivrée par le lieutenant-gouverneur en conseil ou par la personne ou l'autorité qu'il désigne peut être assortie des conditions pertinentes qu'«une loi provinciale peut fixer».

Je n'interprète pas cette disposition comme une délégation d'un pouvoir législatif par le Parlement. À mon avis, on peut interpréter la disposition comme incorporant par renvoi une loi provinciale qui autorise le lieutenant-gouverneur en conseil à délivrer des licences contenant des conditions pertinentes ou qui soustrait à l'interdiction faite par le droit criminel les loteries autorisées en vertu d'une loi provinciale pourvu que les licences les autorisant soient délivrées par le lieutenant-gouverneur en conseil ou par la personne ou l'autorité qu'il désigne. Dreidger fait remarquer, dans l'article susmentionné, que l'exemption prévue par le *Code criminel* en ce qui concerne les loteries exploitées conformément à une loi provinciale ne constitue pas une délégation. Je suis du même avis.

Je constate que ces dispositions mêmes ont été considérées comme valides par le juge en chef Laskin dans l'opinion dissidente (les juges formant la majorité n'ayant pas abordé la question) qu'il a rédigée dans l'arrêt *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616. Le Juge en chef a mentionné, à la p. 627, le pouvoir du Parlement d'introduire, dans ses lois criminelles, des dispenses ou des immunités en déterminant ce qui est et ce qui n'est pas criminel.

The burden upon the appellants is to show that the impugned provisions constitute a delegation of legislative authority to a provincial legislature. That they have failed to do. Save for the last provision of s. 207(2) whatever authority is devolved was not devolved upon a provincial legislature. The last provision must be seen as either incorporating provincial legislation or limiting the reach of the criminal law when provincial legislation meets certain conditions. As Ontario has no legislative scheme, no question arises about whether that scheme meets the conditions prescribed.

I now turn to the first issue; whether there is an invalid discretionary regulatory regime.

The appellants question whether the criminal law power will sustain the establishment of a regulatory scheme in which an administrative agency or official exercises discretionary authority. In so doing they ask the question "referred to by Professor Hogg" in his *Constitutional Law of Canada*, *supra*, at p. 415. Hogg suggests that the question is really one of colourability. On this issue the appellants point to cases such as *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328, and *Re Board of Commerce Act*, [1922] 1 A.C. 191, in which Parliament attempted to use its criminal law power as a "colourable means of regulating matters within provincial jurisdiction". I find the appellants' argument completely inconsistent with their assertion that "the regulation of lotteries is a matter of federal responsibility". In my view the decriminalization of lotteries licensed under prescribed conditions is not colourable. It constitutes a definition of the crime, defining the reach of the offence, a constitutionally permissive exercise of the criminal law power, reducing the area subject to criminal law prohibition where certain conditions exist. I cannot characterize it as an

Il incombe aux appelants de démontrer que les dispositions contestées constituent une délégation de pouvoir législatif à une législature provinciale, ce qu'ils n'ont pas fait. Sauf en ce qui concerne la partie susmentionnée du par. 207(2), quel que soit le pouvoir transmis, il n'est pas transmis à une législature provinciale. Cette partie doit être considérée comme incorporant par renvoi une loi provinciale ou comme limitant la portée du droit criminel lorsque la loi provinciale satisfait à certaines conditions. Comme l'Ontario n'a pas de régime législatif à cet égard, la question ne se pose pas quant à savoir si le régime satisfait aux conditions fixées.

Je traiterai maintenant de la première question qui est de savoir s'il existe un régime discrétionnaire de réglementation non valide.

Les appelants mettent en doute que le pouvoir en matière de droit criminel puisse étayer l'instauration d'un régime de réglementation dans lequel un organisme ou un agent administratif exerce un pouvoir discrétionnaire. Ce faisant, ils posent la question [TRADUCTION] «mentionnée par le professeur Hogg» dans *Constitutional Law of Canada*, *op. cit.*, à la p. 415. Hogg dit qu'il s'agit vraiment d'une question de législation déguisée. À cet égard, les appelants attirent l'attention sur des arrêts comme *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328, et *Re Board of Commerce Act*, [1922] 1 A.C. 191, dans lesquels le Parlement a essayé de se servir de son pouvoir en matière de droit criminel comme [TRADUCTION] «moyen déguisé de réglementer des matières relevant de la compétence des provinces». Je trouve l'argument des appelants tout à fait incompatible avec leur affirmation que [TRADUCTION] «la réglementation des loteries est un domaine de responsabilité fédérale». À mon avis, la décriminalisation des loteries exploitées en vertu de licences assorties de certaines conditions précises n'est pas une tentative déguisée de légiférer. Elle constitue une définition de l'acte criminel, qui fixe la portée de l'infraction, un exercice constitutionnellement acceptable du pouvoir en matière de droit criminel, qui réduit le champ de l'interdiction du droit criminel lorsqu'il existe certaines conditions. Je ne puis qualifier cela d'empiétement sur les pouvoirs des pro-

invasion of provincial powers any more than the appellants were themselves able to do.

Much was made of the fact that the provinces and the federal government reached an agreement in 1985 under which the federal government agreed that it would not conduct lotteries, but rather leave the conduct of lotteries to the provinces. I am unable to discern any grounds upon which this agreement can be said to be unconstitutional let alone have any unconstitutional effects on the provisions of the *Code*. Parliament, in the exercise of the criminal law power, may define those agencies or instrumentalities exempt from the prohibition.

Finally, I turn to the last issue, non-publication. In my view s. 11(*g*) of the *Charter* is directed towards the need that impugned conduct be criminal at the time of its commission. That proposition is fundamental, but has nothing to do with the question of how the law is to be made known. Indeed, s. 11(*g*) embraces criminal law recognized by the community of nations, international law, which is not by its very nature subject to requirements of domestic publication.

The appellants made no reference in argument to s. 7. I do not propose discussing whether that section may have any impact on the question of publication.

The essence of their complaint is that the terms and conditions of lottery licences are not published or gazetted. Assuming that s. 11 embraces some concept of availability, I am of the view that the most that can be said is that the law be ascertainable by those affected by it. The terms and conditions are furnished to every licensee. I note, also, that as licences may vary, the suggestion that the law requires some additional publication of them offends common sense.

In argument reference was made to the provisions of the *Statutory Instruments Act*, R.S.C., 1985, c. S-22, which by ss. 2(1)(*b*) and 11(2) forbids conviction for contravention of a regulation or statutory instrument not gazetted. There is an order-in-council, not published as a statutory instrument, setting out

vinces, pas plus que les appelants n'ont eux-mêmes été en mesure de le faire.

On a attaché beaucoup d'importance au fait que les provinces et le gouvernement fédéral ont conclu en 1985 une entente en vertu de laquelle le gouvernement fédéral a convenu de ne pas exploiter de loteries, mais plutôt de laisser cela aux provinces. Je ne puis voir aucun motif qui permette de dire que cette entente est inconstitutionnelle, encore moins qu'elle a des effets inconstitutionnels sur les dispositions du *Code*. Le Parlement peut, dans l'exercice de son pouvoir en matière de droit criminel, définir les organismes qui sont exempts de l'interdiction.

J'aborde enfin la dernière question, celle de la non-publication. J'estime que l'al. 11*g*) de la *Charte* exige que la conduite reprochée soit de nature criminelle au moment où elle est adoptée. Cette proposition est fondamentale, mais elle n'a rien à voir avec la question de savoir comment la loi doit être publicisée. En effet, l'al. 11*g*) englobe le droit criminel reconnu par l'ensemble des nations, le droit international qui n'est pas, de par sa nature même, soumis à des exigences de publication à l'intérieur d'un pays.

Dans leur plaidoirie, les appelants n'ont nullement mentionné l'art. 7. Je n'ai pas l'intention d'examiner si cet article peut avoir des répercussions sur la question de la publication.

Leur reproche porte essentiellement sur le fait que les conditions des licences de loterie ne sont pas publiées ou ne paraissent pas dans le journal officiel. En admettant que l'art. 11 comprend une certaine notion d'accessibilité, je suis d'avis que, tout au plus, la loi doit pouvoir être vérifiée par ceux qu'elle touche. Les conditions sont fournies à chaque titulaire d'une licence. Je remarque également que, comme les licences peuvent varier, l'affirmation que la loi exige une publication additionnelle est contraire au bon sens.

Au cours des plaidoiries, on a invoqué les dispositions de la *Loi sur les textes réglementaires*, L.R.C. (1985), ch. S-22, dont l'al. 2(1)*b*) et le par. 11(2) interdisent de condamner une personne pour violation d'un règlement ou d'un autre texte réglementaire non publié officiellement. Il y a un décret, non publié en

some terms and conditions (including the one of which the appellants are said to have counselled a breach). However, the offence charged relates to the terms and conditions of specified licences which is an allegation that those terms and conditions are an express provision of the licences, a matter to be proven, rather than an allegation that the terms and conditions are imposed by law. The terms and conditions of individual licences are not within the definition of statutory instruments.

Disposition

I would dismiss the appeal.

I would answer the constitutional questions as follows:

1. Do sections 207(1)(*b*), 207(2) and 207(3) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, create a discretionary administrative regulatory regime to govern lotteries, and if so, is it thereby *ultra vires* Parliament?

Answer: No.

2. Are sections 207(1)(*b*), 207(2) or 207(3) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, or any combination thereof, *ultra vires* Parliament as improper delegation to a provincial body of a matter within the exclusive competence of the Federal Government?

Answer: No.

3. Does the non-publication of the terms and conditions imposed under ss. 207(1)(*b*) and 207(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, infringe or deny the rights guaranteed under ss. 7 or 11(*g*) of the *Canadian Charter of Rights and Freedoms*? If so, is such non-publication a reasonable limit prescribed by law demonstrably justified in a free and democratic society and thereby saved by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: There is no violation of s. 11(*g*). Section 7 was not argued.

tant que texte réglementaire, qui énonce certaines conditions (y compris celle que les appelants auraient conseillé à d'autres personnes de ne pas respecter). Toutefois, l'infraction reprochée a trait aux conditions de licences spécifiées, ce qui est une allégation que ces conditions constituent une disposition expresse des licences, ce qui est matière de preuve, plutôt qu'une allégation que les conditions sont prescrites par la loi. Les conditions des licences particulières ne sont pas visées par la définition des textes réglementaires.

Dispositif

Je suis d'avis de rejeter le pourvoi.

Je suis d'avis de répondre aux questions constitutionnelles de la façon suivante:

1. L'alinéa 207(1)*b*) et les par. 207(2) et (3) du *Code criminel* du Canada, L.R.C. (1985), ch. C-46, créent-ils un régime d'administration et de réglementation discrétionnaire applicable aux loteries et, dans l'affirmative, excèdent-ils la compétence du Parlement?

Réponse: Non.

2. L'alinéa 207(1)*b*) ou les par. 207(2) ou (3) du *Code criminel* du Canada, L.R.C. (1985), ch. C-46, ou toute combinaison de ces dispositions, excèdent-ils la compétence du Parlement à titre de délégation irrégulière à un organisme provincial d'une matière relevant de la compétence exclusive du gouvernement fédéral?

Réponse: Non.

3. La non-publication des modalités prescrites en vertu de l'al. 207(1)*b*) et du par. 207(2) du *Code criminel* du Canada, L.R.C. (1985), ch. C-46, porte-t-elle atteinte aux droits garantis à l'art. 7 ou à l'al. 11*g*) de la *Charte canadienne des droits et libertés*? Dans l'affirmative, pareille non-publication est-elle une limite raisonnable, prescrite par une règle de droit, dont la justification peut se démontrer dans le cadre d'une société libre et démocratique et qui est, de ce fait, sauvegardée par l'article premier de la *Charte canadienne des droits et libertés*?

Réponse: Il n'y a pas eu violation de l'al. 11*g*). L'article 7 n'a pas été invoqué.

Appeal dismissed.

Solicitors for the appellants Furtney, Roy and Diamond Bingo Inc.: Holden, Day, Wilson, Toronto.

Solicitors for the appellant Chamney: Dunn, Gillis & O'Kane, Brampton.

Solicitor for the respondent: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.

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

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

Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

Solicitor for the intervener the Attorney General of Newfoundland: Paul D. Dicks, St. John's.

Pourvoi rejeté.

Procureurs des appelants Furtney, Roy et Diamond Bingo Inc.: Holden, Day, Wilson, Toronto.

Procureurs de l'appelant Chamney: Dunn, Gillis & O'Kane, Brampton.

Procureur de l'intimée: Le ministère du Procureur général, Toronto.

Procureur de l'intervenant le procureur général du Canada: John C. Tait, Ottawa.

Procureur de l'intervenant le procureur général du Québec: Le ministère de la Justice, Ste-Foy.

Procureur de l'intervenant le procureur général de l'Alberta: Le ministère du Procureur général, Edmonton.

Procureur de l'intervenant le procureur général de la Saskatchewan: Brian Barrington-Foote, Regina.

Procureur de l'intervenant le procureur général de Terre-Neuve: Paul D. Dicks, St. John's.

British Columbia Securities Commission *Appellant*

v.

Global Securities Corporation *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Alberta, the Ontario Securities Commission, the Commission des valeurs mobilières du Québec and the Alberta Securities Commission *Interveners*

INDEXED AS: GLOBAL SECURITIES CORP. *v.* BRITISH COLUMBIA (SECURITIES COMMISSION)

Neutral citation: 2000 SCC 21.

File No.: 26887.

Hearing and judgment: January 25, 2000.

Reasons delivered: April 13, 2000.

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 BRITISH COLUMBIA

Constitutional law — Division of powers — Securities — Provincial securities legislation allowing securities commission to require registered brokers in province to produce records "to assist in the administration of the securities laws of another jurisdiction" — Whether legislation intra vires province — Constitution Act, 1867, s. 92(13) — Securities Act, R.S.B.C. 1996, c. 418, s. 141(1)(b).

In 1988 the appellant entered in a Memorandum of Understanding with the United States Securities and Exchange Commission ("SEC") whereby the signatories

British Columbia Securities Commission *Appelante*

c.

Global Securities Corporation *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général du Manitoba, le procureur général de la Colombie-Britannique, le procureur général de l'Alberta, la Commission des valeurs mobilières de l'Ontario, la Commission des valeurs mobilières du Québec et l'Alberta Securities Commission *Intervenants*

RÉPERTORIÉ: GLOBAL SECURITIES CORP. *c.* COLOMBIE-BRITANNIQUE (SECURITIES COMMISSION)

Référence neutre: 2000 CSC 21.

N° du greffe: 26887.

Audition et jugement: 25 janvier 2000.

Motifs déposés: 13 avril 2000.

Présents: Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Partage des compétences — Valeurs mobilières — Loi provinciale sur les valeurs mobilières permettant à la commission des valeurs mobilières d'enjoindre à des courtiers inscrits dans la province de produire des documents «pour aider à appliquer les lois sur les valeurs mobilières d'un autre ressort» — Cette loi relève-t-elle de la compétence de la province? — Loi constitutionnelle de 1867, art. 92(13) — Securities Act, R.S.B.C. 1996, ch. 418, art. 141(1)b).

En 1988, l'appelante a signé un protocole d'entente avec la Securities and Exchange Commission des États-Unis («SEC»), dans lequel les signataires s'engageaient

agreed to provide the "fullest mutual assistance", including obtaining documents and taking evidence from persons when requested by another signatory. That same year British Columbia amended its *Securities Act*. Included in the new provisions was what is now s. 141(1)(b), which authorizes the appellant's executive director to order a registrant to produce records "to assist in the administration of the securities laws of another jurisdiction". In 1996 the appellant made an order under s. 141(1)(b) against the respondent pursuant to a request from the SEC, which was investigating possible violations of U.S. law by the respondent and/or its employees. The respondent provided part of the information requested, but refused to provide anything else. Accordingly, the appellant served the respondent with a notice of hearing under s. 161(1) of the *Securities Act* to determine if it was in the public interest to order the respondent to comply with the order for production. The respondent in turn filed a petition in the British Columbia Supreme Court seeking a declaration that s. 141(1)(b) was *ultra vires* the province. The petition was dismissed. The Court of Appeal, in a majority decision, reversed that judgment.

Held: The appeal should be allowed. Section 141(1)(b) of the *Securities Act* is *intra vires* the province.

Legislation is constitutional if it is in pith and substance within the constitutional powers of the enacting legislature. The pith and substance of a law is the dominant or most important characteristic of the law. The effects of the legislation may be relevant to its validity in so far as they reveal its pith and substance. However, merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law. In characterizing the legislation, the court is free to consider relevant, reliable, extrinsic evidence. As a result, the affidavit evidence submitted by the parties to describe the true object and purpose of s. 141(1)(b) of the *Securities Act* was correctly accepted by the trial court.

The dominant purpose of s. 141(1)(b) is the enforcement of the province's securities law. The law furthers this goal in two ways. First, to regulate effectively the domestic (or intraprovincial) securities market, the appellant will often require access to records located outside the province, access that can most effectively be

à «s'entraide[r] le plus possible» et, notamment, à obtenir des documents et à recueillir des témoignages à la demande d'un cosignataire. Au cours de la même année, la Colombie-Britannique a modifié sa *Securities Act*, en y ajoutant de nouvelles dispositions, dont ce qui est devenu l'al. 141(1)b) qui autorise le directeur général de l'appelante à enjoindre à un courtier inscrit de produire des documents «pour aider à appliquer les lois sur les valeurs mobilières d'un autre ressort». En 1996, l'appelante a rendu contre l'intimée une ordonnance fondée sur l'al. 141(1)b), à la suite d'une demande de la SEC qui enquêtait sur la possibilité que l'intimée ou ses employés, ou les deux à la fois, aient violé la loi américaine. L'intimée a fourni une partie des renseignements demandés, mais a refusé de produire tout autre document. En conséquence, l'appelante a signifié à l'intimée un avis fondé sur le par. 161(1) de la *Securities Act*, dans lequel elle l'informait qu'une audience serait tenue pour déterminer s'il était dans l'intérêt public de lui ordonner de se conformer à l'ordonnance de production. L'intimée a réagi en déposant, devant la Cour suprême de la Colombie-Britannique, une requête visant à obtenir un jugement déclarant que l'al. 141(1)b) excédait la compétence de la province. La requête a été rejetée. La Cour d'appel a, dans une décision majoritaire, infirmé ce jugement.

Arrêt: Le pourvoi est accueilli. L'alinéa 141(1)b) de la *Securities Act* relève de la compétence de la province.

Une mesure législative est constitutionnelle si elle relève, de par son caractère véritable, des pouvoirs que la Constitution confère à la législature qui l'a adoptée. Le caractère véritable d'une loi est la caractéristique dominante ou la plus importante de cette loi. Les effets de la mesure législative peuvent être pertinents pour déterminer si elle est valide, dans la mesure où ils en révèlent le caractère véritable. Cependant, de simples effets accessoires ne rendent pas inconstitutionnelle une loi par ailleurs *intra vires*. Pour qualifier une mesure législative, la cour peut tenir compte d'éléments de preuve extrinsèques pertinents et fiables. En conséquence, la preuve par affidavit que les parties ont produite pour décrire l'objet véritable de l'al. 141(1)b) de la *Securities Act* a été acceptée à juste titre par le tribunal de première instance.

L'objectif dominant de l'al. 141(1)b) est l'application de la loi sur les valeurs mobilières de la province. La mesure législative favorise de deux façons la réalisation de cet objectif. Premièrement, pour réglementer efficacement le marché des valeurs mobilières dans la province, l'appelante doit souvent avoir accès à des docu-

given by the securities regulator in that jurisdiction. If the appellant is to expect this co-operation from bodies like the SEC it must reciprocate, as s. 141(1)(b) enables it to do. Second, s. 141(1)(b) will likely help uncover misconduct abroad by domestic registrants and thus helps the appellant determine the fitness of domestic registrants to trade in the province. While s. 141(1)(b) does involve relations with a foreign authority, it does not attempt to extend the reach of provincial legislation outside its borders. The pith and substance of s. 141(1)(b) falls within the scope of s. 92(13) of the *Constitution Act, 1867*, "Property and Civil Rights in the Province". Section 141(1)(b)'s dominant purpose, the effective regulation of domestic securities, has long been recognized to fall within provincial authority. Moreover, the provinces' authority over securities regulation is not limited to purely intraprovincial matters. Assisting in the investigation of possible violations of foreign securities laws falls within the appellant's power under s. 92(13) to regulate the province's securities market.

ments qui se trouvent à l'extérieur de la province, et c'est l'organisme de réglementation du marché des valeurs mobilières du ressort en cause qui est en mesure de lui donner le plus efficacement cet accès. Pour pouvoir compter sur cette coopération de la part d'organismes comme la SEC, l'appelante se doit, comme l'al. 141(1)b) lui permet de le faire, d'obtempérer à toute demande de coopération qu'ils peuvent lui adresser. Deuxièmement, l'al. 141(1)b) sera vraisemblablement utile pour déceler l'inconduite, à l'étranger, de courtiers inscrits dans la province, et donc pour aider l'appelante à décider de l'aptitude des courtiers inscrits dans la province à y faire du commerce. Bien qu'il implique l'existence de rapports avec un organisme étranger, l'al. 141(1)b) ne tente pas d'étendre la portée de la mesure législative provinciale au-delà des frontières de la province. Le caractère véritable de l'al. 141(1)b) relève du par. 92(13) de la *Loi constitutionnelle de 1867*, à savoir «la propriété et les droits civils dans la province». L'objectif dominant de l'al. 141(1)b), qui est la réglementation efficace du marché des valeurs mobilières dans la province, est considéré depuis longtemps comme relevant de la compétence des provinces. En outre, la compétence des provinces en matière de réglementation du marché des valeurs mobilières ne se limite pas aux questions purement intraprovinciales. Aider à enquêter sur d'éventuelles violations de lois étrangères en matière de valeurs mobilières relève du pouvoir que l'appelante possède, en vertu du par. 92(13), de réglementer le marché des valeurs mobilières dans la province.

Even if s. 141(1)(b) were not in pith and substance provincial, it would clearly be justified under the ancillary doctrine. The provision is a part of a valid legislative scheme, namely the *Securities Act*. Moreover, even assuming that the most rigorous version of the ancillary doctrine applies, s. 141(1)(b) is "necessarily incidental" to the *Securities Act*.

Même s'il n'était pas, de par son caractère véritable, de nature provinciale, l'al. 141(1)b) serait clairement justifié en vertu du principe de la compétence accessoire. Cet alinéa fait partie d'un régime législatif valide, à savoir la *Securities Act*. De plus, même en supposant que la version la plus stricte du principe de la compétence accessoire s'applique, l'al. 141(1)b) est «nécessairement accessoire» à la *Securities Act*.

Cases Cited

Referred to: *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137; *Re McCarthy and Menin and United States Securities and Exchange Commission* (1963), 38 D.L.R. (2d) 660; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Attorney-General for Alberta v.*

Jurisprudence

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Attorney-General for Canada, [1939] A.C. 117; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Ladore v. Bennett*, [1939] A.C. 468; *Smith v. The Queen*, [1960] S.C.R. 776; *Lymburn v. Mayland*, [1932] 2 D.L.R. 6; *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584; *McGuire v. McGuire*, [1953] O.R. 328; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *R. v. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56; *Re Legault and Law Society of Upper Canada* (1975), 58 D.L.R. (3d) 641; *Re Underwood McLellan & Associates Ltd.* (1979), 103 D.L.R. (3d) 268.

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Kehoe, James A. "Exporting Insider Trading Laws: The Enforcement of U.S. Insider Trading Laws Internationally" (1995), 9 *Emory Int'l L. Rev.* 345.

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APPEAL from a judgment of the British Columbia Court of Appeal (1998), 56 B.C.L.R. (3d) 237, 162 D.L.R. (4th) 601, 110 B.C.A.C. 1, 178 W.A.C. 1, [1999] 4 W.W.R. 392, [1998] B.C.J. No. 1597 (QL), reversing a decision of Macdonald J. (1997), 13 C.C.L.S. 256, [1997] B.C.J. No. 1573 (QL), dismissing the respondent's petition for a declaration that s. 141(1)(b) of the *Securities Act*, R.S.B.C. 1996, c. 418, was *ultra vires* the province. Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1998), 56 B.C.L.R. (3d) 237, 162 D.L.R. (4th) 601, 110 B.C.A.C. 1, 178 W.A.C. 1, [1999] 4 W.W.R. 392, [1998] B.C.J. No. 1597 (QL), qui a infirmé la décision du juge Macdonald (1997), 13 C.C.L.S. 256, [1997] B.C.J. No. 1573 (QL), de rejeter la requête de l'intimée visant à obtenir un jugement déclarant que l'al. 141(1)b) de la *Securities Act*, R.S.B.C. 1996, ch. 418, excédait la compétence de la province. Pourvoi accueilli.

James A. Angus and *Stephen M. Zolnay*, for the appellant.

James A. Angus et *Stephen M. Zolnay*, pour l'appelante.

Murray Clemens, Q.C., Julia E. Lawn and *Douglas R. Garrod*, for the respondent.

Murray Clemens, c.r., Julia E. Lawn et *Douglas R. Garrod*, pour l'intimée.

Roslyn J. Levine, Q.C., for the intervener the Attorney General of Canada.

Roslyn J. Levine, c.r., pour l'intervenant le procureur général du Canada.

Michel Y. Hélie, for the intervener the Attorney General for Ontario.

Michel Y. Hélie, pour l'intervenant le procureur général de l'Ontario.

Alain Gingras, for the intervener the Attorney General of Quebec.

Alain Gingras, pour l'intervenant le procureur général du Québec.

Written submissions only by *Louise Walsh Poirier*, for the intervener the Attorney General of Nova Scotia.

Argumentation écrite seulement par *Louise Walsh Poirier*, pour l'intervenant le procureur général de la Nouvelle-Écosse.

Eugene Szach, for the intervener the Attorney General of Manitoba.

Eugene Szach, pour l'intervenant le procureur général du Manitoba.

Harvey Groberman, Q.C., for the intervener the Attorney General of British Columbia.

Harvey Groberman, c.r., pour l'intervenant le procureur général de la Colombie-Britannique.

Roderick Wiltshire, for the intervener the Attorney General for Alberta.

Roderick Wiltshire, pour l'intervenant le procureur général de l'Alberta.

Neil R. Finkelstein and *Russell Cohen*, for the intervener the Ontario Securities Commission.

Neil R. Finkelstein et *Russell Cohen*, pour l'intervenante la Commission des valeurs mobilières de l'Ontario.

Gérald R. Tremblay, Q.C., and *Richard Proulx*, for the intervener the Commission des valeurs mobilières du Québec.

Anne J. Brown and *Lisa Rudan*, for the intervener the Alberta Securities Commission.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction and Overview

This appeal deals with the issue of whether a provincial securities commission may legally gather information for securities regulators in other jurisdictions. Specifically, the respondent Global Securities Corporation, a British Columbia brokerage firm, challenges the authority of the British Columbia Securities Commission ("Commission") to require Global to produce documents to be handed over to the United States Securities and Exchange Commission ("SEC"). We have already allowed the Commission's appeal from the Bench, and indicated that reasons for judgment would follow. These are those reasons.

The provision challenged in this appeal, s. 141(1)(b) of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, allows the Commission to require registered brokers in the province ("registrants") to produce records in their control "to assist in the administration of the securities laws of another jurisdiction". The respondent claims that this provision does not fall within the powers granted to the provinces by the *Constitution Act, 1867*.

With respect, I disagree, and by way of summary advance the following propositions. The fundamental error in the respondent's position is that it fails to recognize that the dominant purpose, or "pith and substance", of the provision in question is the enforcement of British Columbia's securities law. This purpose clearly falls within provincial

Gérald R. Tremblay, c.r., et *Richard Proulx*, pour l'intervenante la Commission des valeurs mobilières du Québec.

Anne J. Brown et *Lisa Rudan*, pour l'intervenante l'Alberta Securities Commission.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction et vue d'ensemble

Le présent pourvoi porte sur la question de savoir si une commission des valeurs mobilières provinciale peut légalement recueillir de l'information au profit d'organismes de réglementation du marché des valeurs mobilières d'autres ressorts. Plus précisément, l'intimée, Global Securities Corporation, une maison de courtage de la Colombie-Britannique, conteste le pouvoir de la British Columbia Securities Commission («Commission») de lui enjoindre de produire des documents en vue de les remettre à la Securities and Exchange Commission des États-Unis («SEC»). Nous avons déjà accueilli le pourvoi de la Commission à l'audience, en mentionnant que les motifs du jugement suivraient. Voici ces motifs. 1

La disposition contestée dans le présent pourvoi, soit l'al. 141(1)b) de la *Securities Act* de la Colombie-Britannique, R.S.B.C. 1996, ch. 418, permet à la Commission d'enjoindre à des courtiers inscrits dans la province (les «courtiers inscrits») de produire des documents qu'ils détiennent [TRADUCTION] «pour aider à appliquer les lois sur les valeurs mobilières d'un autre ressort». L'intimée soutient que cette disposition ne relève pas des pouvoirs que la *Loi constitutionnelle de 1867* accorde aux provinces. 2

En toute déférence, je ne suis pas de cet avis et je vais formuler, sous forme de résumé, les propositions suivantes. L'erreur fondamentale de l'intimée est qu'elle ne reconnaît pas que l'objectif dominant, ou «caractère véritable», de la disposition en cause est l'application de la loi sur les valeurs mobilières de la Colombie-Britannique. 3

authority under s. 92(13) of the *Constitution Act, 1867*, over "Property and Civil Rights in the Province". The law furthers this goal in two ways. First, to regulate effectively the domestic (a term which, in these reasons, I use as a synonym for "intraprovincial") securities market, the Commission will often require access to records located outside the province, access that can most effectively be given by the securities regulator in that jurisdiction. If the Commission is to expect this cooperation from bodies like the SEC it must reciprocate, as s. 141(1)(b) enables it to do.

Cet objectif relève clairement de la compétence que les provinces ont, en vertu du par. 92(13) de la *Loi constitutionnelle de 1867*, pour légiférer dans le domaine de «la propriété et [d]es droits civils dans la province». La mesure législative favorise de deux façons la réalisation de cet objectif. Premièrement, pour réglementer efficacement le marché des valeurs mobilières dans la province, la Commission doit souvent avoir accès à des documents qui se trouvent à l'extérieur de la province, et c'est l'organisme de réglementation du marché des valeurs mobilières du ressort en cause qui est en mesure de lui donner le plus efficacement cet accès. Pour pouvoir compter sur cette coopération de la part d'organismes comme la SEC, la Commission se doit, comme l'al. 141(1)b) lui permet de le faire, d'obtempérer à toute demande de coopération qu'ils peuvent lui adresser.

4 Second, s. 141(1)(b) will likely help uncover misconduct abroad by domestic registrants. The Commission is concerned with the honesty and good repute of domestic registrants. If a British Columbia registrant is violating the securities laws of another jurisdiction, this is undoubtedly relevant to the fitness of that registrant to continue trading in the province. Giving relevant information to the SEC thus helps the Commission determine the fitness of domestic registrants to trade in the province.

Deuxièmement, l'al. 141(1)b) sera vraisemblablement utile pour déceler l'inconduite, à l'étranger, de courtiers inscrits dans la province. La Commission se soucie de l'honnêteté et de la bonne réputation des courtiers inscrits dans la province. Il ne fait aucun doute que la violation, par un courtier inscrit en Colombie-Britannique, des lois sur les valeurs mobilières d'un autre ressort est pertinente pour décider de l'aptitude de ce courtier à continuer de faire du commerce dans la province. La communication de renseignements pertinents à la SEC aide donc la Commission à décider de l'aptitude des courtiers inscrits dans la province à y faire du commerce.

5 Given these two dominant purposes, the fact that the provision assists the enforcement of foreign laws is not determinative, and cannot impugn the law's validity under the *Constitution Act, 1867*.

Compte tenu de ces deux objectifs dominants, le fait que la disposition en cause aide à appliquer des lois étrangères n'est pas déterminant et ne permet pas de mettre en doute la validité de la mesure législative au regard de la *Loi constitutionnelle de 1867*.

II. Facts

II. Les faits

6 In 1988, the securities commissions of British Columbia, Ontario and Quebec entered into a Memorandum of Understanding ("MOU") with the

En 1988, les commissions des valeurs mobilières de la Colombie-Britannique, de l'Ontario et du Québec ont signé un protocole d'entente

SEC. Each signatory agreed to provide the "fullest mutual assistance" to each other, including "obtaining documents" and "taking evidence" from persons when requested by another signatory. That same year, pursuant to the MOU, British Columbia amended its *Securities Act*. Included in the new provisions was what is now s. 141(1)(b), which authorizes the Executive Director of the Commission to order a registrant to produce records "to assist in the administration of the securities laws of another jurisdiction".

(«protocole») avec la SEC. Les signataires s'engageaient à [TRADUCTION] «s'entraide[r] le plus possible» et, notamment, à «obtenir des documents» et à «recueillir des témoignages» à la demande d'un cosignataire. Au cours de la même année, la Colombie-Britannique a modifié sa *Securities Act*, conformément au protocole, en y ajoutant de nouvelles dispositions, dont ce qui est devenu l'al. 141(1)b) qui autorise le directeur général de la Commission à enjoindre à un courtier inscrit de produire des documents [TRADUCTION] «pour aider à appliquer les lois sur les valeurs mobilières d'un autre ressort».

On July 3, 1996, the Commission made an order under s. 141(1)(b) against the respondent pursuant to a request from the SEC, which was investigating possible violations of U.S. law by the respondent and/or its employees. This investigation focused on one Tracy-Anne Godoy, who was at the time employed by the respondent. The order requested all records relating to Ms. Godoy, as well as all records generally relating to the registrant's trading activities in the United States.

7 Le 3 juillet 1996, la Commission a rendu contre l'intimée une ordonnance fondée sur l'al. 141(1)b), à la suite d'une demande de la SEC qui enquêtait sur la possibilité que l'intimée ou ses employés, ou les deux à la fois, aient violé la loi américaine. L'enquête portait principalement sur une certaine Tracy-Anne Godoy qui, à l'époque, travaillait pour l'intimée. L'ordonnance enjoignait de produire tous les documents concernant M^me^ Godoy et tous les documents portant, de façon générale, sur les opérations de courtage de l'intimée aux États-Unis.

The respondent provided the information relating to Ms. Godoy, but refused to produce anything else. Accordingly, on March 3, 1997 the Commission served the respondent with a notice of hearing under s. 161(1) of the *Securities Act* to determine if it was in the public interest to order the respondent to comply with the order for production. The respondent, in turn, filed a petition in the Supreme Court of British Columbia seeking, among other things, a declaration that s. 141(1)(b) was *ultra vires* the province.

8 L'intimée a fourni les renseignements concernant M^me^ Godoy, mais a refusé de produire tout autre document. En conséquence, le 3 mars 1997, la Commission a signifié à l'intimée un avis fondé sur le par. 161(1) de la *Securities Act*, dans lequel elle l'informait qu'une audience serait tenue pour déterminer s'il était dans l'intérêt public de lui ordonner de se conformer à l'ordonnance de production. L'intimée a réagi en déposant, devant la Cour suprême de la Colombie-Britannique, une requête visant notamment à obtenir un jugement déclarant que l'al. 141(1)b) excédait la compétence de la province.

Macdonald J. dismissed the respondent's petition and ordered the hearing before the Commission to proceed, at which hearing the Commission again ordered the respondent to produce the documents requested on July 3, 1996. The respondent successfully appealed Macdonald J.'s decision to the Court of Appeal.

9 Le juge Macdonald a rejeté la requête de l'intimée et a ordonné que l'audience devant la Commission ait lieu. Au cours de cette audience, la Commission a de nouveau enjoint à l'intimée de produire les documents requis le 3 juillet 1996. L'intimée en a appelé avec succès de la décision du juge Macdonald devant la Cour d'appel.

III. Judicial Decisions

A. *British Columbia Supreme Court* (1997), 13 C.C.L.S. 256

10 Macdonald J. was satisfied that cross-border and interjurisdictional co-operation was essential to the Commission's investigatory functions. The impugned section was necessary to enable the Commission to obtain information from other jurisdictions. He therefore rejected the respondent's argument that the pith and substance of s. 141(1)(b) was the regulation of securities outside the province. Instead, he found it to be necessarily incidental to the regulation of the securities industry in British Columbia, and held that it was *intra vires*.

B. *British Columbia Court of Appeal* (1998), 56 B.C.L.R. (3d) 237

1. Newbury J.A., Hinds J.A. concurring

11 Upon reviewing the case law, Newbury J.A. concluded that the provinces clearly have the constitutional authority to enact legislation regulating the securities industry. The issue was to determine whether s. 141(1)(b) was aimed at a purpose that, in pith and substance, fell under a provincial head of jurisdiction under s. 92 of the *Constitution Act, 1867*.

12 Newbury J.A. recognized that securities regulation is interjurisdictional by nature, and that cross-border co-operation is "both necessary and desirable" (p. 247). Nonetheless, she concluded that the province could only authorize such cooperation if it fell within the ambit of s. 92(13), "Property and Civil Rights in the Province". In this case, s. 141(1)(b) does not relate to any misconduct occurring within the province, but instead is concerned only with possible violations of foreign law.

13 Newbury J.A. distinguished *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137, which upheld the validity of a provincial statute giving the courts discretion to enforce spousal support orders made in England. In her opinion, the law

III. Les décisions judiciaires

A. *Cour suprême de la Colombie-Britannique* (1997), 13 C.C.L.S. 256

Le juge Macdonald était convaincu que la coopération transfrontalière et entre ressorts était essentielle aux fonctions d'enquête de la Commission. La disposition contestée était nécessaire pour permettre à la Commission d'obtenir des renseignements d'autres ressorts. Il a donc rejeté l'argument de l'intimée que l'al. 141(1)b) visait, de par son caractère véritable, la réglementation de valeurs mobilières à l'extérieur de la province. Il a plutôt conclu que cet alinéa était nécessairement accessoire à la réglementation du secteur des valeurs mobilières de la Colombie-Britannique, et qu'il était *intra vires*.

B. *Cour d'appel de la Colombie-Britannique* (1998), 56 B.C.L.R. (3d) 237

1. Le juge Newbury, avec l'appui du juge Hinds

Après avoir examiné la jurisprudence, le juge Newbury a conclu que la Constitution habilite clairement les provinces à adopter des lois régissant le secteur des valeurs mobilières. Il s'agissait de savoir si l'al. 141(1)b) visait un objectif qui, de par son caractère véritable, relevait d'un chef de compétence provinciale prévu à l'art. 92 de la *Loi constitutionnelle de 1867*.

Le juge Newbury a reconnu que, de par sa nature, la réglementation des valeurs mobilières ne se limite pas à un seul ressort, et que la coopération transfrontalière est [TRADUCTION] «à la fois nécessaire et souhaitable» (p. 247). Elle a néanmoins conclu que la province ne pouvait permettre une telle coopération que si elle relevait du par. 92(13), «la propriété et les droits civils dans la province». En l'espèce, l'al. 141(1)b) vise non pas l'inconduite dans la province, mais plutôt exclusivement d'éventuelles violations de lois étrangères.

Le juge Newbury a établi une distinction d'avec l'arrêt *Attorney General for Ontario c. Scott*, [1956] R.C.S. 137, qui a confirmé la validité d'une loi provinciale qui accordait aux tribunaux le pouvoir discrétionnaire d'exécuter des ordonnances

upheld in *Scott* merely enforced existing property rights. Moreover, it was the Ontario court that made the order. Here, by contrast, it is the SEC that effectively makes the order. While the motive of facilitating interjurisdictional co-operation may be laudable, it "cannot save legislation that in pith and substance lies outside provincial authority" (p. 250).

Newbury J.A. then turned to provisions in the federal and provincial *Evidence Acts* authorizing superior courts to take evidence relating to proceedings in a foreign country. She expressed doubt as to their constitutional validity, and therefore did not believe that they supported the constitutionality of s. 141(1)(b). Finally, she noted that the SEC was not even a "court or tribunal of competent jurisdiction" that would authorize a request under the *Evidence Act*, even if it were constitutional: *Re McCarthy and Menin and United States Securities and Exchange Commission* (1963), 38 D.L.R. (2d) 660 (Ont. C.A.).

In conclusion, Newbury J.A. noted that the principle of comity did not apply because the legislation did not relate to provincial legislative powers. It did not fall under "Property and Civil Rights in the Province", nor under any other head of provincial authority. She therefore allowed the appeal and declared s. 141(1)(b) *ultra vires*.

2. Southin J.A., dissenting

Southin J.A. held that s. 141(1)(b) fell within the province's authority under s. 92(14), "Administration of Justice in the Province", and was therefore *intra vires*. In her opinion, s. 92(14) should be given a "large and liberal interpretation": *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. Moreover, prior decisions of this Court and the Privy Council have already extended

alimentaires au profit d'un conjoint rendues en Angleterre. À son avis, la loi dont la validité avait été confirmée dans l'arrêt *Scott* faisait simplement respecter des droits de propriété déjà existants. En outre, c'était le tribunal ontarien qui avait rendu l'ordonnance en cause. En l'espèce, par contre, c'est la SEC qui a effectivement rendu l'ordonnance. Bien que la raison de faciliter la coopération entre ressorts puisse être louable, elle [TRADUCTION] «ne permet pas de sauvegarder une mesure législative qui, de par son caractère véritable, excède la compétence de la province» (p. 250).

14 Le juge Newbury a ensuite examiné les dispositions des lois fédérale et provinciale en matière de preuve qui autorisent les cours supérieures à recueillir des témoignages relatifs à des procédures se déroulant à l'étranger. Comme elle doutait de leur propre constitutionnalité, elle n'a pas cru que ces dispositions étayaient celle de l'al. 141(1)b). Enfin, elle a souligné que la SEC n'était même pas [TRADUCTION] «un tribunal compétent» qui autoriserait une requête fondée sur la *Evidence Act*, même si ces dispositions législatives étaient conformes à la Constitution: *Re McCarthy and Menin and United States Securities and Exchange Commission* (1963), 38 D.L.R. (2d) 660 (C.A. Ont.).

15 Pour conclure, le juge Newbury a fait observer que le principe de la courtoisie ne s'appliquait pas du fait que la mesure législative en cause n'avait aucun rapport avec les chefs de compétence provinciale. Elle ne relevait ni de «la propriété et [d]es droits civils dans la province», ni d'un autre chef de compétence provinciale. Elle a donc accueilli l'appel et déclaré que l'al. 141(1)b) excédait la compétence de la province.

2. Le juge Southin, dissidente

16 Le juge Southin a conclu que l'al. 141(1)b) relevait de la compétence sur «l'administration de la justice dans la province», que le par. 92(14) confère à la province, et qu'il était donc *intra vires*. À son avis, le par. 92(14) doit recevoir [TRADUCTION] «une interprétation large et libérale»: *Edwards c. Attorney-General for Canada*, [1930] A.C. 124 (C.P.), à la p. 136. En outre, dans des arrêts anté-

the interpretation of s. 92(14) to cover the detection and investigation of crime. Given the reciprocal nature of securities law enforcement, s. 141(1)(b) assists in the administration of the province's own justice system. She therefore would have dismissed the appeal.

IV. Relevant Constitutional and Statutory Provisions

17 *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, –

. . .

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Securities Act, R.S.B.C. 1996, c. 418

141 (1) The executive director may make an order under subsection (2)

(a) for the administration of this Act,

(b) to assist in the administration of the securities laws of another jurisdiction,

(c) in respect of matters relating to trading in securities in British Columbia, or

(d) in respect of matters in British Columbia relating to trading in securities in another jurisdiction.

(2) By an order applicable generally or to one or more persons or entities named or otherwise described in the order, the executive director may require any of the following persons to provide information or to produce records or classes of records specified or otherwise

rieurs, notre Cour et le Conseil privé ont déjà considéré que le par. 92(14) visait la détection de la criminalité et la tenue d'enquêtes criminelles. Vu la nature réciproque de l'application des lois sur les valeurs mobilières, l'al. 141(1)b) aide la province à administrer son propre système de justice. Elle aurait donc rejeté l'appel.

IV. Les dispositions constitutionnelles et législatives pertinentes

Loi constitutionnelle de 1867

92. Dans chaque province, la législature pourra exclusivement légiférer relativement aux matières entrant dans les catégories de sujets ci-dessous énumérés, à savoir:

. . .

13. la propriété et les droits civils dans la province;

14. l'administration de la justice dans la province, y compris la constitution, le maintien et l'organisation de tribunaux provinciaux, de juridiction tant civile que criminelle, y compris la procédure en matière civile devant ces tribunaux;

Securities Act, R.S.B.C. 1996, ch. 418

[TRADUCTION]

141 (1) Le directeur général peut rendre une ordonnance fondée sur le paragraphe (2):

a) pour appliquer la présente loi,

b) pour aider à appliquer les lois sur les valeurs mobilières d'un autre ressort,

c) à l'égard de questions qui se rapportent à des opérations de courtage en valeurs mobilières en Colombie-Britannique, ou

d) à l'égard de questions qui, en Colombie-Britannique, se rapportent à des opérations de courtage en valeurs mobilières dans un autre ressort.

(2) Le directeur général peut, au moyen d'une ordonnance applicable de façon générale à une seule ou plusieurs personnes physiques ou morales qui y sont nommées ou autrement décrites, enjoindre à l'une ou l'autre des personnes suivantes de fournir des renseignements ou de produire des documents ou catégories de documents énumérés ou autrement décrits dans

described in the order within the time or at the intervals specified in the order:

. . .

(b) a registrant;

. . .

(3) The executive director may require verification by affidavit of information provided or records or classes of records produced pursuant to an order under subsection (2).

l'ordonnance dans le délai ou aux intervalles qui y sont également prévus:

. . .

b) un courtier inscrit;

. . .

(3) Le directeur général peut exiger la vérification, par affidavit, des renseignements fournis ou des documents ou catégories de documents produits conformément à une ordonnance fondée sur le paragraphe (2).

V. Issues

On May 20, 1999, Lamer C.J. stated the following constitutional question:

Is s. 141(1)(b) of the *Securities Act*, R.S.B.C. 1996, c. 418, *intra vires* the province of British Columbia as being legislation pertaining to property and civil rights in the province or pertaining to the administration of justice in the province under ss. 92(13) and 92(14), respectively, of the *Constitution Act, 1867*?

V. Les questions en litige

Le 20 mai 1999, le juge en chef Lamer a formulé la question constitutionnelle suivante: 18

L'alinéa 141(1)b) de la *Securities Act*, R.S.B.C. 1996, ch. 418, relève-t-il de la compétence de la province de la Colombie-Britannique en tant que disposition législative relative à la propriété et aux droits civils dans la province ou à l'administration de la justice dans la province, au sens des par. 92(13) et 92(14), respectivement, de la *Loi constitutionnelle de 1867*?

VI. Analysis

A. *Introduction*

Federalism cases, like many other areas of legal interpretation, greatly involve the proper characterization of the law under attack. In *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 (hereinafter "*GM Canada*"), at pp. 666-69, Dickson C.J. offered a useful three-step structure for analyzing a claim that a law is *ultra vires*. While *GM Canada* itself was concerned with federal legislation, Dickson C.J. made it very clear, at p. 670, that the same analysis applied to determining the constitutionality of provincial legislation. With respect to the first step, Dickson C.J. said the following (at pp. 666-67):

VI. Analyse

A. *Introduction*

Les affaires touchant le fédéralisme, à l'instar de nombreux autres domaines d'interprétation législative, portent en grande partie sur la bonne façon de qualifier la mesure législative contestée. Dans l'arrêt *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641 (ci-après «*GM Canada*»), aux pp. 666 à 669, le juge en chef Dickson a proposé le recours à une méthode en trois étapes pour analyser la prétention qu'une mesure législative est inconstitutionnelle. Même si l'arrêt *GM Canada* lui-même portait sur une mesure législative fédérale, le juge en chef Dickson a affirmé très clairement, à la p. 670, que la même analyse s'appliquait pour décider de la constitutionnalité d'une mesure législative provinciale. Voici ce qu'il a dit au sujet de la première étape (aux pp. 666 et 667): 19

The first step should be to consider whether and to what extent the impugned provision can be characterized as intruding into provincial powers. If it cannot be characterized as intruding at all, i.e., if in its pith and substance

La première étape devrait consister à se demander si et dans quelle mesure il est possible de dire que la disposition contestée empiète sur les pouvoirs de la province. Si on ne peut affirmer que la disposition empiète sur

the provision is federal law, and if the act to which it is attached is constitutionally valid (or if the provision is severable or if it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further.

If, on the other hand, the legislation is not in pith and substance within the constitutional powers of the enacting legislature, then the court must ask if the impugned provision is nonetheless a part of a valid legislative scheme. If it is, at the third stage the impugned provision should be upheld if it is sufficiently integrated into the valid legislative scheme.

20 In the present appeal, I conclude that the impugned provision, s. 141(1)(b) of the British Columbia *Securities Act*, falls within the constitutional powers of the province under the first stage of *GM Canada*. I therefore find it unnecessary to examine the last two steps of the *GM Canada* test.

B. *Is Section 141(1)(b) in Pith and Substance Provincial Legislation?*

21 To answer this question, I use the familiar two-stage test, which was described as follows in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 23, *per* Lamer C.J. and Iacobucci J. (dissenting but not on this point):

The law in question must first be characterized in relation to its "pith and substance", that is, its dominant or most important characteristic. One must then see if the law, seen in this light, can be successfully assigned to one of the government's heads of legislative power.

See also P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 15-6. While there is obviously a great deal of overlap between these two steps, and it is thus perhaps impossible to keep them completely distinct, they provide a useful analytical structure.

ceux-ci, c'est-à-dire si, de par son caractère véritable, elle relève du droit fédéral, et que la loi à laquelle elle se rattache est constitutionnelle (ou si la disposition peut être séparée de la loi ou si elle se rattache à une partie de la loi qui peut être séparée et valide du point de vue constitutionnel), il n'est alors plus nécessaire de poursuivre l'analyse.

Si, par contre, la disposition contestée ne relève pas, de par son caractère véritable, des pouvoirs que la Constitution confère à la législature qui l'a adoptée, la cour doit se demander si elle fait néanmoins partie d'un régime législatif valide. Dans l'affirmative, il y a lieu, à la troisième étape, de confirmer la validité de la disposition contestée si cette disposition est suffisamment intégrée au régime législatif valide.

En l'espèce, je conclus que la disposition contestée, à savoir l'al. 141(1)b) de la *Securities Act* de la Colombie-Britannique, relève des pouvoirs constitutionnels de la province, en application de la première étape de la méthode proposée dans l'arrêt *GM Canada*. Je juge donc inutile d'examiner les deux autres étapes que comporte ce critère.

B. *L'alinéa 141(1)b) est-il, de par son caractère véritable, une mesure législative provinciale?*

Pour répondre à cette question, j'applique le critère à deux étapes bien connu, qui a été décrit de la façon suivante dans l'arrêt *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213, au par. 23 (le juge en chef Lamer et le juge Iacobucci (dissident, mais non sur ce point)):

La loi en question doit d'abord être qualifiée en fonction de son «caractère véritable», c'est-à-dire de sa caractéristique dominante ou la plus importante. Il faut ensuite se demander si la loi, vue sous cet angle, relève à bon droit de l'un des chefs de compétence législative du gouvernement.

Voir également P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 1, à la p. 15-6. Bien qu'elles se chevauchent nettement dans une large mesure et qu'il puisse donc être impossible de les séparer complètement, ces deux étapes fournissent une méthode d'analyse utile.

1. The Pith and Substance of Section 141(1)(b)

As Professor Hogg, *supra*, at p. 15-12, has noted, the pith and substance of a law is "best described as the dominant or most important characteristic of the law". A court must "make a judgment as to which is the most important feature of the law and . . . characterize the law by that feature: that dominant feature is the 'pith and substance' or 'matter' of the law; the other feature is merely incidental, irrelevant for constitutional purposes" (p. 15-8). Similarly, Sopinka J. has described the pith and substance as the "leading feature or true character": *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 481; see also *Hydro-Québec*, *supra*, at para. 113 (*per* La Forest J.); *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286; *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.), at p. 587.

The effects of the legislation may also be relevant to the validity of the legislation in so far as they reveal its pith and substance. For example, in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, the Court struck down a municipal by-law that prohibited leafleting because it had been applied so as to suppress the religious views of Jehovah's Witnesses. Similarly, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, the Privy Council struck down a law imposing a tax on banks because the effects of the tax were so severe that the true purpose of the law could only be in relation to banking, not taxation. However, merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law.

McIntyre J. aptly summarized the correct approach in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 332:

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or con-

1. Le caractère véritable de l'al. 141(1)b)

22 Comme l'a souligné le professeur Hogg, *op. cit.*, à la p. 15-12, le caractère véritable d'une loi est [TRADUCTION] «mieux décrit comme étant la caractéristique dominante ou la plus importante de cette loi». La cour doit «décider quelle est la caractéristique la plus importante de la loi et [. . .] qualifier celle-ci en fonction de cette caractéristique: cette caractéristique dominante constitue le "caractère véritable" ou la "matière" de la loi; l'autre caractéristique est simplement accessoire et n'est pas pertinente sur le plan constitutionnel» (p. 15-8). De même, le juge Sopinka a dit que le caractère véritable d'une loi était «son idée maîtresse»: *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 481; voir également *Hydro-Québec*, précité, au par. 113 (le juge La Forest); *Whitbread c. Walley*, [1990] 3 R.C.S. 1273, à la p. 1286; *Union Colliery Co. of British Columbia c. Bryden*, [1899] A.C. 580 (C.P.), à la p. 587.

23 Les effets de la mesure législative peuvent également être pertinents pour déterminer si elle est valide, dans la mesure où ils en révèlent le caractère véritable. Par exemple, dans l'arrêt *Saumur c. City of Quebec*, [1953] 2 R.C.S. 299, la Cour a invalidé un règlement municipal qui interdisait la distribution de tracts, pour le motif qu'il avait été appliqué de façon à supprimer les opinions religieuses des Témoins de Jéhovah. De même, dans *Attorney-General for Alberta c. Attorney-General for Canada*, [1939] A.C. 117, le Conseil privé a invalidé une loi qui imposait une taxe aux banques, pour le motif que les effets de cette taxe étaient si graves que l'objet véritable de la loi ne pouvait qu'être lié aux opérations bancaires et non à la taxation. Cependant, de simples effets accessoires ne rendent pas inconstitutionnelle une loi par ailleurs *intra vires*.

24 Le juge McIntyre a résumé avec justesse l'approche qu'il convient d'adopter, dans le *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297, à la p. 332:

> Lorsque le caractère véritable d'une loi provinciale se rapporte à des matières qui relèvent du domaine de la compétence législative des provinces, les effets acces-

sequential effects on extra-provincial rights will not render the enactment *ultra vires*. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*.

soires ou indirects sur des droits extra-provinciaux ne rendent pas cette loi *ultra vires*. Cependant, si de par son caractère véritable la loi provinciale porte atteinte à des droits extra-provinciaux ou les élimine, elle est *ultra vires* même si elle revêt une forme constitutionnelle appropriée.

For example, in *Ladore v. Bennett*, [1939] A.C. 468, the Privy Council upheld Ontario's reorganization of four failing municipalities into the City of Windsor, even though the plan reduced the interest rates on bonds held by extra-provincial creditors. Since the law's pith and substance fell within the province's authority over municipalities, its incidental extra-provincial effects were irrelevant.

Par exemple, dans *Ladore c. Bennett*, [1939] A.C. 468, le Conseil privé a maintenu le regroupement, par l'Ontario, de quatre municipalités en difficulté de manière à former la ville de Windsor, même si cette mesure avait pour effet de réduire les taux d'intérêt d'obligations détenues par des créanciers à l'extérieur de la province. Comme le caractère véritable de la loi en cause relevait de la compétence de la province à l'égard des municipalités, ses effets accessoires extraprovinciaux n'étaient pas pertinents.

25 In characterizing the legislation, it is well-settled that the court is free to consider relevant, reliable, extrinsic evidence. McIntyre J., in *Upper Churchill*, *supra*, at p. 318, outlined the proper uses of extrinsic evidence:

Il est bien établi que, pour qualifier une mesure législative, la cour peut tenir compte d'éléments de preuve extrinsèques pertinents et fiables. Dans le renvoi *Upper Churchill*, précité, à la p. 318, le juge McIntyre a exposé les bonnes façons d'utiliser des éléments de preuve extrinsèques:

> I agree with the Court of Appeal in the present case that extrinsic evidence is admissible to show the background against which the legislation was enacted. . . . I am also of the view that in constitutional cases, particularly where there are allegations of colourability, extrinsic evidence may be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well.

> Je suis d'accord avec la Cour d'appel qu'en l'espèce les éléments de preuve extrinsèques sont recevables pour montrer le contexte dans lequel la législation a été adoptée. [. . .] Je suis [. . .] d'avis que dans les affaires constitutionnelles, notamment lorsqu'il y a allégation de législation déguisée, on peut tenir compte d'éléments de preuve extrinsèques pour vérifier non seulement l'application et l'effet de la loi contestée, mais aussi son objet véritable.

See also *Hydro-Québec*, *supra*, at para. 148. As a result, the affidavit evidence submitted by the parties to describe the "true object and purpose" of s. 141(1)(b), to which I will refer in more detail below, was correctly accepted by the trial court and was not challenged before us.

Voir également l'arrêt *Hydro-Québec*, précité, au par. 148. En conséquence, la preuve par affidavit que les parties ont produite pour décrire l'«objet véritable» de l'al. 141(1)b), et que je vais analyser en détail plus loin, a été acceptée à juste titre par le tribunal de première instance et n'a pas été contestée devant nous.

26 As I have already noted, there are two dominant purposes underlying s. 141(1)(b). I will address each in turn, and then discuss whether there are any other effects of the law that should affect its characterization.

Comme je l'ai déjà souligné, deux objectifs dominants sous-tendent l'al. 141(1)b). Après avoir examiné ces objectifs tour à tour, je vais aborder la question de savoir si la mesure législative a d'autres effets qui devraient avoir une incidence sur sa qualification.

(a) *Ensuring Cooperation from Other Jurisdictions*

There can be no disputing the indispensable nature of interjurisdictional co-operation among securities regulators today. Paul Bourque, the Executive Director of the Commission, described this problem as follows:

> Effective securities law enforcement demands that there be inter-jurisdictional cooperation and reciprocal assistance between regulatory agencies. In order to facilitate such cooperation, regulatory agencies in various jurisdictions, including British Columbia and the United States Securities and Exchange Commission (the "SEC"), routinely provide relevant evidence in their possession to their foreign counterparts, and many such agencies have obtained statutory authority to compel evidence from persons in their jurisdiction for the purpose of assisting foreign investigations.

Paul Leder, the Deputy Director of the Office of International Affairs at the SEC, gave a similar description:

> Integral to the SEC's MOUs with foreign securities authorities is the concept of reciprocity. The SEC's ability to assist a particular foreign regulator may depend in part upon the extent to which that foreign authority, such as the [Commission], can be expected to provide similar assistance to the SEC.

See also Elizabeth R. Edinger, "The Constitutional Validity of Provincial Mutual Assistance Legislation: *Global Securities* v. *British Columbia (Securities Commission)*" (1999), 33 *U.B.C. L. Rev.* 169, at p. 176.

The securities market has been an international one for years: see P. Anisman and P. W. Hogg, "Constitutional Aspects of Federal Securities Legislation", in *Proposals for a Securities Market Law for Canada* (1979), vol. 3, 135, at p. 217. However, the Internet has greatly increased the ability of securities traders to extend across borders:

a) *Garantir la coopération d'autres ressorts*

Il ne fait pas de doute que, de nos jours, la coopération des organismes de réglementation de divers ressorts est indispensable. Paul Bourque, le directeur exécutif de la Commission, a décrit le problème en ces termes: 27

> [TRADUCTION] L'application efficace des lois sur les valeurs mobilières commande la coopération et l'entraide des organismes de réglementation des divers ressorts. Pour faciliter cette coopération, les organismes de réglementation de divers ressorts, y compris celui de la Colombie-Britannique et la Securities and Exchange Commission des États-Unis (la «SEC»), fournissent régulièrement aux organismes analogues d'autres ressorts des éléments de preuve pertinents qu'ils ont en leur possession, et un bon nombre de ces organismes ont obtenu le pouvoir légal de contraindre des personnes à témoigner dans leur ressort dans le but de faciliter des enquêtes tenues à l'étranger.

Paul Leder, le directeur adjoint de l'Office of International Affairs de la SEC, a donné une description similaire:

> [TRADUCTION] Le concept de la réciprocité fait partie intégrante du protocole que la SEC a conclu avec des organismes étrangers de réglementation du marché des valeurs mobilières. La capacité de la SEC d'aider un organisme de réglementation étranger peut dépendre en partie de la mesure dans laquelle elle peut s'attendre à ce que cet organisme étranger, la [Commission] par exemple, lui fournisse une aide similaire.

Voir aussi Elizabeth R. Edinger, «The Constitutional Validity of Provincial Mutual Assistance Legislation: *Global Securities* v. *British Columbia (Securities Commission)*» (1999), 33 *U.B.C. L. Rev.* 169, à la p. 176.

Le marché des valeurs mobilières est de nature internationale depuis plusieurs années: voir P. Anisman et P. W. Hogg, «Les aspects constitutionnels de la législation fédérale sur les valeurs mobilières», dans *Avant-projet d'une loi canadienne sur le marché des valeurs mobilières* (1979), vol. 3, 147, aux pp. 244 et 245. Cependant, l'Internet a grandement accru la capacité des courtiers en valeurs mobilières d'outrepasser les frontières: 28

[T]he very qualities that make the Internet a valuable tool for investors and the securities industry may render it a convenient tool to perpetrate securities fraud and other violations. The Internet also provides for instantaneous cross-border communication and interactivity, which challenge traditional notions of jurisdiction and territoriality.

(International Organization of Securities Commissions, *Securities Activity on the Internet* (September 1998), at p. 3.)

In order to regulate effectively this electronic trading, regulators must equally be able to respond, and surmount borders where legally possible.

[TRADUCTION] [L]es qualités mêmes qui font de l'Internet un outil précieux pour les investisseurs et le secteur des valeurs mobilières peuvent aussi en faire un moyen commode de commettre des fraudes et d'autres violations en matière de valeurs mobilières. L'Internet est également un outil de communication et d'interactivité transfrontalières instantanées qui met en question les notions traditionnelles de ressort et de territorialité.

(Organisation internationale des commissions de valeurs, *Securities Activity on the Internet* (septembre 1998), à la p. 3.)

Pour réglementer efficacement ce cybercourtage, les organismes de réglementation doivent également être en mesure de réagir et d'outrepasser des frontières lorsqu'il est légalement possible de le faire.

29 Without directly questioning the general need for securities regulators to share information, the respondent claims this goal can be achieved in other ways, in particular through the federal *Mutual Legal Assistance in Criminal Matters Act*, R.S.C., 1985, c. 30 (4th Supp.). However, this treaty-based method of sharing information is insufficient in the securities context for two reasons. First, it applies only to criminal investigations, and thus would be of no assistance for preliminary, informal investigations of the kind common among securities regulators. Second, MOUs "are specifically tailored to the needs of each securities regulatory agency. Therefore, they tend to be more efficient and effective than treaties": P. O. Erwin, "The International Securities Enforcement Cooperation Act of 1990: Increasing International Cooperation in Extraterritorial Discovery?" (1992), 15 *Boston College Int'l & Comp. L. Rev.* 471, at p. 485; see also C. A. A. Greene, "International Securities Law Enforcement: Recent Advances in Assistance and Cooperation" (1994), 27 *Vand. J. Transnat'l L.* 635, at pp. 649-50; J. A. Kehoe, "Exporting Insider Trading Laws: The Enforcement of U.S. Insider Trading Laws Internationally" (1995), 9 *Emory Int'l L. Rev.* 345, at p. 360. By contrast, the *Mutual Legal Assistance in Criminal Matters Act* provides for a relatively formal, cumbersome set of procedures that lack the

Bien qu'elle ne mette pas directement en question le besoin général des organismes de réglementation des valeurs mobilières de partager des renseignements, l'intimée soutient que cet objectif peut être atteint d'autres manières, au moyen notamment d'une loi fédérale, la *Loi sur l'entraide juridique en matière criminelle*, L.R.C. (1985), ch. 30 (4e suppl.). Cependant, il y a deux raisons pour lesquelles cette méthode de partage de renseignements fondée sur des traités est insuffisante dans le contexte des valeurs mobilières. Premièrement, comme elle ne s'applique qu'aux enquêtes criminelles, elle ne serait d'aucun secours en ce qui concerne le genre d'enquêtes préliminaires informelles que mènent souvent les organismes de réglementation du marché des valeurs mobilières. Deuxièmement, les protocoles [TRADUCTION] «sont expressément conçus pour répondre aux besoins de chaque organisme de réglementation du marché des valeurs mobilières. Ils tendent donc à être plus efficients et efficaces que les traités»: P. O. Erwin, «The International Securities Enforcement Cooperation Act of 1990: Increasing International Cooperation in Extraterritorial Discovery?» (1992), 15 *Boston College Int'l & Comp. L. Rev.* 471, à la p. 485; voir également C. A. A. Greene, «International Securities Law Enforcement: Recent Advances in Assistance and Cooperation» (1994), 27 *Vand. J. Transnat'l L.* 635, aux pp. 649 et 650; J. A. Kehoe, «Exporting Insider Trading Laws: The Enforcement of U.S. Insider Trading

efficiency of inter-agency administrative cooperation pursuant to MOUs.

Laws Internationally» (1995), 9 *Emory Int'l L. Rev.* 345, à la p. 360. Par contre, la *Loi sur l'entraide juridique en matière criminelle* prévoit un ensemble de procédures relativement formelles et lourdes qui n'ont pas l'efficacité de la coopération administrative entre organismes que permettent les protocoles.

The respondent also argues that assistance from foreign regulators like the SEC would be forthcoming even if the Commission cannot reciprocate. It notes that a Letter Agreement with the SEC recognized that "the parties to the MOU may not in all circumstances possess the legal authority to provide the assistance contemplated". However, this argument overlooks the MOU signatories' promise to "use all reasonable efforts to obtain the necessary authorization to provide the assistance described". The Letter Agreement contains a similar promise to obtain legislative authorization for reciprocal assistance.

30 L'intimée soutient également que la Commission bénéficierait de l'aide d'organismes de réglementation étrangers, comme la SEC, même si elle ne pouvait pas leur rendre la politesse. Elle fait remarquer qu'une lettre d'entente avec la SEC reconnaît [TRADUCTION] «qu'il se peut que les parties au protocole n'aient pas, dans tous les cas, le pouvoir légal de fournir l'aide envisagée». Cependant, cet argument ne tient pas compte de la promesse des signataires du protocole de [TRADUCTION] «déployer tous les efforts raisonnables afin d'obtenir l'autorisation nécessaire pour fournir l'aide décrite». La lettre d'entente renferme une promesse similaire d'obtenir l'autorisation législative nécessaire à une assistance mutuelle.

In light of this evidence, I accept Mr. Leder's statement that the Commission does indeed have to provide information to the SEC if it is to be assured of such assistance in return:

31 Compte tenu de cette preuve, je souscris à l'affirmation de M. Leder que la Commission doit effectivement fournir des renseignements à la SEC si elle veut pouvoir, elle aussi, compter sur l'aide de cette dernière:

> In fact, in deciding whether to grant a request for assistance, the SEC is statutorily required to consider whether the requesting authority has agreed to provide reciprocal assistance to the SEC in securities matters, as well as whether granting the request would prejudice the public interest of the U.S. Exchange Act § 21(a)(2).
>
> Were the [Commission] not able to provide the SEC with information such as that requested in this matter, this fact would need to be considered by the SEC in determining the extent to which it could respond to future MOU requests from the [Commission].

> [TRADUCTION] En fait, pour décider si elle doit accueillir une demande d'assistance, la SEC est légalement tenue d'examiner, d'une part, si l'organisme qui a présenté la demande a accepté de lui rendre le même service relativement à des questions de valeurs mobilières, et d'autre part, si le fait d'accueillir la demande nuirait à l'intérêt public des États-Unis. Exchange Act § 21a)(2).
>
> Si la [Commission] n'était pas capable de fournir à la SEC des renseignements comme ceux demandés en l'espèce, la SEC devrait tenir compte de ce fait pour décider jusqu'à quel point elle pourrait, à l'avenir, répondre à des demandes de la [Commission] fondées sur le protocole.

Perhaps more fundamentally, I should note that the Commission need not prove that s. 141(1)(b) is necessary to ensure assistance from the SEC. It need only show that the provision's purpose is a legitimate one. Given the uncertain status of SEC assistance in the absence of reciprocity by the

32 De façon peut-être encore plus fondamentale, je dois souligner que la Commission n'est pas tenue d'établir que l'al. 141(1)b) est nécessaire pour garantir l'assistance de la SEC. Elle doit seulement établir que l'objectif de la disposition est légitime. Vu que l'assistance de la SEC serait incertaine si la

Commission, I have no doubt that such a valid purpose exists. I therefore agree with the Commission that one of the dominant purposes of s. 141(1)(b) is obtaining reciprocal cooperation from other securities regulators, thus enabling the Commission to carry out its domestic mandate effectively.

Commission n'était pas en mesure de lui rendre la politesse, je n'ai aucun doute qu'un tel objectif valide existe. Je suis donc d'accord avec la Commission pour dire que l'un des objectifs dominants de l'al. 141(1)b) est d'obtenir la coopération réciproque d'autres organismes de réglementation du marché des valeurs mobilières, de façon à permettre à cette dernière de remplir efficacement son mandat dans la province.

(b) *Discovering Wrongdoings by British Columbia Registrants in Other Jurisdictions*

b) *Déceler les méfaits accomplis dans d'autres ressorts par des courtiers inscrits en Colombie-Britannique*

33 It is well accepted that securities regulation is concerned not only with the securities themselves, but also with the people who sell them. Kerwin C.J. recognized this point in *Smith v. The Queen*, [1960] S.C.R. 776, which upheld a provincial law regulating prospectuses, at p. 781:

Il est bien reconnu que la réglementation des valeurs mobilières porte non seulement sur les valeurs mobilières elles-mêmes, mais également sur les personnes qui les vendent. Le juge en chef Kerwin a reconnu ce point dans l'arrêt *Smith c. The Queen*, [1960] R.C.S. 776, qui a confirmé la validité d'une loi provinciale réglementant les prospectus (à la p. 781):

> [T]he main purpose of the provincial enactment is to ensure the registration of persons and companies before they are permitted to trade in securities, coupled with what is essentially the registration of the securities themselves before the latter may be traded. . . .

> [TRADUCTION] [L]a loi provinciale vise principalement à assurer que les personnes physiques et morales soient inscrites avant de pouvoir faire le commerce des valeurs mobilières, et en même temps à assurer essentiellement que les valeurs mobilières elles-mêmes soient inscrites avant qu'il soit permis d'en faire le commerce . . .

Similarly, in *Lymburn v. Mayland*, [1932] 2 D.L.R. 6, the Privy Council upheld Alberta's *Security Frauds Prevention Act*, the purpose of which it described as follows, at p. 9:

De même, dans *Lymburn c. Mayland*, [1932] 2 D.L.R. 6, le Conseil privé a confirmé la validité de la *Security Frauds Prevention Act* de l'Alberta, dont il a décrit l'objectif de la façon suivante, à la p. 9:

> There is no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded. [Emphasis added.]

> [TRADUCTION] Il n'y a aucune raison de douter que le principal objectif visé par cette partie de la loi est de garantir que les personnes qui font le commerce de valeurs mobilières soient honnêtes et de bonne réputation, et de protéger ainsi le public contre la fraude. [Je souligne.]

See also *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584, at p. 588; Anisman and Hogg, *supra*, at p. 154; D. Johnston and K. D. Rockwell, *Canadian Securities Regulation* (2nd ed. 1998), at p. 4.

Voir également *Gregory & Co. c. Quebec Securities Commission*, [1961] R.C.S. 584, à la p. 588; Anisman et Hogg, *loc. cit.*, à la p. 154; D. Johnston et K. D. Rockwell, *Canadian Securities Regulation* (2e éd. 1998), à la p. 4.

34 Given the Commission's legitimate concern with ensuring that domestic registrants are "honest

Compte tenu du souci légitime de la Commission de veiller à ce que les courtiers inscrits dans la

and of good repute", another obvious purpose of s. 141(1)(b) is uncovering violations of foreign law by domestic registrants. The intervener the Attorney General for Quebec aptly summarized the point in its factum as follows (at p. 7):

[TRANSLATION] . . . the Securities Commission could take into account violations such persons have committed in carrying on that business outside the province, in order to protect the clients of such persons within the province and with respect to transactions taking place there.

The respondent disagrees, arguing that this purpose explains s. 141(1)(d), not s. 141(1)(b). The former provision authorizes an order for production of documents "in respect of matters in British Columbia relating to trading in securities in another jurisdiction". If British Columbia is interested in foreign violations, the respondent submits, it should conduct its own investigation pursuant to s. 141(1)(d).

With respect, I cannot agree. If British Columbia can legitimately conduct its own investigation of foreign violations, certainly it can choose to have that task carried out by a foreign regulator, which is presumably better positioned to conduct such an investigation. The simple fact that the Commission is itself empowered to investigate under s. 141(1)(d) does not change the purpose of s. 141(1)(b). I therefore conclude that another primary goal of the latter provision is uncovering foreign violations of securities laws by domestic registrants.

(c) *The Extra-provincial Aspects of the Law Are Incidental*

The respondent puts a great deal of emphasis on the fact that the impugned provision enables the Commission to turn evidence over to a foreign reg-

province soient «honnêtes et de bonne réputation», un autre objectif manifeste de l'al. 141(1)b) est de déceler les violations de lois étrangères par ces courtiers. Le procureur général du Québec intervenant a bien résumé ce point dans son mémoire (à la p. 7):

. . . la Commission des valeurs mobilières pourrait prendre en compte les fautes que ces personnes ont commises dans l'exploitation de ce commerce à l'extérieur de la province, dans le but de protéger les clients de ces personnes à l'intérieur de la province et à l'égard de transactions y ayant lieu.

35 L'intimée n'est pas d'accord et elle soutient que cet objectif explique l'al. 141(1)d) et non pas l'al. 141(1)b). Le premier alinéa prévoit qu'une ordonnance de production de documents peut être rendue [TRADUCTION] «à l'égard de questions qui, en Colombie-Britannique, se rapportent à des opérations de courtage en valeurs mobilières dans un autre ressort». L'intimée soutient que, si la Colombie-Britannique s'intéresse à des violations commises à l'étranger, elle doit effectuer sa propre enquête en application de l'al. 141(1)d).

36 En toute déférence, je ne saurais être d'accord. Si la Colombie-Britannique peut légitimement effectuer sa propre enquête sur des violations commises à l'étranger, elle peut certainement choisir de confier cette tâche à un organisme de réglementation étranger, qui est probablement mieux placé pour l'accomplir. Le simple fait que la Commission est elle-même habilitée à enquêter en vertu de l'al. 141(1)d) ne change rien à l'objectif de l'al. 141(1)b). Je conclus donc qu'un autre objectif principal de ce dernier alinéa est de déceler les violations de lois étrangères sur les valeurs mobilières commises par des courtiers inscrits dans la province.

c) *Les aspects extraprovinciaux de la mesure législative sont accessoires*

37 L'intimée insiste beaucoup sur le fait que la disposition législative contestée permet à la Commission de remettre des éléments de preuve à un orga-

ulatory body. As such, it argues that the purpose must be to assist the enforcement of foreign law. With respect, this argument confuses the purpose of a law with the means chosen to achieve that purpose. As discussed above, the purpose of s. 141(1)(b) is the enforcement of domestic securities law, both by obtaining reciprocal assistance from foreign regulators, and by discovering foreign securities law violations by domestic registrants. Authorizing an order for production of information to assist a foreign regulator under s. 141(1)(b) is merely the means by which the Commission achieves these goals. Indeed, given the overwhelming evidence supporting the appellant's position, I cannot agree with the respondent that British Columbia has passed a law whose dominant purpose is to assist a foreign body. Accordingly, in these circumstances, I would not ascribe such a purpose to s. 141(1)(b).

nisme de réglementation étranger. Elle soutient que cette disposition a, de ce fait, nécessairement pour objectif d'aider à appliquer des lois étrangères. En toute déférence, j'estime que cet argument confond l'objectif d'une loi avec les moyens choisis pour atteindre cet objectif. Comme nous l'avons vu, l'al. 141(1)b) a pour objet d'appliquer la loi provinciale sur les valeurs mobilières grâce à l'assistance réciproque d'organismes de réglementation étrangers et à la découverte de violations de lois étrangères sur les valeurs mobilières commises par des courtiers inscrits dans la province. Permettre qu'une ordonnance de production de renseignements, fondée sur l'al. 141(1)b), soit rendue pour aider un organisme de réglementation étranger n'est que le moyen que prend la Commission pour atteindre ces objectifs. En effet, compte tenu de la preuve abondante qui étaye le point de vue de l'appelante, je ne puis souscrire à l'avis de l'intimée que la Colombie-Britannique a adopté une loi ayant pour objectif dominant d'assister un organisme étranger. Dans ces circonstances, je suis donc d'avis de ne pas attribuer un tel objectif à l'al. 141(1)b).

38 Moreover, I do not believe the effects of s. 141(1)(b) alter my analysis of its pith and substance. While it does involve relations with a foreign authority, s. 141(1)(b) does not attempt to extend the reach of provincial legislation outside its borders: see *McGuire v. McGuire*, [1953] O.R. 328 (C.A.), at p. 334. As several provincial interveners pointed out in their submissions, administrative arrangements between provinces and foreign authorities are quite common. Without commenting on the constitutionality of any of these arrangements, I would note simply that where, as here, there is a clearly dominant intraprovincial purpose, the mere fact that the province is co-operating with a foreign authority in the pursuit of that purpose will not change the law's pith and substance: see E. Edinger, "Territorial Limitations on Provincial Powers" (1982), 14 *Ottawa L. Rev.* 57, at p. 94. In short, the extraprovincial effects of s. 141(1)(b) are clearly incidental to the dominant purposes described above.

En outre, je ne crois pas que les effets de l'al. 141(1)b) modifient mon analyse de son caractère véritable. Bien qu'il implique l'existence de rapports avec un organisme étranger, l'al. 141(1)b) ne tente pas d'étendre la portée de la mesure législative provinciale au-delà des frontières de la province: voir *McGuire c. McGuire*, [1953] O.R. 328 (C.A.), à la p. 334. Comme plusieurs intervenants provinciaux l'ont souligné dans leurs observations, il arrive très souvent que des provinces concluent des ententes administratives avec des organismes étrangers. Sans faire de commentaire sur la constitutionnalité de l'une ou l'autre de ces ententes, je souligne simplement que, dans le cas où, comme en l'espèce, il existe un objectif intraprovincial clairement dominant, le simple fait que la province coopère avec un organisme étranger en vue de réaliser cet objectif ne modifie pas le caractère véritable de la loi en cause: voir E. Edinger, «Territorial Limitations on Provincial Powers» (1982), 14 *Ottawa L. Rev.* 57, à la p. 94. Bref, les effets extra-

provinciaux de l'al. 141(1)b) sont nettement accessoires aux objectifs dominants décrits plus haut.

2. Assigning the Legislation to a Head of Provincial Jurisdiction

Having characterized the law, I now turn to determining whether the law can be assigned to an enumerated head of provincial authority. In argument, the respondent and several interveners suggested two possible sources: "Property and Civil Rights", and "Administration of Justice". Because of my conclusion that the legislation fits within "Property and Civil Rights", I do not find it necessary to address the "Administration of Justice" issue.

(a) *Section 92(13): Property and Civil Rights in the Province*

I conclude that the "pith and substance" of s. 141(1)(b), as described above, falls within the scope of s. 92(13) of the *Constitution Act, 1867*, "Property and Civil Rights in the Province". Section 141(1)(b)'s dominant purpose is the effective regulation of domestic securities, a task that has long been recognized to fall within provincial authority: see *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at pp. 183-85; *Smith*, *supra*; *Lymburn*, *supra*.

Moreover, it is well established that the provinces' authority over securities regulation is not limited to purely intraprovincial matters. In *Gregory*, *supra*, the Quebec-based broker in question was prosecuted solely for transactions outside the province. This Court nonetheless held that Quebec had a legitimate interest in those transactions. Conversely, in *R. v. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56, the Manitoba Court of Appeal held that a province can regulate a broker located outside the province if that broker transacts with clients within the province.

2. Rattacher la mesure législative à un chef de compétence provinciale

Après avoir qualifié la loi en cause, je vais maintenant déterminer si elle peut être rattachée à un chef énuméré de compétence provinciale. Dans leurs plaidoiries, l'intimée et plusieurs intervenants ont indiqué deux sources possibles: «la propriété et les droits civils» et «l'administration de la justice». Vu ma conclusion que la mesure législative relève de «la propriété et [d]es droits civils», je juge qu'il n'est pas nécessaire d'aborder la question de l'«administration de la justice». 39

a) *Le paragraphe 92(13): la propriété et les droits civils dans la province*

Je conclus que le «caractère véritable», décrit plus haut, de l'al. 141(1)b) relève du par. 92(13) de la *Loi constitutionnelle de 1867*, à savoir «la propriété et les droits civils dans la province». L'objectif dominant de l'al. 141(1)b) est la réglementation efficace du marché des valeurs mobilières dans la province, une tâche qui est considérée depuis longtemps comme relevant de la compétence des provinces: voir *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, aux pp. 183 à 185; *Smith*, précité; *Lymburn*, précité. 40

En outre, il est bien établi que la compétence des provinces en matière de réglementation du marché des valeurs mobilières ne se limite pas aux questions purement intraprovinciales. Dans l'affaire *Gregory*, précitée, le courtier en cause, dont le bureau était situé au Québec, n'avait été poursuivi que pour des opérations qui avaient eu lieu à l'extérieur de la province. Notre Cour a néanmoins conclu que le Québec avait un intérêt légitime dans ces opérations. Inversement, dans l'arrêt *R. c. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56, la Cour d'appel du Manitoba a conclu qu'une province peut réglementer les activités d'un courtier de l'extérieur de la province si celui-ci transige avec des clients se trouvant dans la province. 41

42 Two different courts of appeal have also acknowledged that provincial regulatory bodies may have jurisdiction to investigate violations of foreign law. In *Re Legault and Law Society of Upper Canada* (1975), 58 D.L.R. (3d) 641, the Ontario Court of Appeal upheld the Law Society's authority to entertain a complaint about the conduct of an Ontario lawyer in another jurisdiction. As the court noted at p. 643, "the jurisdiction of the Law Society over its member is a personal one, which extends to the member's conduct without territorial limitation". In *Re Underwood McLellan & Associates Ltd.* (1979), 103 D.L.R. (3d) 268 (Sask. C.A.), the court similarly upheld the power of the Association of Professional Engineers to examine conduct outside the province in making its licensing decisions.

Deux autres cours d'appel ont également reconnu que les organismes de réglementation provinciaux peuvent avoir compétence pour enquêter sur des violations de lois étrangères. Dans *Re Legault and Law Society of Upper Canada* (1975), 58 D.L.R. (3d) 641, la Cour d'appel de l'Ontario a confirmé le pouvoir du barreau de cette province d'entendre une plainte sur la conduite d'un avocat ontarien dans un autre ressort. Comme la cour l'a souligné, à la p. 643, [TRADUCTION] «la compétence du Barreau à l'égard de ses membres, qui est de nature personnelle, s'étend sans limite territoriale à leur conduite». Dans *Re Underwood McLellan & Associates Ltd.* (1979), 103 D.L.R. (3d) 268 (C.A. Sask.), la cour a, de la même façon, confirmé le pouvoir de l'Association of Professional Engineers d'examiner la conduite à l'extérieur de la province, en prenant ses décisions en matière de permis.

43 Both these cases recognize that provincial regulatory bodies governing professions with a strong interjurisdictional aspect must be able to take into account events occurring abroad. This rationale may not necessarily hold in all circumstances, and each case must be decided on its own facts. However, given the Commission's clear authority over domestic securities regulation, and the clearly interjurisdictional nature of securities regulation in general, I find that it must apply in the present appeal. Assisting in the investigation of possible violations of foreign securities laws falls under the Commission's power under s. 92(13) to regulate British Columbia's securities market.

Ces deux arrêts reconnaissent que les organismes de réglementation provinciaux qui régissent les professions dont le champ d'action dépasse, de façon importante, les limites d'un ressort doivent pouvoir prendre en considération des faits survenus à l'étranger. Il se peut que ce raisonnement ne tienne pas nécessairement dans tous les cas, et chaque cas doit être tranché en fonction des ses propres faits. Cependant, vu la compétence manifeste que la Commission possède en matière de réglementation du marché des valeurs mobilières dans la province, et vu que, de par sa nature, la réglementation des valeurs mobilières en général dépasse clairement les limites d'un ressort, j'estime que ce raisonnement doit s'appliquer dans le présent pourvoi. Aider à enquêter sur d'éventuelles violations de lois étrangères en matière de valeurs mobilières relève du pouvoir que la Commission possède, en vertu du par. 92(13), de réglementer le marché des valeurs mobilières de la Colombie-Britannique.

44 I therefore conclude that the pith and substance of s. 141(1)(b) falls within British Columbia's authority to regulate securities. Obtaining reciprocal cooperation and uncovering violations abroad

Je conclus donc que le caractère véritable de l'al. 141(1)b) relève du pouvoir de la Colombie-Britannique de réglementer le marché des valeurs mobilières. Réaliser une coopération mutuelle et

are both aspects of the Commission's mandate, which fits easily within s. 92(13).

déceler des violations à l'étranger sont deux aspects du mandat de la Commission, qui cadre aisément avec le par. 92(13).

C. *The Ancillary Doctrine*

45 Having concluded that s. 141(1)(b) is, in pith and substance, valid provincial legislation, there is no need to discuss the last two steps of the analysis set out by Dickson C.J. in *GM Canada*, *supra*, frequently referred to collectively as the "ancillary" doctrine: see Hogg, *supra*, at p. 15-35. Indeed, given that this appeal does not involve an allegation that one level of government is trenching on another's sphere of competence, as *GM Canada* did, it is not even clear that this doctrine is applicable. Nevertheless, I would note that even if s. 141(1)(b) were not in pith and substance provincial, it would clearly be justified under the ancillary doctrine. Section 141(1)(b) is a part of a valid legislative scheme, namely, the *Securities Act*. Moreover, even assuming that the most rigorous version of the ancillary doctrine applies, I believe that s. 141(1)(b) is "necessarily incidental" to the *Securities Act* and would therefore also uphold it under the ancillary doctrine.

46 The Attorney General of Canada intervened in this appeal to argue that:

> [I]f the provision in question is held to be within provincial jurisdiction, this decision would not preclude overlapping federal jurisdiction over securities matters in respect of international and interprovincial transactions and co-operation, or any other relevant head of federal jurisdiction.

Since the central question presented by this appeal is the power of the province to enact s. 141(1)(b), I decline to comment on the constitutionality of hypothetical overlapping federal legislation. I would note, however, that this Court has already upheld aspects of federal securities regulation, in another context, in *Multiple Access*, *supra*, under the "double aspect" theory. The Court's decision

C. *Le principe de la compétence accessoire*

Vu ma conclusion que l'al. 141(1)b) est, de par son caractère véritable, une disposition législative provinciale valide, il n'est pas nécessaire d'aborder les deux dernières étapes de l'analyse énoncée par le juge en chef Dickson dans l'arrêt *GM Canada*, précité, que l'on désigne souvent sous le nom de principe de la «compétence accessoire»: voir Hogg, *op. cit.*, à la p. 15-35. En fait, comme il n'est pas allégué, dans le présent pourvoi, qu'un niveau de gouvernement empiète sur le champ de compétence d'un autre niveau de gouvernement, comme c'était le cas dans l'arrêt *GM Canada*, précité, il n'est même pas évident que ce principe s'applique en l'espèce. Je tiens néanmoins à faire remarquer que, même s'il n'était pas, de par son caractère véritable, de nature provinciale, l'al. 141(1)b) serait clairement justifié en vertu du principe de la compétence accessoire. Cet alinéa fait partie d'un régime législatif valide, à savoir la *Securities Act*. De plus, même en supposant que la version la plus stricte du principe de la compétence accessoire s'applique, j'estime que l'al. 141(1)b) est «nécessairement accessoire» à la *Securities Act* et, partant, je suis d'avis d'en confirmer également la validité en vertu du principe de la compétence accessoire.

Le procureur général du Canada est intervenu dans le présent pourvoi pour soutenir que:

> [TRADUCTION] [S]i on concluait que la disposition en question relève de la compétence de la province, cela n'empêcherait pas l'existence d'une compétence fédérale chevauchante en matière de valeurs mobilières, à l'égard des opérations et de la coopération internationales et interprovinciales, ou de tout autre chef de compétence fédérale pertinent.

Comme la question centrale que soulève le présent pourvoi concerne le pouvoir de la province d'adopter l'al. 141(1)b), je m'abstiens de faire des remarques sur la constitutionnalité d'une hypothétique loi fédérale chevauchante à cet égard. Je tiens cependant à souligner que notre Cour a déjà invoqué, dans l'arrêt *Multiple Access*, précité, la règle du «double aspect» pour confirmer la validité de certains aspects de la réglementation fédérale des valeurs mobilières dans un autre contexte.

in the present appeal should not be taken in any way to question the holding of that case.

VII. Conclusion and Disposition

In summary, I find that s. 141(1)(b) of the British Columbia *Securities Act* is, in pith and substance, aimed at furthering the effective enforcement of domestic securities laws and as such falls within the province's powers under s. 92(13) of the *Constitution Act, 1867*. The appeal is allowed with costs throughout, the judgment of the Court of Appeal for British Columbia is set aside, and the judgment of Macdonald J. is restored.

Appeal allowed with costs.

Solicitors for the appellant: James A. Angus and Stephen M. Zolnay, Vancouver.

Solicitors for the respondent: Nathanson, Schachter & Thompson, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Toronto.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: The Department of Justice, Halifax.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

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: The Department of Justice, Edmonton.

L'arrêt de notre Cour en l'espèce ne doit nullement être interprété comme mettant en doute l'arrêt *Multiple Access*.

VII. Conclusion et dispositif

47 En résumé, j'estime que l'al. 141(1)b) de la *Securities Act* de la Colombie-Britannique vise, de par son caractère véritable, à favoriser l'application efficace des lois sur les valeurs mobilières de la province et qu'à ce titre il relève de la compétence conférée à la province par le par. 92(13) de la *Loi constitutionnelle de 1867*. Le pourvoi est accueilli avec dépens dans toutes les cours, l'arrêt de la Cour d'appel de la Colombie-Britannique est annulé et le jugement du juge Macdonald est rétabli.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante: James A. Angus et Stephen M. Zolnay, Vancouver.

Procureurs de l'intimée: Nathanson, Schachter & Thompson, Vancouver.

Procureur de l'intervenant le procureur général du Canada: Le ministère de la Justice, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Procureur de l'intervenant le procureur général du Québec: Le ministère de la Justice, Sainte-Foy.

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse: Le ministère de la Justice, Halifax.

Procureur de l'intervenant le procureur général du Manitoba: Le ministère de la Justice, Winnipeg.

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Le ministère du Procureur général, Victoria.

Procureur de l'intervenant le procureur général de l'Alberta: Le ministère de la Justice, Edmonton.

Solicitors for the intervener the Ontario Securities Commission: Davies, Ward & Beck, Toronto.

Solicitors for the intervener the Commission des valeurs mobilières du Québec: McCarthy Tétrault, Montréal.

Solicitor for the intervener the Alberta Securities Commission: Anne J. Brown, Calgary.

Procureurs de l'intervenante la Commission des valeurs mobilières de l'Ontario: Davies, Ward & Beck, Toronto.

Procureurs de l'intervenante la Commission des valeurs mobilières du Québec: McCarthy Tétrault, Montréal.

Procureur de l'intervenante l'Alberta Securities Commission: Anne J. Brown, Calgary.

Imperial Tobacco Canada Limited *Appellant*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Imperial Tobacco Canada Limited *Appellant*

v.

Attorney General of British Columbia *Respondent*

and

Rothmans, Benson & Hedges Inc. *Appellant*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Rothmans, Benson & Hedges Inc. *Appellant*

v.

Attorney General of British Columbia *Respondent*

and

JTI-Macdonald Corp. *Appellant*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Imperial Tobacco Canada Limitée *Appelante*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique *Intimée*

et

Imperial Tobacco Canada Limitée *Appelante*

c.

Procureur général de la Colombie-Britannique *Intimé*

et

Rothmans, Benson & Hedges Inc. *Appelante*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique *Intimée*

et

Rothmans, Benson & Hedges Inc. *Appelante*

c.

Procureur général de la Colombie-Britannique *Intimé*

et

JTI-Macdonald Corp. *Appelante*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique *Intimée*

et

JTI-Macdonald Corp. *Appellant*

v.

Attorney General of British Columbia *Respondent*

and

Canadian Tobacco Manufacturers' Council *Appellant*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

British American Tobacco (Investments) Limited *Appellant*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Philip Morris Incorporated and Philip Morris International Inc. *Appellants*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta and Attorney General of Newfoundland and Labrador *Interveners*

JTI-Macdonald Corp. *Appelante*

c.

Procureur général de la Colombie-Britannique *Intimé*

et

Conseil canadien des fabricants des produits du tabac *Appelant*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique *Intimée*

et

British American Tobacco (Investments) Limited *Appelante*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique *Intimée*

et

Philip Morris Incorporated et Philip Morris International Inc. *Appelantes*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique *Intimée*

et

Procureur général de l'Ontario, procureur général du Québec, procureur général de la Nouvelle-Écosse, procureur général du Nouveau-Brunswick, procureur général du Manitoba, procureur général de la Saskatchewan, procureur général de l'Alberta et procureur général de Terre-Neuve-et-Labrador *Intervenants*

INDEXED AS: BRITISH COLUMBIA *v.* IMPERIAL TOBACCO CANADA LTD.

Neutral citation: 2005 SCC 49.

File No.: 30411.

2005: June 8; 2005: September 29.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Division of powers — Extraterritoriality — Limitation on provincial legislation — Provincial legislation authorizing civil actions by government of British Columbia against manufacturers of tobacco products for recovery of health care expenditures incurred by government in treating individuals exposed to those products — Tobacco manufacturers sued by government challenging constitutional validity of legislation — Whether legislation exceeds territorial limits on provincial legislative jurisdiction — Constitution Act, 1867, s. 92(13) — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

Constitutional law — Judicial independence — Provincial legislation authorizing civil actions by government of British Columbia against manufacturers of tobacco products for recovery of health care expenditures incurred by government in treating individuals exposed to those products — Whether legislation constitutionally invalid as being inconsistent with principle of judicial independence — Whether rules of civil procedure contained in legislation interfere with adjudicative role of court hearing action — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

Constitutional law — Rule of law — Provincial legislation authorizing civil actions by government of British Columbia against manufacturers of tobacco products for recovery of health care expenditures incurred by government in treating individuals exposed to those products — Whether legislation constitutionally invalid as offending rule of law — Whether Constitution, through rule of law, requires legislation to be prospective, general in character and devoid of special advantages for government (except where necessary for effective

RÉPERTORIÉ : COLOMBIE-BRITANNIQUE *c.* IMPERIAL TOBACCO CANADA LTÉE

Référence neutre : 2005 CSC 49.

N° du greffe : 30411.

2005 : 8 juin; 2005 : 29 septembre.

Présents: La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Partage des compétences — Extraterritorialité — Limites aux lois provinciales — Loi provinciale autorisant le gouvernement de la Colombie-Britannique à poursuivre au civil les fabricants de produits du tabac en vue de recouvrer les dépenses engagées par le gouvernement au titre des soins de santé pour le traitement des personnes exposées à ces produits — Contestation de la validité constitutionnelle de la loi par les fabricants de produits du tabac poursuivis par le gouvernement — La loi excède-t-elle les limites territoriales de la compétence législative provinciale? — Loi constitutionnelle de 1867, art. 92(13) — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, ch. 30.

Droit constitutionnel — Indépendance judiciaire — Loi provinciale autorisant le gouvernement de la Colombie-Britannique à poursuivre au civil les fabricants de produits du tabac en vue de recouvrer les dépenses engagées par le gouvernement au titre des soins de santé pour le traitement des personnes exposées à ces produits — La loi est-elle inconstitutionnelle en raison de son incompatibilité avec l'indépendance judiciaire? — Les règles de procédure civile prévues dans la loi nuisent-elles à la fonction juridictionnelle du tribunal saisi d'une action? — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, ch. 30.

Droit constitutionnel — Primauté du droit — Loi provinciale autorisant le gouvernement de la Colombie-Britannique à poursuivre au civil les fabricants de produits du tabac en vue de recouvrer les dépenses engagées par le gouvernement au titre des soins de santé pour le traitement des personnes exposées à ces produits — La loi est-elle inconstitutionnelle parce qu'elle va à l'encontre de la primauté du droit? — La Constitution exige-t-elle, au moyen de la primauté du droit, que les lois aient un caractère prospectif, qu'elles soient de

governance), as well as to ensure fair civil trial — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

The *Tobacco Damages and Health Care Costs Recovery Act* (the "Act") authorizes an action by the government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures incurred by the government in treating individuals exposed to those products. Liability hinges on those individuals having been exposed to tobacco products because of the manufacturer's breach of a duty owed to persons in British Columbia, and on the government having incurred health care expenditures in treating disease in those individuals caused by such exposure. The appellants, each of which was sued by the government pursuant to the Act, challenged its constitutional validity. The British Columbia Supreme Court dismissed the government's actions, concluding that the Act was unconstitutional because it failed to respect territorial limits on provincial legislative jurisdiction. The Court of Appeal set aside the decision, finding that the Act's pith and substance is "Property and Civil Rights in the Province" within the meaning of s. 92(13) of the *Constitution Act, 1867*, and that the extraterritorial aspects of the Act, if any, are incidental to it. The court also found that the Act does not offend judicial independence or the rule of law.

Held: The appeals should be dismissed. The Act is constitutionally valid.

The Act is not unconstitutional by reason of extraterritoriality. The cause of action that constitutes the pith and substance of the Act is properly described as located "in the Province" under s. 92(13) of the *Constitution Act, 1867*. The Act is meaningfully connected to the province as there are strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs). The Act also respects the legislative sovereignty of other jurisdictions. Though the cause of action may capture, to some extent, activities occurring outside of British Columbia, no territory could possibly assert a stronger relationship to that cause of action than British Columbia. The breaches of duty to which the Act refers are of subsidiary significance to the cause of action created by it, and thus the locations where those breaches

nature générale et dépourvues de privilèges spéciaux à l'égard du gouvernement (sauf lorsque le privilège est nécessaire à une gouvernance efficace), en plus d'assurer un procès équitable au civil? — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, ch. 30.

La *Tobacco Damages and Health Care Costs Recovery Act* (la « Loi ») autorise le gouvernement de la Colombie-Britannique à poursuivre un fabricant de produits du tabac en vue de recouvrer les dépenses engagées par le gouvernement au titre des soins de santé pour le traitement des personnes exposées à ces produits. La responsabilité découle de l'exposition de ces personnes à des produits du tabac parce que le fabricant aurait manqué à une obligation qu'il avait envers la population en Colombie-Britannique, et de l'engagement, par le gouvernement, de dépenses au titre des soins de santé pour le traitement des maladies ainsi causées. Les appelants, qui sont tous poursuivis par le gouvernement en vertu de la Loi, contestent sa constitutionnalité. La Cour suprême de la Colombie-Britannique a rejeté les actions intentées par le gouvernement, concluant que la Loi est inconstitutionnelle parce qu'elle ne respecte pas les limites territoriales de la compétence législative provinciale. La Cour d'appel a annulé cette décision, concluant que le caractère véritable de la Loi concerne « la propriété et les droits civils dans la province » au sens du par. 92(13) de la *Loi constitutionnelle de 1867*, et que ses aspects extraterritoriaux, s'il en est, ont un caractère accessoire. La cour a également conclu que la Loi ne porte pas atteinte à l'indépendance judiciaire ou à la primauté du droit.

Arrêt : Les pourvois sont rejetés. La Loi est constitutionnellement valide.

La Loi n'est pas invalide pour cause d'extraterritorialité. La cause d'action qui en constitue le caractère véritable est à juste titre décrite comme se trouvant « dans la province » aux termes du par. 92(13) de la *Loi constitutionnelle de 1867*. Il existe un lien significatif entre la Loi et la province puisqu'un lien solide unit le territoire ayant légiféré (la Colombie-Britannique), l'objet de la Loi (l'indemnisation pour les coûts des soins de santé liés au tabac engagés par le gouvernement de la Colombie-Britannique) et les personnes assujetties à cette Loi (les fabricants de produits du tabac ultimement responsables de ces coûts). La Loi respecte aussi la souveraineté législative des autres ressorts. Bien que la cause d'action puisse, dans une certaine mesure, viser des activités menées à l'extérieur de la Colombie-Britannique, aucun territoire autre que la Colombie-Britannique ne pourrait prétendre à l'existence d'un lien plus fort avec cette cause d'action. Les manquements à une obligation auxquels renvoie la Loi ont, pour la cause

might occur have little or no bearing on the strength of the relationship between the cause of action and British Columbia. [37-38] [40] [43]

The Act does not violate the independence of the judiciary. A court called upon to try an action brought pursuant to the Act retains at all times its adjudicative role, and the ability to exercise that role without interference. It must independently determine the applicability of the Act to the government's claim, independently assess the evidence led to support and defend that claim, independently assign that evidence weight, then independently determine whether its assessment of the evidence supports a finding of liability. The fact that the Act shifts onuses of proof in respect of some of the elements of an aggregate claim or limits the compellability of certain information does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence. [55-56]

The Act does not implicate the rule of law in the sense that the Constitution comprehends that term. Except in respect of criminal law, the retrospectivity and retroactivity of which is limited by s. 11(*g*) of the *Canadian Charter of Rights and Freedoms*, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Nor does the Constitution, through the rule of law, require that legislation be general in character and devoid of special advantages for the government (except where necessary for effective governance), or that it ensure a fair civil trial. In any event, tobacco manufacturers sued pursuant to the Act will receive a fair civil trial: they are entitled to a public hearing, before an independent and impartial court, in which they may contest the claims of the plaintiff and adduce evidence in their defence. The court will determine their liability only following that hearing, based solely on its understanding of the law as applied to its findings of fact. That defendants might regard the Act as unjust, or the procedural rules it prescribes as unprecedented, does not render their trial unfair. [69] [73] [76-77]

d'action qu'elle crée, une importance secondaire; ainsi, le lieu où ces manquements pourraient survenir a peu de rapport, sinon aucun, avec la force du lien qui existe entre la cause d'action et la Colombie-Britannique. [37-38] [40] [43]

La Loi ne viole pas l'indépendance des tribunaux. Un tribunal appelé à instruire une action introduite sous le régime de la Loi conserve en tout temps sa fonction juridictionnelle et sa capacité d'exercer cette fonction sans ingérence. Il doit statuer de façon indépendante sur l'applicabilité de la Loi à la demande présentée par le gouvernement, il doit apprécier de façon indépendante les éléments de preuve soumis à l'appui et à l'encontre de cette demande, il doit évaluer de façon indépendante le poids de cette preuve, et déterminer alors de la même manière si son appréciation de la preuve justifie une conclusion de responsabilité. Le fait que la Loi déplace des fardeaux de la preuve quant à certains éléments propres à une action globale, ou qu'elle limite la contraignabilité à l'égard de certains renseignements ne fait en aucun cas obstacle, ni en apparence ni en réalité, à la fonction juridictionnelle du tribunal ou à l'une des conditions essentielles de l'indépendance judiciaire. L'indépendance judiciaire peut s'accommoder de l'introduction de règles de procédure civile et de preuve novatrices. [55-56]

La Loi ne met pas en jeu l'application du principe de la primauté du droit dans le sens où cette expression est consacrée dans la Constitution. Sauf pour ce qui est du droit criminel, où l'al. 11*g*) de la *Charte canadienne des droits et libertés* limite le caractère prospectif et la rétroactivité de la législation, le principe de la primauté du droit et les dispositions de notre Constitution n'exigent aucunement que les lois aient seulement un caractère prospectif. La Constitution n'exige pas non plus, au moyen de la primauté du droit, que les lois soient de nature générale et dépourvues de privilèges spéciaux à l'égard du gouvernement (sauf lorsque le privilège est nécessaire à une gouvernance efficace), ou qu'elles assurent un procès équitable au civil. Quoi qu'il en soit, les fabricants de tabac poursuivis en application de la Loi subiront un procès équitable au civil : ils ont droit à une audition publique, devant un tribunal indépendant et impartial, et ils peuvent contester les réclamations de la demanderesse et produire des éléments de preuve en défense. Le tribunal ne statuera sur leur responsabilité qu'à l'issue de cette audition, en se fondant exclusivement sur son interprétation du droit qu'il applique à ses conclusions de fait. Le fait que les défendeurs puissent estimer que la Loi est injuste, ou que les règles de procédure qu'elle prescrit sont nouvelles, ne rend pas leur procès inéquitable. [69] [73] [76-77]

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David C. Harris, *Q.C.*, *William S. Berardino*, *Q.C.*, and *Andrea N. MacKay*, for the appellant Imperial Tobacco Canada Limited.

Kenneth N. Affleck, *Q.C.*, *James A. Macaulay*, *Q.C.*, *Steven Sofer*, *Michael Sobkin* and *Ian G. Christman*, for the appellant Rothmans, Benson & Hedges Inc.

Jack M. Giles, *Q.C.*, *Jeffrey J. Kay*, *Q.C.*, and *Dylana R. Bloor*, for the appellant JTI-Macdonald Corp.

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David C. Harris, *c.r.*, *William S. Berardino*, *c.r.*, et *Andrea N. MacKay*, pour l'appelante Imperial Tobacco Canada Limitée.

Kenneth N. Affleck, *c.r.*, *James A. Macaulay*, *c.r.*, *Steven Sofer*, *Michael Sobkin* et *Ian G. Christman*, pour l'appelante Rothmans, Benson & Hedges Inc.

Jack M. Giles, *c.r.*, *Jeffrey J. Kay*, *c.r.*, et *Dylana R. Bloor*, pour l'appelante JTI-Macdonald Corp.

Written submissions only by *Maryanne F. Prohl*, for the appellant Canadian Tobacco Manufacturers' Council.

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Simon Potter and *Cynthia A. Millar*, for the appellants Philip Morris Incorporated and Philip Morris International Inc.

Thomas R. Berger, *Q.C.*, *Daniel A. Webster*, *Q.C.*, *Elliott M. Myers*, *Q.C.*, and *Craig E. Jones*, for the respondents.

Robin K. Basu and *Mark Crow*, for the intervener the Attorney General of Ontario.

Alain Gingras and *Brigitte Bussières*, for the intervener the Attorney General of Quebec.

Written submissions only by *Edward A. Gores*, for the intervener the Attorney General of Nova Scotia.

John G. Furey, for the intervener the Attorney General of New Brunswick.

Eugene B. Szach, for the intervener the Attorney General of Manitoba.

Graeme G. Mitchell, *Q.C.*, and *R. James Fyfe*, for the intervener the Attorney General for Saskatchewan.

Robert Normey, for the intervener the Attorney General of Alberta.

Donna Ballard and *Barbara Barrowman*, for the intervener the Attorney General of Newfoundland and Labrador.

The judgment of the Court was delivered by

1 MAJOR J. — The *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (the "Act"), authorizes an action by the government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures

Argumentation écrite seulement par *Maryanne F. Prohl*, pour l'appelant le Conseil canadien des fabricants des produits du tabac.

John J. L. Hunter, *c.r.*, *Craig P. Dennis*, *Matthew J. Westphal*, pour l'appelante British American Tobacco (Investments) Limited.

Simon Potter et *Cynthia A. Millar*, pour les appelantes Philip Morris Incorporated et Philip Morris International Inc.

Thomas R. Berger, *c.r.*, *Daniel A. Webster*, *c.r.*, *Elliott M. Myers*, *c.r.*, et *Craig E. Jones*, pour les intimés.

Robin K. Basu et *Mark Crow*, pour l'intervenant le procureur général de l'Ontario.

Alain Gingras et *Brigitte Bussières*, pour l'intervenant le procureur général du Québec.

Argumentation écrite seulement par *Edward A. Gores*, pour l'intervenant le procureur général de la Nouvelle-Écosse.

John G. Furey, pour l'intervenant le procureur général du Nouveau-Brunswick.

Eugene B. Szach, pour l'intervenant le procureur général du Manitoba.

Graeme G. Mitchell, *c.r.*, et *R. James Fyfe*, pour l'intervenant le procureur général de la Saskatchewan.

Robert Normey, pour l'intervenant le procureur général de l'Alberta.

Donna Ballard et *Barbara Barrowman*, pour l'intervenant le procureur général de Terre-Neuve-et-Labrador.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR — La *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, ch. 30 (la « Loi »), autorise le gouvernement de la Colombie-Britannique à poursuivre un fabricant de produits du tabac en vue de recouvrer les dépenses

incurred by the government in treating individuals exposed to those products. Liability hinges on those individuals having been exposed to tobacco products because of the manufacturer's breach of a duty owed to persons in British Columbia, and on the government of British Columbia having incurred health care expenditures in treating disease in those individuals caused by such exposure.

These appeals question the constitutional validity of the Act. The appellants, each of which was sued by the government of British Columbia pursuant to the Act, challenge its constitutional validity on the basis that it violates: (1) territorial limits on provincial legislative jurisdiction; (2) the principle of judicial independence; and (3) the principle of the rule of law.

For the reasons that follow, the Act is constitutionally valid. The appeals are dismissed, with costs to the respondents throughout.

I. Background

A. *The Legislation*

The Act, in its entirety, is reproduced in the Appendix. Its essential aspects are summarized below.

Section 2(1) is the keystone of the Act. It reads:

> The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.

The terms "manufacturer", "cost of health care benefits" and "tobacco related wrong" are defined in s. 1(1) of the Act. Their definitions in turn refer to other defined terms. Incorporating the definitions into s. 2, then paraphrasing to some degree, the section provides as follows:

> The government has a direct and distinct action against a manufacturer for the present value of existing and reasonably expected future expenditures by the government for

engagées par le gouvernement au titre des soins de santé pour le traitement des personnes exposées à ces produits. La responsabilité découle de l'exposition de ces personnes à des produits du tabac parce que le fabricant aurait manqué à une obligation qu'il avait envers la population en Colombie-Britannique, et de l'engagement, par le gouvernement de cette province, de dépenses au titre de soins de santé pour le traitement des maladies ainsi causées.

2 Les présents pourvois mettent en cause la constitutionnalité de la Loi. Les appelants, que le gouvernement de la Colombie-Britannique a tous poursuivi en vertu de la Loi, contestent sa constitutionnalité au motif qu'elle viole (1) les limites territoriales de la compétence législative provinciale, (2) le principe de l'indépendance judiciaire, et (3) le principe de la primauté du droit.

3 Pour les motifs qui suivent, la Loi est constitutionnellement valide. Les pourvois sont rejetés avec dépens en faveur des intimés dans toutes les cours.

I. Contexte

A. *Les dispositions législatives*

4 La Loi est reproduite intégralement à l'annexe. Ses éléments essentiels sont résumés comme suit.

5 Le paragraphe 2(1) qui constitue la pierre angulaire de la Loi prévoit ce qui suit :

> [TRADUCTION] Le gouvernement a contre un fabricant un droit d'action direct et distinct pour le recouvrement du coût des services de soins de santé occasionnés ou favorisés par une faute d'un fabricant.

6 Les termes [TRADUCTION] « fabricant », « coût des services de soins de santé » et [TRADUCTION] « faute d'un fabricant » sont définis au par. 1(1) de la Loi. Ces définitions renvoient à leur tour à d'autres définitions. Si l'on incorpore ces définitions à l'art. 2 et l'on paraphrase celui-ci quelque peu, la disposition prévoit alors ce qui suit :

> Le gouvernement a contre un fabricant un droit d'action direct et distinct pour la valeur actuelle des dépenses engagées et raisonnablement prévues par le gouvernement au titre :

(a) benefits as defined under the *Hospital Insurance Act* or the *Medicare Protection Act*;

(b) payments under the *Continuing Care Act*; and

(c) programs, services or benefits associated with disease,

where

(a) such expenditures result from disease or the risk of disease caused or contributed to by exposure to a tobacco product; and

(b) such exposure was caused or contributed to by

(i) a tort committed in British Columbia by the manufacturer; or

(ii) a breach of a common law, equitable or statutory duty or obligation owed by the manufacturer to persons in British Columbia who have been or might have become exposed to a tobacco product.

7 Viewed in this light, s. 2(1) creates a cause of action by which the government of British Columbia may recover from a tobacco manufacturer money spent treating disease in British Columbians, where such disease was caused by exposure to a tobacco product (whether entirely in British Columbia or not), and such exposure was caused by that manufacturer's tort in British Columbia, or breach of a duty owed to persons in British Columbia.

8 The cause of action created by s. 2(1), besides being "direct and distinct", is not a subrogated claim: s. 2(2). Nor is it barred by the *Limitation Act*, R.S.B.C. 1996, c. 266, s. 6(1). Crucially, it can be pursued on an aggregate basis — i.e., in respect of a population of persons for whom the government has made or can reasonably be expected to make expenditures: s. 2(4)(b).

9 Where the government's claim is made on an aggregate basis, it may use statistical, epidemiological and sociological evidence to prove its case: s. 5(b). It need not identify, prove the cause of disease

a) des services au sens de l'*Hospital Insurance Act* ou de la *Medicare Protection Act*;

b) des versements faits aux termes de la *Continuing Care Act*;

c) des programmes, des services ou des prestations liés à une maladie;

lorsque

a) ces dépenses résultent d'une maladie ou d'un risque de maladie causés ou favorisés par une exposition à un produit du tabac;

b) cette exposition a été causée ou favorisée, selon le cas, par :

(i) un délit commis en Colombie-Britannique par le fabricant;

(ii) un manquement par le fabricant à une obligation que lui impose la common law, l'equity ou la loi à l'égard de personnes en Colombie-Britannique qui ont été exposées à un produit du tabac ou qui pourraient l'être.

Vu sous cet angle, le par. 2(1) crée une cause d'action permettant au gouvernement de la Colombie-Britannique de recouvrer d'un fabricant de produits du tabac les sommes dépensées pour soigner les malades en Colombie-Britannique, lorsque la maladie est causée par une exposition (entièrement ou en partie en Colombie-Britannique) à un produit du tabac et que cette exposition résulte d'une faute commise en Colombie-Britannique par un fabricant, ou d'un manquement à son obligation envers la population en Colombie-Britannique.

Outre le fait qu'il soit [TRADUCTION] « direct et distinct », le droit d'action créé par le par. 2(1) ne constitue pas un droit de recours par subrogation : par. 2(2). Il n'est pas non plus prescrit par la *Limitation Act*, R.S.B.C. 1996, ch. 266, par. 6(1). Essentiellement, il peut être exercé de manière globale — c.-à-d. à l'égard d'une population de personnes pour lesquelles le gouvernement a engagé des dépenses ou s'attend raisonnablement à engager des dépenses : al. 2(4)b).

Lorsqu'il procède par action globale, le gouvernement peut recourir à des éléments de preuve statistiques, épidémiologiques et sociologiques pour établir le bien-fondé de sa demande : al. 5b). Il n'est

or prove the expenditures made in respect of any individual member of the population on which it bases its claim: s. 2(5)(a). Furthermore, health care records and related information in respect of individual members of that population are not compellable, except if relied upon by an expert witness: s. 2(5)(b) and (c). However, the court is free to order the discovery of a "statistically meaningful sample" of the health care records of individual members of that population, stripped of personal identifiers: s. 2(5)(d) and (e).

Pursuant to s. 3(1) and (2), the government enjoys a reversed burden of proof in respect of certain elements of an aggregate claim. Where the aggregate claim is, like the one brought against each of the appellants, to recover expenditures in respect of disease caused by exposure to cigarettes, the reversed burden of proof operates as follows. Once the government proves that

(a) the defendant manufacturer breached a common law, equitable or statutory duty or obligation it owed to persons in British Columbia who have been or might become exposed to cigarettes;

(b) exposure to cigarettes can cause or contribute to disease; and

(c) during the manufacturer's breach, cigarettes manufactured or promoted by the manufacturer were offered for sale in British Columbia,

the court will presume that

(a) the population that is the basis for the government's aggregate claim would not have been exposed to cigarettes but for the manufacturer's breach; and

(b) such exposure caused or contributed to disease in a portion of the population that is the basis for the government's aggregate claim.

pas nécessaire qu'il identifie les membres individuels de la population pour lesquels il présente sa demande, qu'il établisse la cause de la maladie de chaque personne ou qu'il prouve les dépenses engagées à l'égard de chacun : al. 2(5)a). En outre, nul ne peut exiger la production des dossiers et renseignements médicaux concernant ces personnes, sauf s'ils sont invoqués par un témoin expert : al. 2(5)b) et c). Le tribunal peut toutefois ordonner la communication préalable d'un [TRADUCTION] « échantillon statistiquement significatif » des dossiers médicaux qui concernent ces personnes, expurgés des indices permettant d'identifier les personnes : al. 2(5)d) et e).

Selon les par. 3(1) et (2), le gouvernement bénéficie d'une inversion de la charge de la preuve quant à certains éléments propres à une action globale. Lorsque l'action globale, à l'instar de celle intentée contre chacun des appelants, vise à recouvrer les dépenses engagées pour le traitement des maladies causées par une exposition à la cigarette, l'inversion de la charge de la preuve produit son effet. Ainsi, dès que le gouvernement prouve les faits suivants :

a) le fabricant défendeur a manqué à une obligation que lui impose la common law, l'equity ou la loi à l'égard des personnes en Colombie-Britannique qui ont été exposées à la cigarette ou pourraient l'être;

b) une exposition à la cigarette peut causer ou contribuer à causer une maladie;

c) pendant la période où le fabricant manque à son obligation, des cigarettes fabriquées ou annoncées par lui ont été offertes en vente en Colombie-Britannique;

le tribunal présumera que

a) la population à l'égard de laquelle le gouvernement intente une action globale n'aurait pas été exposée à la cigarette n'eût été le manquement du fabricant;

b) cette exposition a causé ou a contribué à causer la maladie chez une partie de la population à l'égard de laquelle le gouvernement a intenté l'action globale.

11 In this way, it falls on a defendant manufacturer to show that its breach of duty did not give rise to exposure, or that exposure resulting from its breach of duty did not give rise to the disease in respect of which the government claims for its expenditures. The reversed burden of proof on the manufacturer is a balance of probabilities: s. 3(4).

12 Where the aforementioned presumptions apply, the court must determine the portion of the government's expenditures after the date of the manufacturer's breach that resulted from exposure to cigarettes: s. 3(3)(a). The manufacturer is liable for such expenditures in proportion to its share of the market for cigarettes in British Columbia, calculated over the period of time between its first breach of duty and trial: ss. 3(3)(b) and 1(6).

13 In an action by the government, a manufacturer will be jointly and severally liable for expenditures arising from a joint breach of duty (i.e., for expenditures caused by disease, which disease was caused by exposure, which exposure was caused by a joint breach of duty to which the manufacturer was a party): s. 4(1).

14 Pursuant to s. 10, all provisions of the Act operate retroactively.

15 The Act is the second British Columbia statute designed to enable the government to sue tobacco manufacturers for tobacco-related health care costs that has been challenged on the basis of its constitutionality. The Supreme Court of British Columbia struck down the earlier statute, the *Tobacco Damages Recovery Act*, S.B.C. 1997, c. 41, as being in pith and substance legislation in relation to extra-provincial civil rights and therefore *ultra vires* the Legislative Assembly of British Columbia: see *JTI-Macdonald Corp. v. British Columbia (Attorney General)* (2000), 184 D.L.R. (4th) 335, 2000 BCSC 312.

De cette façon, il incombe au défendeur fabricant de démontrer que le manquement à son obligation n'est pas à l'origine de l'exposition, ou que l'exposition résultant du manquement à son obligation n'est pas à l'origine de la maladie à l'égard de laquelle le gouvernement réclame le remboursement de ses dépenses. Le fabricant doit s'acquitter du fardeau de la preuve inversé selon la prépondérance des probabilités : par. 3(4).

Lorsque les présomptions mentionnées plus haut s'appliquent, le tribunal doit déterminer la partie des dépenses engagées par le gouvernement, après la date à laquelle le fabricant a manqué à son obligation, qui résulte de l'exposition à la cigarette : al. 3(3)a). Le fabricant devient responsable de ces dépenses au prorata de sa part du marché des cigarettes en Colombie-Britannique, calculée en fonction de la période comprise entre la date où il a pour la première fois manqué à son obligation et celle du procès : al. 3(3)b) et par. 1(6).

Dans le cadre d'une action intentée par le gouvernement, un fabricant sera solidairement responsable des dépenses découlant d'un manquement commun à une obligation (c.-à-d. à l'égard des dépenses occasionnées par la maladie, laquelle maladie résulte d'une exposition, elle-même causée par un manquement commun à une obligation imposée au fabricant) : par. 4(1).

Selon l'art. 10, toutes les dispositions de la Loi ont un effet rétroactif.

La Loi est la deuxième loi de la Colombie-Britannique visant à permettre au gouvernement de poursuivre les fabricants de produits du tabac pour recouvrer le coût des soins de santé liés au tabac dont la constitutionnalité est contestée. La Cour suprême de la Colombie-Britannique a annulé la loi antérieure, la *Tobacco Damages Recovery Act*, S.B.C. 1997, ch. 41, parce qu'elle touchait aux droits civils extraprovinciaux par son caractère véritable et était donc *ultra vires* de l'Assemblée législative de la Colombie-Britannique : voir *JTI-Macdonald Corp. c. British Columbia (Attorney General)* (2000), 184 D.L.R. (4th) 335, 2000 BCSC 312.

The legislative history of the Act confirms that it was drafted to address concerns about the extra-territorial aspects of the earlier statute and to avoid any further challenges with respect to extra-territoriality: see *Debates of the Legislative Assembly*, vol. 20, No. 6, 4th Sess., 36th Parl., June 7, 2000, at p. 16314.

B. *Procedural History*

On January 24, 2001, the Act came into force. On the same day, the government sued 14 entities in the tobacco industry in the Supreme Court of British Columbia, pursuant to s. 2 of the Act.

The appellants are among the 14 entities sued by the government. The appellants Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., JTI-Macdonald Corp. and Canadian Tobacco Manufacturers' Council are Canadian corporations, and were served in British Columbia. The appellants Philip Morris Incorporated (now Philip Morris USA Inc.) and Philip Morris International Inc. are incorporated under the laws of Virginia and Delaware, respectively, and were served *ex juris*. The appellant British American Tobacco (Investments) Limited is incorporated under the laws of the United Kingdom, and was also served *ex juris*.

The Canadian appellants applied for a declaration that the Act is unconstitutional. The appellants served *ex juris* applied to set aside service on the basis that the Act is unconstitutional, and thus that the government's actions founded on it were bound to fail.

Throughout the proceedings, the appellants' constitutional attack has been essentially tripartite. They argue that the Act exceeds the territorial limits on provincial legislative jurisdiction, violates judicial independence and infringes the rule of law.

16 L'historique législatif de la Loi confirme qu'elle a été conçue pour répondre aux préoccupations suscitées par les aspects extraterritoriaux de la loi antérieure et pour éviter toute contestation future à ce sujet : voir *Debates of the Legislative Assembly*, vol. 20, nº 6, 4e sess., 36e lég., 7 juin 2000, p. 16314.

B. *Historique des procédures judiciaires*

17 La Loi est entrée en vigueur le 24 janvier 2001. Le même jour, le gouvernement a intenté, en vertu de l'art. 2 de la Loi, une action devant la Cour suprême de la Colombie-Britannique contre 14 organismes de l'industrie du tabac.

18 Les appelants se retrouvent parmi les 14 organismes poursuivis par le gouvernement. Les appelants Imperial Tobacco Canada Limitée, Rothmans, Benson & Hedges Inc., JTI-Macdonald Corp. et le Conseil canadien des fabricants des produits du tabac sont des sociétés canadiennes et ont reçu signification de l'action en Colombie-Britannique. Les appelantes Philip Morris Incorporated (maintenant Philip Morris USA Inc.) et Philip Morris International Inc. sont respectivement constituées sous le régime des lois de la Virginie et du Delaware et ont reçu signification *ex juris*. L'appelante British American Tobacco (Investments) Limited est constituée sous le régime des lois du Royaume-Uni et a également reçu signification *ex juris*.

19 Les appelants canadiens ont sollicité un jugement déclarant que la Loi est inconstitutionnelle. Les appelants ayant reçu signification *ex juris* ont demandé l'annulation de ces significations au motif qu'en raison de l'inconstitutionnalité de la Loi, les actions intentées par le gouvernement sous son autorité sont vouées à l'échec.

20 Tout au cours de l'instance, la contestation constitutionnelle soulevée par les appelants a été essentiellement tripartite. Les appelants soutiennent que la Loi excède les limites territoriales de la compétence législative provinciale, qu'elle viole l'indépendance judiciaire et qu'elle porte atteinte au principe de la primauté du droit.

II. Judicial History

A. *Supreme Court of British Columbia* (2003), 227 D.L.R. (4th) 323, 2003 BCSC 877

21 Holmes J. rejected the appellants' submissions concerning judicial independence and the rule of law, but accepted their submissions concerning extra-territoriality. He concluded that the Act fails to respect territorial limits on provincial legislative jurisdiction because, in his view, the exposure to tobacco products giving rise to liability is territorially unconfined, and the aim of the Act is recovery of health care costs "from the tobacco industry nationally and internationally" (para. 222).

22 In the result, Holmes J. declared the Act invalid, dismissed the government's actions brought pursuant to the Act and set aside all *ex juris* service by the government.

B. *Court of Appeal for British Columbia* (2004), 239 D.L.R. (4th) 412, 2004 BCCA 269

23 The Court of Appeal for British Columbia allowed the respondents' appeals. Lambert, Rowles and Prowse JJ.A. each gave reasons concluding that the Act's pith and substance is "Property and Civil Rights in the Province" within the meaning of s. 92(13) of the *Constitution Act, 1867*; that the extra-territorial aspects of the Act, if any, are incidental to it; and therefore that the Act is not invalid by reason of extra-territoriality. All agreed that the Act does not offend judicial independence or the rule of law.

24 In the result, the court dismissed the appellants' applications for declarations that the Act is invalid, set aside Holmes J.'s orders dismissing the government's actions and remitted to the Supreme Court of British Columbia the applications of the appellants served *ex juris* to have service set aside, with such applications to be decided on the basis that the Act is constitutionally valid.

II. Les jugements antérieurs

A. *Cour suprême de la Colombie-Britannique* (2003), 227 D.L.R. (4th) 323, 2003 BCSC 877

Le juge Holmes a rejeté les prétentions des appelants concernant l'indépendance judiciaire et la primauté du droit, mais il a retenu celles portant sur l'extraterritorialité. Il a conclu toutefois que la Loi ne respecte pas les limites territoriales de la compétence législative provinciale parce que, à son avis, l'exposition aux produits du tabac qui donne naissance à une responsabilité n'est pas circonscrite territorialement, et que la Loi a pour objet de recouvrer le coût des soins de santé [TRADUCTION] « de l'industrie du tabac sur les plans national et international » (par. 222).

En conclusion, le juge Holmes a déclaré la Loi non valide, a rejeté les actions intentées par le gouvernement en vertu de la Loi et a annulé toutes les significations *ex juris* faites par le gouvernement.

B. *Cour d'appel de la Colombie-Britannique* (2004), 239 D.L.R. (4th) 412, 2004 BCCA 269

La Cour d'appel de la Colombie-Britannique a accueilli les appels des intimés. Les juges Lambert, Rowles et Prowse ont conclu que le caractère véritable de la Loi concerne la « propriété et les droits civils dans la province » au sens du par. 92(13) de la *Loi constitutionnelle de 1867*, que ses aspects extraterritoriaux, s'il en est, n'ont qu'un caractère accessoire et que, par conséquent, elle n'est pas invalide pour cause d'extraterritorialité. Tous ont reconnu que la Loi ne porte pas atteinte à l'indépendance judiciaire ou à la primauté du droit.

En conclusion, la cour a rejeté les demandes des appelants visant à obtenir un jugement déclarant que la Loi n'est pas valide, elle a annulé les ordonnances du juge Holmes rejetant les actions du gouvernement et elle a renvoyé à la Cour suprême de la Colombie-Britannique les demandes d'annulation des significations formées par les appelants ayant reçu significations *ex juris* pour qu'elle statue sur ces demandes en tenant pour acquis que la Loi est constitutionnellement valide.

III. Issues

McLachlin C.J. stated the following constitutional questions:

1. Is the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, *ultra vires* the provincial legislature by reason of extra-territoriality?

2. Is the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, constitutionally invalid, in whole or in part, as being inconsistent with judicial independence?

3. Is the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, constitutionally invalid, in whole or in part, as offending the rule of law?

IV. Analysis

A. *Extra-territoriality*

Section 92 of the *Constitution Act, 1867* is the primary source of provincial legislatures' authority to legislate. Provincial legislation must therefore respect the limitations, territorial and otherwise, on provincial legislative competence found in s. 92. The opening words of s. 92 — "In each Province" — represent a blanket territorial limitation on provincial powers. That limitation is echoed in a similar phrase that qualifies a number of the heads of power in s. 92: "in the Province".

The territorial limitations on provincial legislative competence reflect the requirements of order and fairness underlying Canadian federal arrangements and discussed by this Court in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1102-3, *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at pp. 324-25, and *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, at para. 56. They serve to ensure that provincial legislation both has a meaningful connection to the province enacting it, and pays respect to "the sovereignty of the other provinces within their respective legislative spheres": *Unifund*, at para. 51. See also, generally,

III. Questions en litige

25 La juge en chef McLachlin a énoncé les questions constitutionnelles suivantes :

1. La *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, ch. 30, est-elle *ultra vires* de la législature provinciale pour cause d'extraterritorialité?

2. La *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, ch. 30, est-elle inconstitutionnelle, en tout ou en partie, en raison de son incompatibilité avec l'indépendance judiciaire?

3. La *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, ch. 30, est-elle inconstitutionnelle, en tout ou en partie, parce qu'elle va à l'encontre de la primauté du droit?

IV. Analyse

A. *L'extraterritorialité*

26 L'article 92 de la *Loi constitutionnelle de 1867* est la source première du pouvoir de légiférer des législatures provinciales. Les lois provinciales doivent donc respecter les limites, territoriales et autres, de la compétence législative provinciale que l'on trouve à l'art. 92. Le passage liminaire de l'art. 92 — « Dans chaque province » — constitue une limite territoriale générale aux pouvoirs des provinces. Cette limite est reprise dans une expression semblable qui atténue la portée d'un certain nombre de chefs de compétence figurant à l'art. 92 : « dans la province ».

27 Les limites territoriales de la compétence législative provinciale reflètent les exigences d'ordre et d'équité qui sous-tendent les structures fédérales canadiennes et la Cour les a examinées dans *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077, p. 1102-1103, *Hunt c. T&N plc*, [1993] 4 R.C.S. 289, p. 324-325, et *Unifund Assurance Co. c. Insurance Corp. of British Columbia*, [2003] 2 R.C.S. 63, 2003 CSC 40, par. 56. Elles servent à assurer que les lois provinciales conservent un lien utile avec la province qui les adopte et qu'elles respectent « la souveraineté législative des autres provinces dans leurs champs de compétence respectifs » : *Unifund*, par. 51. Voir également, de

R. E. Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985), 7 *Sup. Ct. L. Rev.* 511.

28 Where the validity of provincial legislation is challenged on the basis that it violates territorial limitations on provincial legislative competence, the analysis centres on the pith and substance of the legislation. If its pith and substance is in relation to matters falling within the field of provincial legislative competence, the legislation is valid. Incidental or ancillary extra-provincial aspects of such legislation are irrelevant to its validity. See *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 ("*Churchill Falls*"), at p. 332, and *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 24.

29 In determining the pith and substance of legislation, the court identifies its essential character or dominant feature: see *Global Securities Corp.*, at para. 22, and *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 16. This may be done through reference to both the purpose and effect of the legislation: see *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 53. See also *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292, 2005 SCC 20, at para. 20.

30 Where the pith and substance of legislation relates to a tangible matter — i.e., something with an intrinsic and observable physical presence — the question of whether it respects the territorial limitations in s. 92 is easy to answer. One need only look to the location of the matter. If it is in the province, the limitations have been respected, and the legislation is valid. If it is outside the province, the limitations have been violated, and the legislation is invalid.

31 Where legislation's pith and substance relates to an intangible matter, the characterization is more complicated. That is the case here.

façon générale, R. E. Sullivan, « Interpreting the Territorial Limitations on the Provinces » (1985), 7 *Sup. Ct. L. Rev.* 511.

Dans le cas où la validité d'une loi provinciale est contestée pour le motif qu'elle viole les limites territoriales de la compétence législative provinciale, l'analyse porte essentiellement sur son caractère véritable. Si le caractère véritable de la loi se rapporte à des matières qui relèvent du domaine de la compétence législative des provinces, la loi est valide. Ses aspects extraprovinciaux accessoires ou indirects restent sans pertinence pour l'appréciation de sa validité. Voir *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297 (« *Churchill Falls* »), p. 332, et *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21, par. 24.

Dans la recherche de son caractère véritable, le tribunal précise l'essence ou la caractéristique dominante de la loi : voir *Global Securities Corp.*, par. 22, et *Renvoi relatif à la Loi sur les armes à feu (Can.)*, [2000] 1 R.C.S. 783, 2000 CSC 31, par. 16. Pour ce faire, il peut se reporter à l'objet et aux effets de la loi : voir *Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)*, [2002] 2 R.C.S. 146, 2002 CSC 31, par. 53. Voir également *Fédération des producteurs de volailles du Québec c. Pelland*, [2005] 1 R.C.S. 292, 2005 CSC 20, par. 20.

Lorsque le caractère véritable d'une loi se rapporte à une matière tangible — c.-à-d. une chose tangible et observable — la question de savoir si la loi respecte les limites territoriales prévues à l'art. 92 se résout facilement. Il suffit de vérifier l'endroit où se trouve cette chose. Si elle se trouve dans la province, les limites ont été respectées et la loi est valide. Si elle se trouve à l'extérieur de la province, les limites ont alors été violées et la loi est invalide.

Lorsque le caractère véritable d'une loi se rapporte à une matière intangible, la qualification devient plus complexe. C'est le cas en l'espèce.

The pith and substance of the Act is plainly the creation of a civil cause of action. More specifically, it is the creation of a civil cause of action by which the government of British Columbia may seek compensation for certain health care costs incurred by it. Civil causes of action are a matter within provincial legislative jurisdiction under s. 92(13) of the *Constitution Act, 1867*: "Property and Civil Rights in the Province". See *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 672.

32 De par son caractère véritable, la Loi vise simplement la création d'une cause d'action civile. Plus particulièrement, il s'agit de la création d'une cause d'action civile par laquelle le gouvernement de la Colombie-Britannique peut chercher à être indemnisé de certains coûts qu'il a engagés au titre des soins de santé. Les causes d'action civile relèvent de la compétence législative provinciale conférée au par. 92(13) de la *Loi constitutionnelle de 1867* : « La propriété et les droits civils dans la province ». Voir *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641, p. 672.

But s. 92(13) does not speak to "Property and Civil Rights" located anywhere. It speaks only to "Property and Civil Rights in the Province". And, to reiterate, it is, like all provincial heads of power, qualified by the opening words of s. 92: "In each Province". The issue thus becomes how to determine whether an intangible, such as the cause of action constituting the pith and substance of the Act, is "in the Province".

33 Mais le par. 92(13) ne mentionne pas « la propriété et les droits civils » situés ailleurs. Son texte vise seulement la « propriété et les droits civils dans la province ». Et, je le répète, sa portée est atténuée, comme tous les chefs de compétence provinciale, par le passage liminaire de l'art. 92 : « Dans chaque province ». Il faut alors trouver une façon de déterminer si une matière intangible, telle que la cause d'action constituant le caractère véritable de la Loi, se situe « dans la province ».

Churchill Falls dealt with a similar issue. In that case, McIntyre J. was confronted with a Newfoundland statute, the pith and substance of which was the modification of rights existing under a contract between Churchill Falls (Labrador) Corporation Limited and Quebec Hydro-Electric Commission. Since the entity possessing those rights (namely, the Commission) was constituted in Quebec, and the parties had agreed that the Quebec courts had exclusive jurisdiction to adjudicate disputes concerning their contract, McIntyre J. regarded the rights created by that contract as situated in Quebec. The Newfoundland law that purported to modify them was thus invalid. It related to civil rights, but not to civil rights "in the Province".

34 L'arrêt *Churchill Falls* portait sur une question semblable. Dans cet arrêt, le juge McIntyre devait statuer sur une loi de Terre-Neuve qui, de par son caractère véritable, visait à modifier des droits existant en vertu d'un contrat conclu entre Churchill Falls (Labrador) Corporation Limited et la Commission Hydro-Électrique du Québec. Puisque l'entité investie de ces droits (soit la Commission) était constituée au Québec et que les parties avaient convenu que les tribunaux du Québec avaient compétence exclusive pour trancher les différends concernant leur contrat, le juge McIntyre a considéré que les droits créés par cette entente étaient situés au Québec. La loi de Terre-Neuve qui visait à modifier ces droits était de ce fait invalide. En effet, elle se rapportait aux droits civils, mais non aux droits civils « dans la province ».

McIntyre J.'s approach to locating the civil rights constituting the pith and substance of the Newfoundland legislation illustrates the role, pointed out by Binnie J. in *Unifund*, at para. 63, that "the relationships among the enacting territory, the subject matter of the law, and the person[s] sought to

35 La méthode adoptée par le juge McIntyre pour localiser les droits civils constituant le caractère véritable de la loi terre-neuvienne illustre le rôle, signalé par le juge Binnie dans *Unifund*, par. 63, que jouent le « lien entre le territoire ayant légiféré, l'objet du texte de loi en cause et [les] personne[s]

be subjected to its regulation" play in determining the validity of legislation alleged to be impermissibly extra-territorial in scope. In *Churchill Falls*, an examination of those relationships indicated that the intangible civil rights constituting the pith and substance of the Newfoundland legislation at issue were not meaningfully connected to the legislating province, and could properly be the subject matter only of Quebec legislation. Put slightly differently, if the impugned Newfoundland legislation had been permitted to regulate those civil rights, neither of the purposes underlying s. 92's territorial limitations would be respected. It followed that those civil rights should be regarded as located beyond the territorial scope of Newfoundland's legislative competence under s. 92.

36 From the foregoing it can be seen that several analytical steps may be required to determine whether provincial legislation in pith and substance respects territorial limits on provincial legislative competence. The first step is to determine the pith and substance, or dominant feature, of the impugned legislation, and to identify a provincial head of power under which it might fall. Assuming a suitable head of power can be found, the second step is to determine whether the pith and substance respects the territorial limitations on that head of power — i.e., whether it is in the province. If the pith and substance is tangible, whether it is in the province is simply a question of its physical location. If the pith and substance is intangible, the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it, in order to determine whether the legislation, if allowed to stand, would respect the dual purposes of the territorial limitations in s. 92 (namely, to ensure that provincial legislation has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories). If it would, the pith and substance of the legislation should be regarded as situated in the province.

37 Here, the cause of action that is the pith and substance of the Act serves exclusively to make the persons ultimately responsible for tobacco-related

qu'on entendait assujettir à celui-ci » dans la détermination de la validité d'une loi dont on allègue la portée indûment extraterritoriale. Dans *Churchill Falls*, l'examen de ce lien a révélé que les droits civils intangibles constituant le caractère véritable de la loi de Terre-Neuve en litige n'avaient pas de lien significatif avec la province ayant légiféré et qu'ils ne pouvaient validement faire l'objet que d'une loi québécoise. En termes légèrement différents, si la loi terre-neuvienne contestée avait pu réglementer ces droits civils, aucun des objectifs qui sous-tendent les limites territoriales prévues à l'art. 92 n'auraient été respectés. Il s'ensuit que ces droits civils devaient être considérés comme se trouvant hors de la portée territoriale de la compétence législative de Terre-Neuve conférée par l'art. 92.

À la lumière de ce qui précède, on constate qu'une analyse en plusieurs étapes peut être nécessaire pour déterminer si, par son caractère véritable, une loi provinciale respecte les limites territoriales de la compétence législative provinciale. La première étape consiste à déterminer le caractère véritable, ou la caractéristique dominante, de la loi contestée, ainsi que le chef de compétence provinciale dont elle pourrait relever. En supposant qu'il soit possible d'établir le chef de compétence approprié, la deuxième étape consiste à déterminer si le caractère véritable respecte les limites territoriales de ce chef de compétence — c.-à-d., s'il se trouve dans la province. Si le caractère véritable est tangible, la question de savoir s'il se trouve dans la province se règle simplement sur la base de son emplacement physique. S'il est intangible, le tribunal doit examiner le lien entre le territoire ayant légiféré, l'objet du texte de loi en cause et les personnes qui y sont assujetties, afin de déterminer si la loi, dans le cas où elle est maintenue, respecte le double objet des limites territoriales prévues à l'art. 92 (à savoir s'assurer que la loi provinciale a un lien significatif avec la province qui l'adopte et qu'elle respecte la souveraineté législative des autres territoires). Le cas échéant, l'objet véritable de la loi devrait être considéré comme situé dans la province.

En l'espèce, la cause d'action qui constitue le caractère véritable de la Loi sert exclusivement à faire en sorte que les personnes ultimement

disease suffered by British Columbians — namely, the tobacco manufacturers who, through their wrongful acts, caused those British Columbians to be exposed to tobacco — liable for the costs incurred by the government of British Columbia in treating that disease. There are thus strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs), such that the Act can easily be said to be meaningfully connected to the province.

responsables des maladies liées au tabac dont souffrent les Britanno-Colombiens — à savoir les fabricants de produits du tabac qui, par leurs actes fautifs, ont exposé au tabac ces Britanno-Colombiens — deviennent responsables des frais engagés par le gouvernement de la Colombie-Britannique pour le traitement de ces maladies. Il existe donc un lien solide entre le territoire ayant légiféré (la Colombie-Britannique), l'objet de la loi (l'indemnisation pour les coûts des soins de santé liés au tabac engagés par le gouvernement de la Colombie-Britannique) et les personnes assujetties à cette loi (les fabricants de produits du tabac ultimement responsables de ces coûts). On peut alors conclure facilement à l'existence d'un lien significatif entre la Loi et la province.

The Act respects the legislative sovereignty of other jurisdictions. Though the cause of action that is its pith and substance may capture, to some extent, activities occurring outside of British Columbia, no territory could possibly assert a stronger relationship to that cause of action than British Columbia. That is because there is at all times one critical connection to British Columbia exclusively: the recovery permitted by the action is in relation to expenditures by the government of British Columbia for the health care of British Columbians.

38 La Loi respecte la souveraineté législative des autres ressorts. Bien que la cause d'action qui en constitue le caractère véritable puisse, dans une certaine mesure, viser des activités menées à l'extérieur de la Colombie-Britannique, aucun territoire autre que la Colombie-Britannique ne pourrait prétendre à l'existence d'un lien plus fort avec cette cause d'action. En effet, un lien critique et exclusif les unit en tout temps : le recouvrement qu'autorise l'action se rapporte aux dépenses engagées par le gouvernement de la Colombie-Britannique pour les soins de santé des Britanno-Colombiens.

In assessing the Act's respect for the territorial limitations on British Columbia's legislative competence, the appellants and the Court of Appeal placed considerable emphasis on the question of whether, as a matter of statutory interpretation, the breach of duty by a manufacturer that is a necessary condition of its liability under the cause of action created by the Act must occur in British Columbia. That emphasis was undue, for two reasons.

39 Pour déterminer si la Loi respecte les limites territoriales de la compétence législative de la Colombie-Britannique, les appelants et la Cour d'appel ont fortement insisté sur la question de savoir si, sur le plan de l'interprétation législative, le manquement à une obligation par un fabricant, qui est une condition nécessaire à sa responsabilité suivant la cause d'action créée par la Loi, doit survenir en Colombie-Britannique. Cette insistance était excessive, et ce pour deux raisons.

First, the driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief

40 Premièrement, l'élément déterminant de la cause d'action créée par la Loi demeure l'indemnisation des coûts engagés par le gouvernement de la Colombie-Britannique au titre des soins de santé, et non la correction des manquements aux obligations des fabricants de produits du tabac. La Loi fait de l'existence d'une violation d'une obligation une des

at which the cause of action created by the Act is aimed. The Act leaves breaches of duty to be remedied by the law that gives rise to the duty. Thus, the breaches of duty to which the Act refers are of subsidiary significance to the cause of action created by it, and the locations where those breaches might occur have little or no bearing on the strength of the relationship between the cause of action and the enacting jurisdiction.

41 Second, and in any event, the only relevant breaches under the Act are breaches of duties (or obligations) owed "to persons in British Columbia" (s. 1(1) "tobacco related wrong" and s. 3(1)(a)) that give rise to health care expenditures by the government of British Columbia. Thus, even if the existence of a breach of duty were the central element of the Act's cause of action (it is not), the cause of action would remain strongly related to British Columbia.

42 The question of whether other matters, such as exposure and disease, to which the Act refers, must occur or arise in British Columbia is equally or more irrelevant to the Act's validity. Those matters too are conditions precedent to success in an action brought pursuant to the Act and of subsidiary significance to it.

43 It follows that the cause of action that constitutes the pith and substance of the Act is properly described as located "in the Province". The Act is not invalid by reason of extra-territoriality, being in pith and substance legislation in relation "Property and Civil Rights in the Province" under s. 92(13) of the *Constitution Act, 1867*.

B. *Judicial Independence*

44 Judicial independence is a "foundational principle" of the Constitution reflected in s. 11(*d*) of

diverses conditions préalables à l'établissement de la responsabilité du fabricant envers le gouvernement, mais ce n'est pas cette faute que vise la cause d'action créée par la Loi. La Loi laisse la réparation des manquements à une telle obligation aux dispositions législatives qui sont à l'origine de cette obligation. Ainsi, les manquements à une obligation auxquels renvoie la Loi ont, pour la cause d'action qu'elle crée, une importance secondaire, et le lieu où ces manquements pourraient survenir a peu de rapport, sinon aucun, avec la force du lien qui existe entre la cause d'action et le territoire ayant légiféré.

Ensuite, et en tout état de cause, seuls sont pertinents pour l'application de la Loi les manquements à des obligations envers [TRADUCTION] « des personnes en Colombie-Britannique » (par. 1(1) « faute d'un fabricant » et l'al. 3(1)a)) qui sont à l'origine des dépenses engagées par le gouvernement de la Colombie-Britannique au titre des soins de santé. Donc, même si l'existence d'un manquement à une obligation était l'élément central de la cause d'action créée par la Loi (ce qu'elle n'est pas), cette dernière demeurerait fortement liée à la Colombie-Britannique.

La question de savoir si d'autres éléments mentionnés dans la Loi, tels que l'exposition et la maladie, doivent survenir en Colombie-Britannique s'avère autant, sinon plus, dépourvue de pertinence pour la validité de la Loi. Ces éléments appartiennent aussi aux conditions préalables au succès d'une action intentée en vertu de la Loi et leur importance demeure secondaire quant à la validité de la Loi.

Il s'ensuit que la cause d'action qui constitue le caractère véritable de la Loi est à juste titre décrite comme se trouvant « dans la province ». La Loi n'est pas invalide pour cause d'extraterritorialité puisqu'elle est, par son caractère véritable, liée à la « propriété et les droits civils dans la province » aux termes du par. 92(13) de la *Loi constitutionnelle de 1867*.

B. *L'indépendance judiciaire*

L'indépendance judiciaire est reconnue comme un « principe fondamental » de la Constitution qui

the *Canadian Charter of Rights and Freedoms*, and in both ss. 96-100 and the preamble to the *Constitution Act, 1867*: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 109. It serves "to safeguard our constitutional order and to maintain public confidence in the administration of justice": *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35, at para. 29. See also *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42, at paras. 80-81.

Judicial independence consists essentially in the freedom "to render decisions based solely on the requirements of the law and justice": *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 37. It requires that the judiciary be left free to act without improper "interference from any other entity" (*Ell*, at para. 18) — i.e., that the executive and legislative branches of government not "impinge on the essential 'authority and function' . . . of the court" (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at p. 828). See also *Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 686-87; *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 73 and 75; *R. v. Lippé*, [1991] 2 S.C.R. 114, at pp. 152-54; *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57, at para. 57; and *Application under s. 83.28 of the Criminal Code (Re)*, at para. 87.

Security of tenure, financial security and administrative independence are the three "core characteristics" or "essential conditions" of judicial independence: *Valente*, at pp. 694, 704 and 708, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 115. It is a precondition to judicial independence that they be maintained, and be seen by "a reasonable person who is fully informed of all the circumstances" to be maintained: *Mackin*, at paras. 38 and 40, and *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286, 2005 SCC 44, at para. 6.

se reflète à l'al. 11*d*) de la *Charte canadienne des droits et libertés*, ainsi qu'aux art. 96 à 100 et dans le préambule de la *Loi constitutionnelle de 1867* : *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 109. Elle est un moyen de « préserver notre ordre constitutionnel et de maintenir la confiance du public dans l'administration de la justice » : *Ell c. Alberta*, [2003] 1 R.C.S. 857, 2003 CSC 35, par. 29. Voir aussi *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, [2004] 2 R.C.S. 248, 2004 CSC 42, par. 80-81.

45 L'indépendance judiciaire consiste essentiellement en la liberté « de rendre des décisions que seules les exigences du droit et de la justice inspirent » : *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, [2002] 1 R.C.S. 405, 2002 CSC 13, par. 37. Elle requiert que les juges soient libres d'agir sans « ingérence [indue] de la part de quelque autre entité » (*Ell*, par. 18) — c.-à-d. que les pouvoirs exécutif et législatif du gouvernement ne doivent pas « empiéter sur les "pouvoirs et fonctions" essentiels du tribunal » (*MacKeigan c. Hickman*, [1989] 2 R.C.S. 796, p. 828). Voir aussi *Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 686-687; *Beauregard c. Canada*, [1986] 2 R.C.S. 56, p. 73 et 75; *R. c. Lippé*, [1991] 2 R.C.S. 114, p. 152-154; *Babcock c. Canada (Procureur général)*, [2002] 3 R.C.S. 3, 2002 CSC 57, par. 57; et *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, par. 87.

46 L'inamovibilité, la sécurité financière et l'indépendance administrative constituent les trois « caractéristiques essentielles » ou « conditions essentielles » de l'indépendance judiciaire : *Valente*, p. 694, 704 et 708, et *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, par. 115. Leur maintien est indispensable à l'indépendance judiciaire. Il faut qu'« une personne raisonnable et bien informée de toutes les circonstances » les perçoive comme étant sauvegardées : *Mackin*, par. 38 et 40, et *Assoc. des juges de la Cour provinciale du Nouveau-Brunswick c. Nouveau-Brunswick (Ministre de la Justice)*, [2005] 2 R.C.S. 286, 2005 CSC 44, par. 6.

47 However, even where the essential conditions of judicial independence exist, and are reasonably seen to exist, judicial independence itself is not necessarily ensured. The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government. See, for example, *Application under s. 83.28 of the Criminal Code (Re)*, at paras. 82-92.

48 The appellants submit that the Act violates judicial independence, both in reality and appearance, because it contains rules of civil procedure that fundamentally interfere with the adjudicative role of the court hearing an action brought pursuant to the Act. They point to s. 3(2), which they say forces the court to make irrational presumptions, and to ss. 2(5)(a), 2(5)(b) and 2(5)(c), which they say subvert the court's ability to discover relevant facts. They say that these rules impinge on the court's fact-finding function, and virtually guarantee the government's success in an action brought pursuant to the Act.

49 The rules in the Act with which the appellants take issue are not as unfair or illogical as the appellants submit. They appear to reflect legitimate policy concerns of the British Columbia legislature regarding the systemic advantages tobacco manufacturers enjoy when claims for tobacco-related harm are litigated through individualistic common law tort actions. That, however, is beside the point. The question is not whether the Act's rules are unfair or illogical, nor whether they differ from those governing common law tort actions, but whether they interfere with the courts' adjudicative role, and thus judicial independence.

50 The primary role of the judiciary is to interpret and apply the law, whether procedural or

Or, même lorsque les conditions essentielles de l'indépendance judiciaire existent, et qu'elles sont raisonnablement perçues comme telles, l'indépendance judiciaire elle-même n'est pas nécessairement assurée. La question critique est de savoir si la cour est libre, et raisonnablement perçue comme étant libre, d'exercer sa fonction juridictionnelle sans ingérence de la part de qui que ce soit, y compris des pouvoirs exécutif et législatif du gouvernement. Voir, par exemple, *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, par. 82-92.

Les appelants soutiennent que la Loi viole l'indépendance judiciaire, tant dans les faits qu'en apparence, parce qu'elle contient des règles de procédure civile qui nuisent à la fonction juridictionnelle du tribunal saisi d'une action intentée sous le régime de la Loi. Ils attirent l'attention sur le par. 3(2) qui, affirment-ils, oblige le tribunal à tirer des présomptions irrationnelles, et sur les al. 2(5)a), b) et c) qui, selon eux, empêchent le tribunal de découvrir certains faits pertinents. Ils prétendent que ces règles empiètent sur la fonction d'appréciation des faits par le tribunal et qu'elles garantissent pratiquement que le gouvernement aura gain de cause dans une action intentée en vertu de la Loi.

Les règles prévues par la Loi que contestent les appelants ne sont pas aussi injustes ou illogiques que ceux-ci le prétendent. Elles semblent faire écho à des préoccupations d'intérêt général légitimes de la législature de la Colombie-Britannique à l'égard des avantages systémiques dont bénéficient les fabricants de produits du tabac lorsque des réclamations relatives aux méfaits du tabac sont soumises aux tribunaux par voie d'action de common law individuelle en responsabilité civile. Là n'est toutefois pas la question. Il ne s'agit pas de déterminer si les règles prévues par la Loi sont injustes ou illogiques, ni si elles diffèrent de celles régissant les actions de common law en responsabilité civile, mais plutôt si elles interfèrent avec la fonction juridictionnelle des tribunaux et, partant, à l'indépendance judiciaire.

Le rôle principal des tribunaux est d'interpréter et d'appliquer le droit, qu'il soit procédural ou

substantive, to the cases brought before it. It is to hear and weigh, in accordance with the law, evidence that is relevant to the legal issues confronted by it, and to award to the parties before it the available remedies.

The judiciary has some part in the development of the law that its role requires it to apply. Through, for example, its interpretation of legislation, review of administrative decisions and assessment of the constitutionality of legislation, it may develop the law significantly. It may also make incremental developments to its body of previous decisions — i.e., the common law — in order to bring the legal rules those decisions embody "into step with a changing society": *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 666. See also *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 91-92. But the judiciary's role in developing the law is a relatively limited one. "[I]n a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform": *Salituro*, at p. 670.

It follows that the judiciary's role is not, as the appellants seem to submit, to apply only the law of which it approves. Nor is it to decide cases with a view simply to what the judiciary (rather than the law) deems fair or pertinent. Nor is it to second-guess the law reform undertaken by legislators, whether that reform consists of a new cause of action or procedural rules to govern it. Within the boundaries of the Constitution, legislatures can set the law as they see fit. "The wisdom and value of legislative decisions are subject only to review by the electorate": *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 59.

In essence, the appellants' arguments misapprehend the nature and scope of the courts' adjudicative role protected from interference by the Constitution's guarantee of judicial independence. To accept their position on that adjudicative role would be to recognize a constitutional

substantif, aux affaires qui leurs sont soumises. Ils doivent entendre et apprécier, conformément à la loi, la preuve pertinente aux questions de droit qui leurs sont posées et accorder aux parties les réparations qui s'offrent à eux.

51 Les tribunaux participent dans une certaine mesure à l'évolution du droit qu'il leur appartient d'appliquer. Grâce, par exemple, à l'interprétation qu'ils donnent aux lois, au contrôle qu'ils exercent sur les décisions administratives et à l'évaluation qu'ils font de la constitutionnalité des lois, ils peuvent grandement faire avancer le droit. Ils peuvent aussi faire évoluer progressivement l'ensemble des décisions antérieures — c.-à-d., la common law — afin d'adapter les règles de droit qu'elles comportent « aux changements sociaux » : *R. c. Salituro*, [1991] 3 R.C.S. 654, p. 666. Voir également *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 91 et 92. Mais le rôle des tribunaux dans l'évolution du droit reste relativement limité. « [E]n régime de démocratie constitutionnelle comme le nôtre, c'est le législateur et non les tribunaux qui assume, quant à la réforme du droit, la responsabilité principale » : *Salituro*, p. 670.

52 Il s'ensuit que le rôle des tribunaux n'est pas, comme les appelants semblent le prétendre, d'appliquer seulement le droit qu'ils approuvent. Il ne s'agit pas non plus pour eux de rendre des décisions simplement à la lumière de ce qu'ils (plutôt que le droit) estiment juste ou pertinent. Leur rôle ne consiste pas d'avantage à remettre en question la réforme du droit entreprise par le législateur, bien qu'elle introduise une nouvelle cause d'action ou des règles de procédure la régissant. Dans les limites de la Constitution, les législatures peuvent définir le droit comme bon leur semble. « Seuls les électeurs peuvent débattre de la sagesse et de la valeur des décisions législatives » : *Wells c. Terre-Neuve*, [1999] 3 R.C.S. 199, par. 59.

53 Essentiellement, les arguments des appelants reflètent mal la nature et la portée de la fonction juridictionnelle des tribunaux, protégée de l'ingérence par la garantie d'indépendance judiciaire prévue dans la Constitution. Accepter leur point de vue sur cette fonction juridictionnelle reviendrait à

guarantee not of judicial independence, but of judicial governance.

54 None of this is to say that legislation, being law, can never unconstitutionally interfere with courts' adjudicative role. But more is required than an allegation that the content of the legislation required to be applied by that adjudicative role is irrational or unfair, or prescribes rules different from those developed at common law. The legislation must interfere, or be reasonably seen to interfere, with the courts' adjudicative role, or with the essential conditions of judicial independence. As McLachlin C.J. stated in *Babcock*, at para. 57:

> 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.

55 No such fundamental alteration or interference was brought about by the legislature's enactment of the Act. A court called upon to try an action brought pursuant to the Act retains at all times its adjudicative role and the ability to exercise that role without interference. It must independently determine the applicability of the Act to the government's claim, independently assess the evidence led to support and defend that claim, independently assign that evidence weight, and then independently determine whether its assessment of the evidence supports a finding of liability. The fact that the Act shifts certain onuses of proof or limits the compellability of information that the appellants assert is relevant does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence.

reconnaître une garantie constitutionnelle, non pas à l'indépendance judiciaire, mais à la gouvernance judiciaire.

Cela ne signifie pas qu'une loi, en tant que règle de droit, ne peut jamais faire inconstitutionnellement obstacle à la fonction juridictionnelle des tribunaux. Mais il faut plus qu'une allégation selon laquelle le contenu de la loi dont l'application relève de la fonction juridictionnelle est illogique ou injuste, ou que la loi prescrit des règles différentes de celles établies en common law. La loi doit faire obstacle, ou être raisonnablement perçue comme faisant obstacle, à la fonction juridictionnelle des tribunaux ou aux conditions essentielles de l'indépendance judiciaire. Dans ses motifs, la juge en chef McLachlin affirme ce qui suit dans *Babcock*, par. 57 :

> La législature a entièrement compétence pour édicter des lois — et même des lois que certains peuvent considérer draconiennes —, à condition de ne pas nuire ni faire obstacle sous un aspect fondamental aux rapports entre les tribunaux et les autres composantes du gouvernement.

L'édiction de la Loi par la législature n'a porté atteinte à aucun aspect fondamental de la fonction juridictionnelle des tribunaux. Un tribunal appelé à instruire une action introduite sous le régime de la Loi conserve en tout temps sa fonction juridictionnelle et sa capacité d'exercer cette fonction sans ingérence. Il doit statuer de façon indépendante sur l'applicabilité de la Loi à la demande présentée par le gouvernement, comme il doit apprécier de façon indépendante les éléments de preuve soumis à l'appui et à l'encontre de cette demande. Il doit aussi évaluer de façon indépendante le poids de cette preuve, et alors il doit déterminer, de la même manière, si son appréciation de la preuve justifie une conclusion de responsabilité. Le fait que la Loi déplace certains fardeaux de la preuve, ou qu'elle limite la contraignabilité à l'égard de renseignements que les appelants estiment pertinents, ne fait en aucun cas obstacle, ni en apparence ni en réalité, à la fonction juridictionnelle du tribunal ou à l'une des conditions essentielles de l'indépendance judiciaire. L'indépendance judiciaire peut s'accommoder de l'introduction de règles de procédure civile et de preuve novatrices.

The appellants' submission that the Act violates the independence of the judiciary and is therefore unconstitutional fails for the reasons stated above.

C. *Rule of Law*

The rule of law is "a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142) that lies "at the root of our system of government" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70). It is expressly acknowledged by the preamble to the *Constitution Act, 1982*, and implicitly recognized in the preamble to the *Constitution Act, 1867*: see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750.

This Court has described the rule of law as embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": *Reference re Manitoba Language Rights*, at p. 748. The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": *Reference re Manitoba Language Rights*, at p. 749. The third requires that "the relationship between the state and the individual . . . be regulated by law": *Reference re Secession of Quebec*, at para. 71.

So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. 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

Pour ces raisons, la prétention des appelants selon laquelle la Loi viole l'indépendance des tribunaux et qu'elle est donc inconstitutionnelle ne saurait être retenue. 56

C. *La primauté du droit*

La primauté du droit constitue [TRADUCTION] « un des postulats fondamentaux de notre structure constitutionnelle » (*Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 142) qui repose « à la base de notre système de gouvernement » (*Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 70). Elle est reconnue de manière explicite dans le préambule de la *Loi constitutionnelle de 1982*, et de manière implicite dans celui de la *Loi constitutionnelle de 1867* : voir *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, p. 750. 57

La Cour a décrit la primauté du droit comme embrassant trois principes. Le premier reconnaît que « le droit est au-dessus des autorités gouvernementales aussi bien que du simple citoyen et exclut, par conséquent, l'influence de l'arbitraire » : *Renvoi relatif aux droits linguistiques au Manitoba*, p. 748. Le deuxième « exige la création et le maintien d'un ordre réel de droit positif qui préserve et incorpore le principe plus général de l'ordre normatif » : *Renvoi relatif aux droits linguistiques au Manitoba*, p. 749. Selon le troisième, « les rapports entre l'État et les individus doivent être régis par le droit » : *Renvoi relatif à la sécession du Québec*, par. 71. 58

Lorsqu'on l'interprète de cette manière, il est difficile de concevoir que la primauté du droit puisse servir à invalider une loi comme celle qui nous occupe en raison de son contenu. Cela tient au fait qu'aucun des principes qu'embrasse la primauté du droit ne vise directement les termes de la loi. Le premier principe requiert que les lois soient appliquées à tous ceux, incluant les représentants gouvernementaux, à qui, de par leur libellé, elles doivent s'appliquer. Le deuxième principe signifie que les lois doivent exister. Quant au troisième principe, lequel chevauche dans une certaine mesure le premier et le deuxième, il exige que les 59

Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at pp. 114-15.

60 This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in *Babcock*, at para. 54, "unwritten constitutional principles", including the rule of law, "are capable of limiting government actions". See also *Reference re Secession of Quebec*, at para. 54. But the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed).

61 Nonetheless, considerable debate surrounds the question of what *additional* principles, if any, the rule of law might embrace, and the extent to which *they* might mandate the invalidation of legislation based on its content. P. W. Hogg and C. F. Zwibel write in "The Rule of Law in the Supreme Court of Canada" (2005), 55 *U.T.L.J.* 715, at pp. 717-18:

> Many authors have tried to define the rule of law and to explain its significance, or lack thereof. Their views spread across a wide spectrum. . . . T.R.S. Allan, for example, claims that laws that fail to respect the equality and human dignity of individuals are contrary to the rule of law. Luc Tremblay asserts that the rule of law includes the liberal principle, the democratic principle, the constitutional principle, and the federal principle. For Allan and Tremblay, the rule of law demands not merely that positive law be obeyed but that it embody a particular vision of social justice. Another strong version comes from David Beatty, who argues that the 'ultimate rule of law' is a principle of 'proportionality' to which all laws must conform on pain of invalidity (enforced by judicial review). In the middle of the

mesures prises par les représentants de l'État s'appuient sur des lois. Voir R. Elliot, « References, Structural Argumentation and the Organizing Principles of Canada's Constitution » (2001), 80 *R. du B. can.* 67, p. 114-115.

Cela ne signifie pas que la primauté du droit, telle que décrite par cette Cour, n'a aucune force normative. Comme l'a affirmé la juge en chef McLachlin dans *Babcock*, par. 54, les « principes constitutionnels non écrits », incluant la primauté du droit, « [peuvent] limiter les actes du gouvernement ». Voir aussi *Renvoi sur la sécession du Québec*, par. 54. Mais les actes du gouvernement que limite la primauté du droit, comme l'entendent le *Renvoi relatif aux droits linguistiques au Manitoba* et le *Renvoi sur la sécession du Québec*, sont habituellement, par définition, ceux des pouvoirs exécutif et judiciaire. Les actes du pouvoir législatif sont aussi limités, mais seulement dans le sens où ils doivent respecter des conditions légales de manière et de forme (c.-à-d., les procédures d'adoption, de modification et d'abrogation des lois).

Il reste que la question de savoir quels *autres* principes, s'il en est, la primauté du droit devrait embrasser, et dans quelle mesure *ils* pourraient entraîner l'invalidation d'une loi en raison de son contenu, soulève beaucoup de controverse. À ce propos, P. W. Hogg et C. F. Zwibel ont écrit ces commentaires dans « The Rule of Law in the Supreme Court of Canada » (2005), 55 *U.T.L.J.* 715, p. 717-718 :

> [TRADUCTION] De nombreux auteurs ont tenté de définir la primauté du droit et d'expliquer son importance ou son manque d'importance. Leurs vues couvrent un large spectre. [. . .] Selon T.R.S. Allan par exemple, les lois qui ne respectent pas l'égalité et la dignité humaine des personnes sont contraires à la primauté du droit. Luc Tremblay affirme que la primauté du droit inclut le principe libéral, le principe démocratique, le principe constitutionnel et le principe fédéral. Pour Allan et Tremblay, la primauté du droit n'exige pas simplement le respect du droit positif, mais l'intégration d'une certaine vision de justice sociale. David Beatty propose une autre conception importante en soutenant que l'« absolue primauté du droit » est un principe de « proportionnalité » auquel toutes les lois doivent se

spectrum are those who, like Joseph Raz, accept that the rule of law is an ideal of constitutional legality, involving open, stable, clear, and general rules, even-handed enforcement of those laws, the independence of the judiciary, and judicial review of administrative action. Raz acknowledges that conformity to the rule of law is often a matter of degree, and that breaches of the rule of law do not lead to invalidity.

conformer sous peine d'invalidité (mise en œuvre par un contrôle judiciaire). Au milieu du spectre se situent ceux qui, à l'instar de Joseph Raz, admettent que la primauté du droit représente un idéal de légalité constitutionnelle qui suppose des règles de droit transparentes, stables, claires et générales, l'impartialité de leur application, l'indépendance des tribunaux et le contrôle judiciaire des actes administratifs. Raz reconnaît que le respect de la primauté du droit est souvent une question de degré, et que le manquement à ce principe ne mène pas à l'invalidité.

See also W. J. Newman, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005), 16 *N.J.C.L.* 175, at pp. 177-80.

Voir également W. J. Newman, « The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation » (2005), 16 *R.N.D.C.* 175, p. 177-180.

This debate underlies Strayer J.A.'s apt observation in *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.), at para. 33, that "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be."

62 Ce débat souligne le caractère judicieux d'une remarque du juge Strayer dans *Singh c. Canada (Procureur général)*, [2000] 3 C.F. 185 (C.A.), par. 33, selon qui « [c]eux qui prônent ou défendent quelque chose en particulier tendent à voir dans le principe de la primauté du droit tout ce qui conforte leur vue de ce que doit être la loi. »

The appellants' conceptions of the rule of law can fairly be said to fall at one extreme of the spectrum of possible conceptions and to support Strayer J.A.'s thesis. They submit that the rule of law requires that legislation: (1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial. And they argue that the Act breaches each of these requirements, rendering it invalid.

63 Il est possible d'affirmer en toute objectivité que les conceptions qu'offrent les appelants de la primauté du droit se situent à l'une des extrémités du spectre des conceptions possibles. Elles valident ainsi la remarque du juge Strayer. Les appelants plaident en effet que la primauté du droit exige que la loi (1) soit prospective, (2) qu'elle soit de nature générale, (3) qu'elle ne confère aucun privilège spécial au gouvernement, sauf pour les besoins d'une gouvernance efficace, et (4) qu'elle assure un procès équitable au civil. Ils soutiennent alors que la Loi contrevient à chacune de ces exigences, ce qui la rendrait invalide.

A brief review of this Court's jurisprudence will reveal that none of these requirements enjoy constitutional protection in Canada. But before embarking on that review, it should be said that acknowledging the constitutional force of anything resembling the appellants' conceptions of the rule of law would seriously undermine the legitimacy of judicial review of legislation for constitutionality. That is so for two separate but interrelated reasons.

64 Un bref examen de la jurisprudence de notre Cour révélera qu'aucune de ces exigences ne jouit d'une protection constitutionnelle au Canada. Mais, avant de s'engager dans cet examen, il importe de noter que le fait de reconnaître la valeur constitutionnelle de conceptions de la primauté du droit analogues à celles que défendent les appelants compromettrait gravement la légitimité du contrôle judiciaire des lois fondé sur la Constitution. Deux raisons distinctes, mais interreliées, expliquent cette conclusion.

65 First, many of the requirements of the rule of law proposed by the appellants are simply broader versions of rights contained in the *Charter*. For example, the appellants' proposed fair trial requirement is essentially a broader version of s. 11(*d*) of the *Charter*, which provides that "[a]ny person charged with an offence has the right . . . to . . . a fair and public hearing." But the framers of the *Charter* enshrined that fair trial right only for those "charged with an offence." If the rule of law constitutionally required that all legislation provide for a fair trial, s. 11(*d*) and its relatively limited scope (not to mention its qualification by s. 1) would be largely irrelevant because *everyone* would have the unwritten, but constitutional, right to a "fair . . . hearing". (Though, as explained in para. 76, the Act provides for a fair trial in any event.) Thus, the appellants' conception of the unwritten constitutional principle of the rule of law would render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers. That is specifically what this Court cautioned against in *Reference re Secession of Quebec*, at para. 53:

> Given the existence of these underlying constitutional principles, what use may the Court make of them? In [*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*], at paras. 93 and 104, we cautioned that the recognition of these constitutional principles . . . could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. [Emphasis added.]

66 Second, 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

D'une part, plusieurs des exigences de la primauté du droit proposées par les appelants sont simplement des versions élargies des droits protégés par la *Charte*. Par exemple, l'exigence relative à la tenue d'un procès équitable que proposent les appelants constitue essentiellement une version élargie de l'al. 11*d*) de la *Charte*, qui dispose que « [t]out inculpé a le droit [. . .] à [. . .] un procès public et équitable. » Mais les rédacteurs de la *Charte* ont garanti ce droit à un procès équitable aux seules personnes « inculpées ». Si la primauté du droit exigeait sur le plan constitutionnel que toutes les lois prévoient la tenue d'un procès équitable, cette exigence priverait l'al. 11*d*), dont la portée est relativement limitée (sans compter la restriction apportée par l'article premier), d'une grande partie de sa pertinence parce que *tous* auraient le droit, non écrit mais constitutionnel, à un « procès [. . .] équitable ». (Bien que, comme je l'indique au par. 76, la Loi prévoit de toute manière la tenue d'un procès équitable.) Ainsi, la conception qu'ont les appelants du principe constitutionnel non écrit de la primauté du droit rendrait superflu un bon nombre de nos droits constitutionnels écrits. Elle compromettrait ainsi la délimitation de ces droits établie par les rédacteurs de notre Constitution. Ces difficultés expliquent la prudence recommandée par notre Cour à ce propos dans le *Renvoi sur la sécession du Québec*, par. 53 :

> Étant donné l'existence de ces principes constitutionnels sous-jacents, de quelle façon notre Cour peut-elle les utiliser? Dans le [*Renvoi relatif aux juges de la Cour provinciale de l'Île-du-Prince-Édouard*], aux par. 93 et 104, nous avons apporté la réserve que la reconnaissance de ces principes constitutionnels [. . .] n'est pas une invitation à négliger le texte écrit de la Constitution. Bien au contraire, nous avons réaffirmé qu'il existe des raisons impératives d'insister sur la primauté de notre Constitution écrite. Une constitution écrite favorise la certitude et la prévisibilité juridiques, et fournit les fondements et la pierre de touche du contrôle judiciaire en matière constitutionnelle. [Je souligne.]

D'autre part, les arguments des appelants ne tiennent pas compte du fait que plusieurs principes constitutionnels autres que la primauté du droit reconnus par notre Cour — plus particulièrement, la démocratie et le constitutionnalisme — militent très fortement en faveur de la confirmation de la

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. See *Bacon v. Saskatchewan Crop Insurance Corp.* (1999), 180 Sask. R. 20 (C.A.), at para. 30; Elliot, at pp. 141-42; Hogg and Zwibel, at p. 718; and Newman, at p. 187.

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.

A review of the cases showing that each of the appellants' proposed requirements of the rule of law has, as a matter of precedent and policy, no constitutional protection is conclusive of the appellants' rule of law arguments.

(1) Prospectivity in the Law

Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(*g*) of the *Charter*, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Professor P. W. Hogg sets out the state of the law accurately (in *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 48-29):

> Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.

validité des lois qui respectent les termes exprès de la Constitution (et les exigences, telles que l'indépendance judiciaire, qui découlent de ces termes par déduction nécessaire). Autrement dit, les arguments soulevés par les appelants ne reconnaissent pas que, dans une démocratie constitutionnelle telle que la nôtre, la protection contre une loi que certains pourraient considérer injuste ou inéquitable ne réside pas dans les principes amorphes qui sous-tendent notre Constitution, mais dans son texte et dans l'urne électorale. Voir *Bacon c. Saskatchewan Crop Insurance Corp.* (1999), 180 Sask. R. 20 (C.A.), par. 30; Elliot, p. 141-142; Hogg et Zwibel, p. 718; et Newman, p. 187.

67 La primauté du droit n'est pas une invitation à banaliser ou à remplacer les termes écrits de la Constitution. Il ne s'agit pas non plus d'un instrument permettant à celui qui s'oppose à certaines mesures législatives de s'y soustraire. Au contraire, elle exige des tribunaux qu'ils donnent effet au texte constitutionnel, et qu'ils appliquent, quels qu'en soient les termes, les lois qui s'y conforment.

68 Un examen des décisions montrant que chacune des exigences proposées par les appelants à l'égard de la primauté du droit ne jouit, en jurisprudence, d'aucune protection constitutionnelle met un terme à leurs arguments à ce sujet.

(1) Le caractère prospectif de la Loi

69 Sauf en droit criminel, où l'al. 11*g*) de la *Charte* limite le caractère rétrospectif et la rétroactivité de la législation, le principe de la primauté du droit et les dispositions de notre Constitution n'exigent aucunement que les lois aient seulement un caractère rétrospectif. Le professeur P. W. Hogg expose avec précision l'état du droit sur ce point (dans *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, p. 48-29) :

> [TRADUCTION] Sous réserve de l'al. 11g), le droit constitutionnel canadien n'interdit pas la rétroactivité (ex post facto) des lois. En matière d'interprétation législative, il faut présumer qu'une loi n'a pas d'effet rétroactif, mais si cet effet est clairement exprimé, il n'y a alors place à aucune interprétation et la loi prend effet au moment prévu. Les lois rétroactives sont en fait courantes.

70 Hence, in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1192, La Forest J., writing for a majority of this Court, characterized a retroactive tax as "not constitutionally barred". And in *Cusson v. Robidoux*, [1977] 1 S.C.R. 650, at p. 655, Pigeon J., for a unanimous Court, said that it would be "untenable" to suggest that legislation reviving actions earlier held by this Court (in *Notre-Dame Hospital v. Patry*, [1975] 2 S.C.R. 388) to be time-barred was unconstitutional.

71 The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 *U.B.C. L. Rev.* 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness": *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), at p. 268.

72 It might also be observed that developments in the common law have always had retroactive and retrospective effect. Lord Nicholls recently explained this point in *In re Spectrum Plus Ltd.*, [2005] 3 W.L.R. 58, [2005] UKHL 41, at para. 7:

> A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned, as occurred with the manufacturer of the ginger beer in *Donoghue v Stevenson* [1932] AC 562. When Mr Stevenson manufactured and bottled and sold his ginger beer the law on manufacturers' liability as generally understood may have been as stated by the majority of the Second Division of the Court of Session and the minority of their Lordships in that case. But in the claim Mrs Donoghue brought against Mr Stevenson his legal obligations fell to be decided in accordance

Ainsi, dans *Air Canada c. Colombie-Britannique*, [1989] 1 R.C.S. 1161, p. 1193, le juge La Forest, s'exprimant au nom des juges majoritaires de la Cour, a affirmé « que la Constitution n'interdit pas » l'adoption d'une taxe rétroactive. Et dans *Cusson c. Robidoux* , [1977] 1 R.C.S. 650, p. 655, le juge Pigeon a écrit, au nom de la Cour, qu'il serait « futile » de laisser croire qu'une loi est inconstitutionnelle parce qu'elle fait revivre des actions déjà jugées prescrites par notre Cour (dans *Hôpital Notre-Dame c. Patry*, [1975] 2 R.C.S. 388).

Il n'existe aussi aucune exigence générale que la législation ait une portée uniquement prospective, même si une loi rétrospective et rétroactive peut renverser des expectatives bien établies et être parfois perçue comme étant injuste : voir E. Edinger, « Retrospectivity in Law » (1995), 29 *U.B.C. L. Rev.* 5, p. 13. Ceux qui partagent cette perception seront peut-être rassurés par les règles d'interprétation législative qui imposent au législateur d'indiquer clairement les effets rétroactifs ou rétrospectifs souhaités. Ces règles garantissent que le législateur a réfléchi aux effets souhaités et [TRADUCTION] « a conclu que les avantages de la rétroactivité [ou du caractère rétrospectif] l'emportent sur les possibilités de perturbation ou d'iniquité » : *Landgraf c. USI Film Products*, 511 U.S. 244 (1994), p. 268.

Il convient aussi de faire remarquer que la jurisprudence en common law a toujours eu un effet à la fois rétroactif et rétrospectif. Lord Nicholls a récemment expliqué ce point dans *In Re Spectrum Plus Ltd.*, [2005] 3 W.L.R. 58, [2005] UKHL 41, par. 7 :

> [TRADUCTION] Une décision judiciaire qui modifie le droit tel qu'on le connaissait jusqu'alors s'applique d'une façon rétrospective aussi bien que prospective. La décision aura un effet rétrospectif dans la mesure où les parties en litige sont concernées, comme c'était le cas du fabricant de bière au gingembre dans *Donoghue c. Stevenson* [1932] AC 562. Lorsque M. Stevenson a fabriqué, embouteillé et vendu sa bière au gingembre, l'interprétation généralement donnée à la loi sur la responsabilité des fabricants aurait pu être celle que lui ont donnée les juges majoritaires de la deuxième division de la Cour de session et la minorité des lords juges dans cette affaire. Mais dans l'action intentée par

with Lord Atkin's famous statements. Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the majority of the House of Lords in that case even though the relevant events occurred before that decision was given.

This observation adds further weight, if needed, to the view that retrospectivity and retroactivity do not generally engage constitutional concerns.

(2) Generality in the Law, Ordinary Law for the Government and Fair Civil Trials

Two decisions of this Court defeat the appellants' submission that the Constitution, through the rule of law, requires that legislation be general in character and devoid of special advantages for the government (except where necessary for effective governance), as well as that it ensure a fair civil trial.

The first is *Air Canada*. In it, a majority of this Court affirmed the constitutionality of 1981 amendments to the *Gasoline Tax Act, 1948*, R.S.B.C. 1960, c. 162, that retroactively taxed certain companies in the airline industry. The amendments were meant strictly to defeat three companies' claims, brought in 1980, for reimbursement of gasoline taxes paid between 1974 and 1976, the collection of which was *ultra vires* the legislature of British Columbia. The legislative amendments, in addition to being retroactive, were for the benefit of the Crown, aimed at a particular industry with readily identifiable members and totally destructive of that industry's ability to pursue successfully their claims filed a year earlier. Nonetheless, the constitutionality of those amendments was affirmed by a majority of this Court.

The second is *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, 2003 SCC 39, in

M^me^ Donoghue contre M. Stevenson, les obligations légales de ce dernier devaient être déterminées en fonction des énoncés célèbres de Lord Atkin. En outre, en raison de la doctrine du précédent, il en serait ainsi pour quiconque saisit par la suite un tribunal de son affaire. Ses droits et ses obligations seraient tranchés en fonction des règles exposées par la Chambre des lords à la majorité dans cette affaire, même si les événements pertinents sont survenus antérieurement à cette décision.

Cette observation vient renforcer, si au besoin est, l'opinion suivant laquelle le caractère rétrospectif et la rétroactivité ne soulèvent généralement pas de préoccupations d'ordre constitutionnel.

(2) La généralité en droit, les règles de droit ordinaires applicables au gouvernement et les procès équitables au civil

73 Deux arrêts de notre Cour font échec à la prétention des appelants voulant que la Constitution, au moyen de la primauté du droit, exige que les lois soient de nature générale et dépourvues de privilèges spéciaux à l'égard du gouvernement (sauf lorsqu'un tel privilège est nécessaire à une gouvernance efficace), en plus d'assurer un procès équitable au civil.

74 La première décision est *Air Canada*. Dans cet arrêt, la Cour a confirmé à la majorité la constitutionnalité des modifications apportées en 1981 à la *Gasoline Tax Act, 1948*, R.S.B.C. 1960, ch. 162, qui imposait une taxe rétroactive à certaines compagnies aériennes. Les modifications visaient strictement à faire échec aux poursuites intentées par trois sociétés en 1980 pour obtenir le remboursement des taxes sur l'essence payées entre 1974 et 1976, dont la perception excédait la compétence de la législature de la Colombie-Britannique. En plus d'être rétroactives, les modifications législatives servaient les intérêts de l'État, visaient une industrie en particulier dont les membres étaient facilement identifiables et réduisaient à néant la capacité de cette industrie de faire valoir avec succès les demandes qu'elle avait déposées un an plus tôt. La constitutionnalité de ces modifications a néanmoins été confirmée par notre Cour à la majorité.

75 La deuxième décision est *Authorson c. Canada (Procureur général)*, [2003] 2 R.C.S. 40, 2003

which this Court unanimously upheld a provision of the *Department of Veterans Affairs Act*, R.S.C. 1985, c. V-1, aimed specifically at defeating certain disabled veterans' claims, the merits of which were undisputed, against the federal government. The claims concerned interest owed by the government on the veterans' benefit accounts administered by it, which interest it had not properly credited for decades. Though the appeal was pursued on the basis of the *Canadian Bill of Rights*, S.C. 1960, c. 44, the decision confirmed that it was well within Parliament's power to enact the provision at issue — despite the fact that it was directed at a known class of vulnerable veterans, conferred benefits on the Crown for "undisclosed reasons" (para. 62) and routed those veterans' ability to have *any* trial — fair or unfair — of their claims. See para. 15:

CSC 39. Dans cet arrêt, la Cour a confirmé à l'unanimité la validité d'une disposition de la *Loi sur le ministère des Anciens combattants*, L.R.C. 1985, ch. V-1, qui visait expressément à rendre irrecevables les actions intentées par certains anciens combattants invalides à l'encontre du gouvernement fédéral, actions dont le bien-fondé n'était pas contesté. Les actions portaient sur des intérêts qui auraient dû être versés par le gouvernement sur les fonds qu'il gérait et qui appartenaient aux anciens combattants, intérêts qui n'avaient pas été payés pendant des décennies. Bien que le pourvoi reposât sur la *Déclaration canadienne des droits*, S.C. 1960, ch. 44, la décision a confirmé que le Parlement possédait bien le pouvoir d'édicter la disposition en cause — même si elle ne visait qu'une seule catégorie connue d'anciens combattants vulnérables, elle conférait des avantages à l'État « pour des raisons qu'il [le législateur] n'a pas dévoilées » (par. 62) et elle anéantissait la possibilité d'*un* procès — équitable ou non — portant sur les revendications de ces anciens combattants. Voir par. 15 :

> The *Department of Veterans Affairs Act*, s. 5.1(4) takes a property claim from a vulnerable group, in disregard of the Crown's fiduciary duty to disabled veterans. However, that taking is within the power of Parliament. The appeal has to be allowed.

> Le paragraphe 5.1(4) de la *Loi sur le ministère des Anciens combattants* a pour effet de déposséder les membres d'un groupe vulnérable de leur droit sur des biens, au mépris de l'obligation de fiduciaire de l'État envers les anciens combattants invalides. Toutefois, le législateur a effectivement le pouvoir de les déposséder ainsi. Le pourvoi doit être accueilli.

76 Additionally, the appellants' conception of a "fair" civil trial seems in part to be of one governed by customary rules of civil procedure and evidence. As should be evident from the analysis concerning judicial independence, there is no constitutional right to have one's civil trial governed by such rules. Moreover, new rules are not necessarily unfair. Indeed, tobacco manufacturers sued pursuant to the Act will receive a fair civil trial, in the sense that the concept is traditionally understood: they are entitled to a public hearing, before an independent and impartial court, in which they may contest the claims of the plaintiff and adduce evidence in their defence. The court will determine their liability only following that hearing, based solely on its understanding of the law as applied to its findings of fact. The fact that defendants might regard that law (i.e., the Act) as unjust, or the

En outre, la conception que les appelants se font de la nature de procès « équitable » au civil semble, en bonne part, reprendre le contenu des règles traditionnelles de procédure civile et de preuve. Comme il devrait ressortir de l'analyse portant sur l'indépendance judiciaire, il n'existe aucun droit constitutionnel à un procès civil régi par de telles règles. De plus, les nouvelles règles ne sont pas nécessairement injustes. En effet, les fabricants de tabac poursuivis en application de la Loi subiront un procès équitable au civil, suivant le sens habituellement attribué à ce concept : ils ont droit à une audition publique, devant un tribunal indépendant et impartial, et ils peuvent contester les réclamations de la demanderesse et produire des éléments de preuve en défense. Le tribunal ne statuera sur leur responsabilité qu'à l'issue de cette audition, en se fondant exclusivement sur son interprétation

procedural rules it prescribes as unprecedented, does not render their trial unfair.

The Act does not implicate the rule of law in the sense that the Constitution comprehends that term. It follows that the Act is not unconstitutional by reason of interference with it.

V. Conclusion

The Act is constitutionally valid. The appeals are dismissed, with costs to the respondents throughout. Each constitutional question is answered "no". The stay of proceedings granted by McLachlin C.J. on January 21, 2005 is vacated.

APPENDIX

Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, as am. S.B.C. 2003, c. 70, s. 297

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Definitions and interpretation

1 (1) In this Act:

"cost of health care benefits" means the sum of

(a) the present value of the total expenditure by the government for health care benefits provided for insured persons resulting from tobacco related disease or the risk of tobacco related disease, and

(b) the present value of the estimated total expenditure by the government for health care benefits that could reasonably be expected will be provided for those insured persons resulting from tobacco related disease or the risk of tobacco related disease;

"disease" includes general deterioration of health;

du droit qu'il applique à ses conclusions de fait. Le fait que les défendeurs puissent estimer que le droit (c.-à-d. la Loi) est injuste, ou que les règles de procédure qu'il prescrit sont nouvelles, ne rend pas leur procès inéquitable.

La Loi ne met pas en jeu l'application du principe de la primauté du droit dans le sens où cette expression est consacrée dans la Constitution. Il s'ensuit que la Loi n'est pas inconstitutionnelle pour cause d'incompatibilité. 77

V. Conclusion

La Loi est constitutionnellement valide. Les pourvois sont rejetés avec dépens en faveur des intimés dans toutes les cours. Il convient de répondre « non » à chaque question constitutionnelle. Le sursis d'exécution ordonné par la juge en chef McLachlin le 21 janvier 2005 est annulé. 78

ANNEXE

Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, ch. 30, mod. par S.B.C. 2003, ch. 70, art. 297

[TRADUCTION]

SA MAJESTÉ, sur l'avis et avec le consentement de l'Assemblée législative de la province de la Colombie-Britannique, édicte :

Définitions

1 (1) Les définitions qui suivent s'appliquent à la présente loi.

« assuré »

a) Une personne, y compris une personne décédée, ayant reçu des services de soins de santé;

b) une personne vraisemblablement susceptible de recevoir des services de soins de santé.

« coentreprise » Une association de deux personnes ou plus si :

a) leurs rapports ne constituent pas une personne morale, une société de personnes ou une fiducie;

"exposure" means any contact with, or ingestion, inhalation or assimilation of, a tobacco product, including any smoke or other by-product of the use, consumption or combustion of a tobacco product;

"health care benefits" means

(a) benefits as defined under the *Hospital Insurance Act*,

(b) benefits as defined under the *Medicare Protection Act*,

(c) payments made by the government under the *Continuing Care Act*, and

(d) other expenditures, made directly or through one or more agents or other intermediate bodies, by the government for programs, services, benefits or similar matters associated with disease;

"insured person" means

(a) a person, including a deceased person, for whom health care benefits have been provided, or

(b) a person for whom health care benefits could reasonably be expected will be provided;

"joint venture" means an association of 2 or more persons, if

(a) the relationship among the persons does not constitute a corporation, a partnership or a trust, and

(b) the persons each have an undivided interest in assets of the association;

"manufacture" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

"manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

(a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with

b) chacune d'elles possède un droit indivis à la propriété des biens de l'association.

« coût des services de soins de santé » La somme des éléments suivants :

a) la valeur actuelle des dépenses totales engagées par le gouvernement pour les services de soins de santé fournis aux assurés par suite d'une maladie liée au tabac ou du risque d'une maladie liée au tabac;

b) la valeur actuelle des dépenses totales prévues par le gouvernement pour les services de soins de santé qu'il peut raisonnablement s'attendre à fournir aux assurés par suite d'une maladie liée au tabac ou du risque d'une maladie liée au tabac.

« exposition » Tout contact avec un produit du tabac, incluant la fumée ou un autre sous-produit résultant de l'usage, de la consommation ou de la combustion d'un produit du tabac, ou toute ingestion, inhalation ou assimilation d'un tel produit.

« fabricant » Une personne qui fabrique ou a fabriqué un produit du tabac, y compris une personne qui :

a) directement ou indirectement, fait ou a fait fabriquer un produit du tabac dans le cadre d'ententes conclues avec des entrepreneurs, des sous-entrepreneurs, des titulaires de licence, des franchisés ou d'autres personnes;

b) au cours d'un exercice financier, tire ou a tiré au moins 10 pourcent de son revenu, calculé sur une base consolidée conformément aux principes comptables généralement reconnus au Canada, de la fabrication ou de la promotion de produits du tabac par elle-même ou par d'autres personnes;

c) fait ou fait faire, ou a fait ou fait faire, directement ou indirectement, la promotion d'un produit du tabac;

d) est ou a été une association commerciale qui se consacre principalement :

(i) à la promotion des intérêts des fabricants;

(ii) à la promotion d'un produit du tabac;

(iii) à la promotion par d'autres personnes, directement ou indirectement, d'un produit du tabac.

generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,

(c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(d) is a trade association primarily engaged in

(i) the advancement of the interests of manufacturers,

(ii) the promotion of a tobacco product, or

(iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

"person" includes a trust, joint venture or trade association;

"promote" or **"promotion"** includes, for a tobacco product, the marketing, distribution or sale of the tobacco product and research with respect to the tobacco product;

"tobacco product" means tobacco and any product that includes tobacco;

"tobacco related disease" means disease caused or contributed to by exposure to a tobacco product;

"tobacco related wrong" means,

(a) a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease, or

(b) in an action under section 2 (1), a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in British Columbia who have been exposed or might become exposed to a tobacco product;

"type of tobacco product" means one or a combination of the following tobacco products:

(a) cigarettes;

(b) loose tobacco intended for incorporation into cigarettes;

(c) cigars;

(d) cigarillos;

« fabrication » Est assimilée à la fabrication, à l'égard d'un produit du tabac, la production, l'assemblage ou l'empaquetage de ce produit.

« faute d'un fabricant »

a) Délit commis en Colombie-Britannique par un fabricant qui cause une maladie liée au tabac ou y contribue;

b) dans une action visée au paragraphe 2(1), manquement par un fabricant à une obligation que lui impose la common law, l'equity ou la loi à l'égard de personnes en Colombie-Britannique qui ont été exposées à un produit du tabac ou qui pourraient l'être;

« maladie » Est assimilée à la maladie la détérioration générale de la santé.

« maladie liée au tabac » Maladie causée ou favorisée par l'exposition à un produit du tabac.

« personne » Sont assimilées à une personne une fiducie, une coentreprise ou une association commerciale.

« produit du tabac » Le tabac et tout produit qui contient du tabac.

« promouvoir » ou **« promotion »** Sont assimilés à la promotion d'un produit du tabac le marketing, la distribution ou la vente de ce produit, de même que la recherche relative à ce produit.

« services de soins de santé »

a) Les services au sens de l'*Hospital Insurance Act*;

b) les services au sens de la *Medicare Protection Act*;

c) les versements faits par le gouvernement sous le régime de la *Continuing Care Act*;

d) les autres dépenses, engagées par le gouvernement, directement ou par un ou plusieurs représentants ou organismes intermédiaires, pour des programmes, services, prestations ou avantages semblables liés à la maladie.

« type de produit du tabac » Un des produits du tabac suivants ou une combinaison de ces produits :

a) cigarettes;

b) tabac à cigarettes:

c) cigares;

(e) pipe tobacco;

(f) chewing tobacco;

(g) nasal snuff;

(h) oral snuff;

(i) a prescribed form of tobacco.

(2) The definition of "manufacturer" in subsection (1) does not include

(a) an individual,

(b) a person who

(i) is a manufacturer only because they are a wholesaler or retailer of tobacco products, and

(ii) is not related to

(A) a person who manufactures a tobacco product, or

(B) a person described in paragraph (a) of the definition of "manufacturer", or

(c) a person who

(i) is a manufacturer only because paragraph (b) or (c) of the definition of "manufacturer" applies to the person, and

(ii) is not related to

(A) a person who manufactures a tobacco product, or

(B) a person described in paragraphs (a) or (d) of the definition of "manufacturer".

(3) For the purposes of subsection (2), a person is related to another person if, directly or indirectly, the person is

(a) an affiliate, as defined in section 1 of the *Business Corporations Act*, of the other person, or

(b) an affiliate of the other person or an affiliate of an affiliate of the other person.

d) cigarillos;

e) tabac à pipe;

f) tabac à mâcher;

g) tabac à priser nasal;

h) tabac à priser oral;

i) forme de tabac réglementaire.

(2) La définition de « fabricant » au paragraphe 1 n'inclut pas :

a) un particulier;

b) une personne qui, selon le cas :

(i) est un fabricant du seul fait qu'elle est un grossiste ou un détaillant de produits du tabac;

(ii) n'est pas liée à :

(A) une personne qui fabrique un produit du tabac;

(B) une personne visée à l'alinéa a) de la définition de « fabricant »;

c) une personne qui :

(i) est un fabricant du seul fait qu'elle est visée à l'alinéa b) ou c) de la définition de « fabricant »,

et qui

(ii) n'est pas liée à :

(A) une personne qui fabrique un produit du tabac;

(B) une personne visée à l'alinéa a) ou d) de la définition de « fabricant ».

(3) Pour l'application du paragraphe (2), une personne est liée à une autre personne si elle est, directement ou indirectement, selon le cas :

a) une affiliée, au sens que l'article premier de la *Business Corporations Act* donne à ce terme, de l'autre personne;

b) une affiliée de l'autre personne ou une affiliée d'une affiliée de l'autre personne.

(4) For the purposes of subsection (3) (b), a person is deemed to be an affiliate of another person if the person

(a) is a corporation and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, owns a beneficial interest in shares of the corporation

(i) carrying at least 50% of the votes for the election of directors of the corporation and the votes carried by the shares are sufficient, if exercised, to elect a director of the corporation, or

(ii) having a fair market value, including a premium for control if applicable, of at least 50% of the fair market value of all the issued and outstanding shares of the corporation, or

(b) is a partnership, trust or joint venture and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has an ownership interest in the assets of that person that entitles the other person or group to receive at least 50% of the profits or at least 50% of the assets on dissolution, winding up or termination of the partnership, trust or joint venture.

(5) For the purposes of subsection (3) (b), a person is deemed to be an affiliate of another person if the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has any direct or indirect influence that, if exercised, would result in control in fact of that person except if the other person deals at arm's length with that person and derives influence solely as a lender.

(6) For the purposes of determining the market share of a defendant for a type of tobacco product sold in British Columbia, the court must calculate the defendant's market share for the type of tobacco product by the following formula:

$$dms = \frac{dm}{MM} \times 100\%$$

(4) Pour l'application de l'alinéa (3)b), une personne est réputée être une affiliée de l'autre personne si elle est, selon le cas :

a) une société et que l'autre personne, ou un groupe de personnes ayant entre elles un lien de dépendance dont l'autre personne est membre, possède dans des actions de la société un intérêt bénéficiaire :

(i) donnant droit à au moins 50 pour cent des voix pour l'élection des administrateurs de la société, et les voix que comportent ces actions sont suffisantes, lorsqu'on y a recours, pour élire un administrateur de la société;

(ii) dont la juste valeur marchande, incluant une prime de contrôle, le cas échéant, correspond à au moins 50 pour cent de la juste valeur marchande de toutes actions émises et en circulation de la société;

b) une société de personnes, une fiducie ou une coentreprise, et que l'autre personne, ou un groupe de personnes ayant entre elles un lien de dépendance dont l'autre personne est membre, possède un droit de propriété dans l'actif de cette personne lui donnant droit de recevoir au moins 50 pour cent des bénéfices ou au moins 50 pour cent des éléments d'actif de celle-ci au moment de la dissolution, liquidation ou cessation de la société de personnes, fiducie ou coentreprise.

(5) Pour l'application de l'alinéa (3)b), une personne est réputée être une affiliée d'une autre personne si cette autre personne, ou un groupe de personnes ayant entre elles un lien de dépendance dont l'autre personne est membre, a une influence directe ou indirecte dont l'exercice entraînerait un contrôle de fait sur la personne, sauf si l'autre personne n'a aucun lien de dépendance avec la personne et que son influence découle exclusivement de sa qualité de prêteur.

(6) Le tribunal détermine la part du marché d'un défendeur à l'égard d'un type de produit du tabac vendu en Colombie-Britannique au moyen de la formule suivante :

$$pmd = \frac{pd}{FF} \times 100\%$$

where

dms = the defendant's market share for the type of tobacco product from the date of the earliest tobacco related wrong committed by that defendant to the date of trial;

dm = the quantity of the type of tobacco product manufactured or promoted by the defendant that is sold within British Columbia from the date of the earliest tobacco related wrong committed by that defendant to the date of trial;

MM = the quantity of the type of tobacco product manufactured or promoted by all manufacturers that is sold within British Columbia from the date of the earliest tobacco related wrong committed by the defendant to the date of trial.

Direct action by government

2 (1) The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.

(2) An action under subsection (1) is brought by the government in its own right and not on the basis of a subrogated claim.

(3) In an action under subsection (1), the government may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the tobacco related wrong committed by the defendant.

(4) In an action under subsection (1), the government may recover the cost of health care benefits

(a) for particular individual insured persons, or

(b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

(5) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

(a) it is not necessary

(i) to identify particular individual insured persons,

où

pmd = la part de marché du défendeur à l'égard du type de produit du tabac entre la date de la première faute d'un fabricant commise par ce défendeur et la date du procès;

pd = la quantité du type de produit du tabac fabriqué ou annoncé par le défendeur qui est vendue en Colombie-Britannique entre la date de la première faute d'un fabricant commise par ce défendeur et la date du procès;

FF = la quantité du type de produit du tabac fabriqué ou annoncé par tous les fabricants qui est vendue en Colombie-Britannique entre la date de la première faute d'un fabricant commise par ce défendeur et la date du procès.

Action directe par le gouvernement

2 (1) Le gouvernement a contre un fabricant un droit d'action direct et distinct pour le recouvrement du coût des services de soins de santé occasionnés ou favorisés par une faute d'un fabricant.

(2) Le gouvernement intente l'action prévue au paragraphe (1) en son nom propre et non par subrogation.

(3) Dans une action fondée sur le paragraphe (1), le gouvernement peut recouvrer le coût des services de soins de santé s'il y a eu recouvrement par d'autres personnes ayant subi un préjudice occasionné ou favorisé par une faute d'un fabricant commise par le défendeur.

(4) Dans une action fondée sur le paragraphe (1), le gouvernement peut recouvrer le coût des soins de santé dispensés :

a) à certains assurés en particulier;

b) globalement, à une population d'assurés par suite d'une exposition à un type de produit du tabac.

(5) Dans une action fondée sur le paragraphe (1), si le gouvernement cherche à recouvrer globalement le coût des services de soins de santé,

a) il n'est pas nécessaire

(i) d'identifier les assurés en particulier;

(ii) to prove the cause of tobacco related disease in any particular individual insured person, or

(iii) to prove the cost of health care benefits for any particular individual insured person,

(b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

(c) a person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons,

(d) despite paragraphs (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed, and

(e) if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents before the documents are disclosed.

Recovery of cost of health care benefits on aggregate basis

3 (1) In an action under section 2 (1) for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) applies if the government proves, on a balance of probabilities, that, in respect of a type of tobacco product,

(a) the defendant breached a common law, equitable or statutory duty or obligation owed to persons in British Columbia who have been exposed or might become exposed to the type of tobacco product,

(ii) de prouver à l'égard d'un assuré en particulier la cause de la maladie liée au tabac;

(iii) de prouver le coût des services de soins de santé fournis à un assuré en particulier;

b) nul ne peut être requis de produire les dossiers et documents médicaux concernant des assurés en particulier, ou les documents relatifs aux soins de santé prodigués à ces assurés, sauf dans la mesure prévue par une règle de droit, de pratique ou de procédure exigeant la production des documents invoqués par un témoin expert;

c) nul ne peut être contraint de répondre à des questions relatives à la santé d'assurés en particulier ou aux soins de santé prodigués à ces assurés;

d) malgré les alinéas b) et c), le tribunal peut, à la demande d'un défendeur, ordonner la communication préalable d'un échantillon statistiquement significatif des dossiers mentionnés à l'alinéa b) et l'ordonnance doit comporter des directives concernant la nature, le degré de précision et le type des renseignements qui doivent être communiqués;

e) dans le cas d'une ordonnance rendue conformément à l'alinéa d), l'identité des assurés en particulier ne doit pas être divulguée, et tous les indices pouvant divulguer ou servir à divulguer le nom ou l'identité des assurés en particulier doivent être expurgés des documents avant leur communication.

Recouvrement global du coût des services de soins de santé

3 (1) Dans une action fondée sur le paragraphe 2(1) visant le recouvrement global du coût des services de soins de santé, le paragraphe (2) s'applique si le gouvernement prouve, suivant la prépondérance des probabilités, que, relativement à un type de produit du tabac :

a) le défendeur a manqué à une obligation que lui impose la common law, l'equity ou la loi à l'égard des personnes en Colombie-Britannique qui ont été exposées à un type de produit du tabac ou pourraient y être exposées;

(b) exposure to the type of tobacco product can cause or contribute to disease, and

(c) during all or part of the period of the breach referred to in paragraph (a), the type of tobacco product, manufactured or promoted by the defendant, was offered for sale in British Columbia.

(2) Subject to subsections (1) and (4), the court must presume that

(a) the population of insured persons who were exposed to the type of tobacco product, manufactured or promoted by the defendant, would not have been exposed to the product but for the breach referred to in subsection (1) (a), and

(b) the exposure described in paragraph (a) caused or contributed to disease or the risk of disease in a portion of the population described in paragraph (a).

(3) If the presumptions under subsection (2) (a) and (b) apply,

(a) the court must determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in subsection (1) (a) resulting from exposure to the type of tobacco product, and

(b) each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product.

(4) The amount of a defendant's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted amongst the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in subsection (1) (a) did not cause or contribute to the exposure referred to in subsection (2) (a) or to the disease or risk of disease referred to in subsection (2) (b).

Joint and several liability in an action under section 2 (1)

4 (1) Two or more defendants in an action under section 2 (1) are jointly and severally liable for the cost of health care benefits if

b) l'exposition à ce type de produit du tabac peut causer ou contribuer à causer une maladie;

c) pendant la totalité ou une partie de la période de manquement à une obligation mentionné à l'alinéa a), le type de produit du tabac fabriqué ou annoncé par le fabricant a été offert en vente en Colombie-Britannique.

2) Sous réserve des paragraphes (1) et (4), le tribunal présume que :

a) la population d'assurés qui a été exposée au type de produit du tabac fabriqué ou annoncé par le défendeur n'y aurait pas été exposée n'eût été le manquement visé à l'alinéa (1)a);

b) l'exposition mentionnée à l'alinéa a) a causé ou a contribué à causer la maladie ou le risque de maladie chez une partie de la population visée à l'alinéa a).

(3) Si les présomptions établies aux alinéas (2)a) et b) s'appliquent :

a) le tribunal doit déterminer globalement le coût des services de soins de santé fournis après la date du manquement mentionné à l'alinéa (1)a) résultant de l'exposition au type de produit du tabac;

b) chaque défendeur auquel s'appliquent les présomptions est responsable du coût global mentionné à l'alinéa a) au prorata de sa part de marché du type de produit du tabac.

(4) Le montant établi en application de l'alinéa (3)b) auquel est tenu un défendeur peut être réduit, ou les parts de responsabilité établies en application de l'alinéa (3)b) peuvent être rajustées entre les défendeurs, dans la mesure où l'un d'eux prouve, selon la prépondérance des probabilités, que le manquement visé à l'alinéa (1)a) n'a pas causé ou contribué à causer l'exposition mentionnée à l'alinéa (2)a) ou la maladie ou le risque de maladie mentionnés à l'alinéa (2)b).

Responsabilité solidaire dans une action fondée sur le paragraphe 2(1)

4 (1) Dans une action fondée sur le paragraphe 2(1), les défendeurs sont solidairement responsables du coût des services de soins de santé :

(a) those defendants jointly breached a duty or obligation described in the definition of "tobacco related wrong" in section 1 (1), and

(b) as a consequence of the breach described in paragraph (a), at least one of those defendants is held liable in the action under section 2 (1) for the cost of those health care benefits.

(2) For purposes of an action under section 2 (1), 2 or more manufacturers, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in the definition of "tobacco related wrong" in section 1 (1) if

(a) one or more of those manufacturers are held to have breached the duty or obligation, and

(b) at common law, in equity or under an enactment those manufacturers would be held

(i) to have conspired or acted in concert with respect to the breach,

(ii) to have acted in a principal and agent relationship with each other with respect to the breach, or

(iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach.

Population based evidence to establish causation and quantify damages or cost

5 Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco related wrong in an action brought

(a) by or on behalf of a person in the person's own name or as a member of a class of persons under the *Class Proceedings Act*, or

a) s'ils ont conjointement manqué à une obligation visée par la définition de « faute d'un fabricant » au paragraphe 1(1);

b) si, en conséquence du manquement visé à l'alinéa a), au moins un des défendeurs est responsable, dans l'action fondée sur le paragraphe 2(1), du coût de ces services de soins de santé.

(2) Dans le cadre d'une action visée au paragraphe 2(1), plusieurs fabricants, qu'ils soient ou non défendeurs dans l'action, sont réputés avoir manqué conjointement à une obligation mentionnée à la définition de « faute d'un fabricant » au paragraphe 1(1) dans les cas où :

a) il est reconnu qu'au moins un de ces fabricants a manqué à l'obligation;

b) il serait reconnu en common law, en equity ou en vertu d'un texte législatif que ces fabricants :

(i) auraient conspiré ou agi de concert relativement au manquement;

(ii) auraient agi dans le cadre d'une relation mandant-mandataire relativement au manquement;

(iii) seraient solidairement ou indirectement responsables du manquement si des dommages-intérêts avaient été accordés à une personne ayant subi un préjudice en conséquence du manquement.

Preuve fondée sur la population afin d'établir un lien de causalité et de quantifier les dommages-intérêts ou le coût

5 Les renseignements statistiques et ceux découlant d'études épidémiologiques, sociologiques et d'autres études pertinentes, y compris les renseignements provenant d'échantillons, sont admissibles en preuve pour établir le lien de causalité et quantifier les dommages-intérêts ou le coût des services de soins de santé imputables à une faute d'un fabricant dans une action intentée :

a) par ou pour une personne, agissant en son propre nom ou en sa qualité de membre d'une catégorie de personnes visée par la *Class Proceedings Act*;

(b) by the government under section 2 (1).

Limitation periods

6 (1) No action that is commenced within 2 years after the coming into force of this section by

(a) the government,

(b) a person, on his or her own behalf or on behalf of a class of persons, or

(c) a personal representative of a deceased person on behalf of the spouse, parent or child, as defined in the *Family Compensation Act*, of the deceased person,

for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong is barred under the *Limitation Act*.

(2) Any action described in subsection (1) for damages alleged to have been caused or contributed to by a tobacco related wrong is revived if the action was dismissed before the coming into force of this section merely because it was held by a court to be barred or extinguished by the *Limitation Act*.

Liability based on risk contribution

7 (1) This section applies to an action for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong other than an action for the recovery of the cost of health care benefits on an aggregate basis.

(2) If a plaintiff is unable to establish which defendant caused or contributed to the exposure described in paragraph (b) and, as a result of a breach of a common law, equitable or statutory duty or obligation,

(a) one or more defendants causes or contributes to a risk of disease by exposing persons to a type of tobacco product, and

(b) the plaintiff has been exposed to the type of tobacco product referred to in paragraph (a) and suffers disease as a result of the exposure,

b) par le gouvernement en application du paragraphe 2(1).

Délais de prescription

6 (1) Aucune action introduite dans les deux ans suivant l'entrée en vigueur de la présente disposition par

a) le gouvernement,

b) une personne, agissant en son propre nom ou pour le compte d'une catégorie de personnes,

c) le représentant personnel d'une personne décédée, agissant pour le compte du conjoint, d'un parent ou d'un enfant de la personne décédée au sens de la *Family Compensation Act*,

en recouvrement de dommages-intérêts ou du coût des services de soins de santé qui auraient été causés ou favorisés par une faute d'un fabricant n'est prescrite aux termes de la *Limitation Act*.

(2) Toute action visée au paragraphe (1) en dommages-intérêts qui auraient été causés ou favorisés par une faute d'un fabricant est rétablie si l'action a été rejetée avant l'entrée en vigueur de la présente disposition du seul fait qu'un tribunal a conclu que l'action était prescrite ou éteinte par application de la *Limitation Act*.

Responsabilité fondée sur la contribution au risque

7 (1) Le présent article s'applique à une action en dommages-intérêts ou en recouvrement du coût des services de soins de santé qui auraient été causés ou favorisés par une faute d'un fabricant, mais ne s'applique pas à une action en recouvrement global du coût des services de soins de santé.

(2) Si un demandeur ne peut établir l'identité du défendeur qui a causé l'exposition visée à l'alinéa b) ou y a contribué et que, en conséquence d'un manquement à une obligation imposée en common law, en equity ou en vertu d'un texte législatif :

a) un ou plusieurs défendeurs causent ou contribuent à causer un risque de maladie en exposant des personnes à un type de produit du tabac;

b) le demandeur a été exposé au type de produit du tabac mentionné à l'alinéa a) et est atteint d'une maladie résultant de cette exposition;

the court may find each defendant that caused or contributed to the risk of disease liable for a proportion of the damages or cost of health care benefits incurred equal to the proportion of its contribution to that risk of disease.

(3) The court may consider the following in apportioning liability under subsection (2):

(a) the length of time a defendant engaged in the conduct that caused or contributed to the risk of disease;

(b) the market share the defendant had in the type of tobacco product that caused or contributed to the risk of disease;

(c) the degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant;

(d) the amount spent by a defendant on promoting the type of tobacco product that caused or contributed to the risk of disease;

(e) the degree to which a defendant collaborated or acted in concert with other manufacturers in any conduct that caused, contributed to or aggravated the risk of disease;

(f) the extent to which a defendant conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;

(g) the extent to which a defendant assumed a leadership role in manufacturing the type of tobacco product;

(h) the efforts a defendant made to warn the public about the risk of disease resulting from exposure to the type of tobacco product;

(i) the extent to which a defendant continued manufacture or promotion of the type of tobacco product after it knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;

(j) affirmative steps that a defendant took to reduce the risk of disease to the public;

le tribunal peut tenir chaque défendeur ayant causé ou contribué à causer le risque de maladie responsable d'une partie des dommages-intérêts ou du coût des services de soins de santé au prorata de sa contribution à ce risque de maladie.

(3) Dans le partage de la responsabilité prévu au paragraphe (2), le tribunal peut tenir compte des facteurs suivants :

a) la période pendant laquelle un défendeur a accompli les actes ayant causé ou contribué à causer le risque de maladie;

b) la part de marché détenue par le défendeur à l'égard du type de produit du tabac ayant causé ou contribué à causer le risque de maladie;

c) le degré de toxicité de toute substance toxique contenue dans le type de produit du tabac fabriqué ou annoncé par un défendeur;

d) le montant consacré par un défendeur à la promotion du type de produit du tabac ayant causé ou contribué à causer le risque de maladie;

e) la mesure dans laquelle un défendeur a collaboré ou participé avec d'autres fabricants aux actes ayant causé ou aggravé le risque de maladie ou ayant contribué à ce risque;

f) la mesure dans laquelle un défendeur a procédé à des analyses et à des études visant à évaluer le risque de maladie résultant de l'exposition au type de produit du tabac;

g) la mesure dans laquelle un défendeur a assumé un leadership dans la fabrication du type de produit du tabac;

h) les efforts déployés par un défendeur pour prévenir le public du risque de maladie résultant de l'exposition au type de produit du tabac;

i) la mesure dans laquelle un défendeur a continué de fabriquer ou de promouvoir le type de produit du tabac après qu'il eut connu ou aurait dû connaître le risque de maladie résultant de l'exposition à ce type de produit;

j) les mesures concrètes prises par un défendeur en vue de réduire le risque de maladie pour le public;

(k) other considerations considered relevant by the court.

Apportionment of liability in tobacco related wrongs

8 (1) This section does not apply to a defendant in respect of whom the court has made a finding of liability under section 7.

(2) A defendant who is found liable for a tobacco related wrong may commence, against one or more of the defendants found liable for that wrong in the same action, an action or proceeding for contribution toward payment of the damages or the cost of health care benefits caused or contributed to by that wrong.

(3) Subsection (2) applies whether or not the defendant commencing an action or proceeding under that subsection has paid all or any of the damages or the cost of health care benefits caused or contributed to by the tobacco related wrong.

(4) In an action or proceeding described in subsection (2), the court may apportion liability and order contribution among each of the defendants in accordance with the considerations listed in section 7 (3) (a) to (k).

Regulations

9 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations prescribing a form of tobacco for the purposes of paragraph (i) of the definition of "type of tobacco product" in section 1 (1).

Retroactive effect

10 When brought into force under section 12, a provision of this Act has the retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under section 2 (1) arising from a tobacco related wrong, whenever the tobacco related wrong occurred.

. . .

k) tout autre facteur que le tribunal estime pertinent.

Partage de la responsabilité en matière de fautes du fabricant

8 (1) Le présent article ne s'applique pas à un défendeur reconnu responsable par un tribunal aux termes de l'article 7.

(2) Un défendeur reconnu responsable d'une faute d'un fabricant peut intenter, contre un ou plusieurs des défendeurs reconnus responsables de cette faute dans le cadre de la même action, une action ou une procédure en contribution pour le paiement des dommages-intérêts ou du coût des services de soins de santé causés ou favorisés par cette faute.

(3) Le paragraphe (2) s'applique que le défendeur introduisant l'action ou la procédure sous le régime de cette disposition ait payé ou non tout ou partie des dommages-intérêts ou du coût des services de soins de santé causés ou favorisés par la faute d'un fabricant.

(4) Dans une action ou une procédure visée au paragraphe (2), le tribunal peut procéder au partage de la responsabilité et ordonner à chacun des défendeurs de verser une contribution établie en fonction des facteurs énumérés aux alinéas 7(3) a) à k).

Règlements

9 (1) Le lieutenant gouverneur en conseil peut prendre les règlements mentionnés à l'article 41 de l'*Interpretation Act*.

(2) Le lieutenant gouverneur en conseil peut notamment prescrire par règlement une forme de tabac pour l'application de l'alinéa i) de la définition de « type de produit du tabac » figurant au paragraphe 1(1).

Effet rétroactif

10 Toute disposition de la présente loi qui entre en vigueur aux termes de l'article 12 a l'effet rétroactif nécessaire pour lui donner plein effet à toutes fins utiles, notamment pour permettre l'introduction d'une action fondée sur le paragraphe 2(1) découlant d'une faute d'un fabricant, quelle que soit la date à laquelle la faute est survenue.

. . .

Commencement

12 This Act comes into force by regulation of the Lieutenant Governor in Council.

Appeals dismissed with costs.

Solicitors for the appellant Imperial Tobacco Canada Limited: Berardino & Harris, Vancouver.

Solicitors for the appellant Rothmans, Benson & Hedges Inc.: Macaulay McColl, Vancouver.

Solicitors for the appellant JTI-Macdonald Corp.: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the appellant Canadian Tobacco Manufacturers' Council: Kuhn & Company, Vancouver.

Solicitors for the appellant British American Tobacco (Investments) Limited: Sugden, McFee & Roos, Vancouver.

Solicitors for the appellants Philip Morris Incorporated and Philip Morris International Inc.: McCarthy Tétrault, Montréal.

Solicitors for the respondents: Bull, Housser & Tupper, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

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

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Entrée en vigueur

12 La présente loi entre en vigueur par règlement du lieutenant gouverneur en conseil.

Pourvois rejetés avec dépens.

Procureurs de l'appelante Imperial Tobacco Canada Limitée : Berardino & Harris, Vancouver.

Procureurs de l'appelante Rothmans, Benson & Hedges Inc. : Macaulay McColl, Vancouver.

Procureurs de l'appelante JTI-Macdonald Corp. : Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs de l'appelant le Conseil canadien des fabricants des produits du tabac : Kuhn & Company, Vancouver.

Procureurs de l'appelante British American Tobacco (Investments) Limited : Sugden, McFee & Roos, Vancouver.

Procureurs des appelantes Philip Morris Incorporated et Philip Morris International Inc. : McCarthy Tétrault, Montréal.

Procureurs des intimés : Bull, Housser & Tupper, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Sainte-Foy.

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse : Procureur général de la Nouvelle-Écosse, Halifax.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Procureur général du Nouveau-Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

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

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Procureur de l'intervenant le procureur général du Manitoba : Procureur général du Manitoba, Winnipeg.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureur de l'intervenant le procureur général de Terre-Neuve-et-Labrador : Procureur général de Terre-Neuve-et-Labrador, St. John's.

IN THE MATTER OF a Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the *Code of Civil Procedure*, CQLR, c. C-25.01, which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec

Conférence des juges de la Cour du Québec *Appellant*

v.

Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Alberta, Conseil de la magistrature du Québec, Canadian Association of Provincial Court Judges, Organisme d'autoréglementation du courtage immobilier du Québec, Canadian Council of Chief Judges, Trial Lawyers Association of British Columbia and Canadian Superior Courts Judges Association *Interveners*

- and -

Attorney General of Quebec *Appellant*

v.

Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec *Respondents*

DANS L'AFFAIRE D'UN renvoi à la Cour d'appel du Québec portant sur la validité constitutionnelle des dispositions de l'article 35 du *Code de procédure civile*, RLRQ, c. C-25.01, qui fixent à moins de 85 000 $ la compétence pécuniaire exclusive de la Cour du Québec et sur la compétence d'appel attribuée à la Cour du Québec

Conférence des juges de la Cour du Québec *Appelante*

c.

Juge en chef, juge en chef associée et juge en chef adjointe de la Cour supérieure du Québec *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Conseil de la magistrature du Québec, Association canadienne des juges des cours provinciales, Organisme d'autoréglementation du courtage immobilier du Québec, Canadian Council of Chief Judges, Trial Lawyers Association of British Columbia et Association canadienne des juges des cours supérieures *Intervenants*

- et -

Procureur général du Québec *Appelant*

c.

Juge en chef, juge en chef associée et juge en chef adjointe de la Cour supérieure du Québec *Intimés*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Alberta,
Conseil de la magistrature du Québec,
Canadian Association of Provincial Court Judges,
Organisme d'autoréglementation du courtage immobilier du Québec,
Conférence des juges de la Cour du Québec,
Canadian Council of Chief Judges,
Trial Lawyers Association of British Columbia and
Canadian Superior Courts Judges Association
Interveners

- and -

Conseil de la magistrature du Québec
Appellant

v.

Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec *Respondents*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,
Canadian Association of Provincial Court Judges,
Organisme d'autoréglementation du courtage immobilier du Québec,
Conférence des juges de la Cour du Québec,
Canadian Council of Chief Judges,

et

Procureur général du Canada,
procureur général de l'Ontario,
procureur général de la Colombie-Britannique,
procureur général de l'Alberta,
Conseil de la magistrature du Québec,
Association canadienne des juges des cours provinciales,
Organisme d'autoréglementation du courtage immobilier du Québec,
Conférence des juges de la Cour du Québec,
Canadian Council of Chief Judges,
Trial Lawyers Association of British Columbia et Association canadienne des juges des cours supérieures
Intervenants

- et -

Conseil de la magistrature du Québec
Appelant

c.

Juge en chef, juge en chef associée et juge en chef adjointe de la Cour supérieure du Québec *Intimés*

et

Procureur général du Canada,
procureur général de l'Ontario,
procureur général du Québec,
procureur général de la Colombie-Britannique,
procureur général de l'Alberta,
Association canadienne des juges des cours provinciales,
Organisme d'autoréglementation du courtage immobilier du Québec,
Conférence des juges de la Cour du Québec,

Trial Lawyers Association of British Columbia and Canadian Superior Courts Judges Association *Interveners*

- and -

Canadian Association of Provincial Court Judges *Appellant*

v.

Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Alberta, Conseil de la magistrature du Québec, Organisme d'autoréglementation du courtage immobilier du Québec, Conférence des juges de la Cour du Québec, Canadian Council of Chief Judges, Trial Lawyers Association of British Columbia and Canadian Superior Courts Judges Association *Interveners*

- and -

Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec *Appellants*

v.

Attorney General of Quebec *Respondent*

Canadian Council of Chief Judges, Trial Lawyers Association of British Columbia et Association canadienne des juges des cours supérieures *Intervenants*

- et -

Association canadienne des juges des cours provinciales *Appelante*

c.

Juge en chef, juge en chef associée et juge en chef adjointe de la Cour supérieure du Québec *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Conseil de la magistrature du Québec, Organisme d'autoréglementation du courtage immobilier du Québec, Conférence des juges de la Cour du Québec, Canadian Council of Chief Judges, Trial Lawyers Association of British Columbia et Association canadienne des juges des cours supérieures *Intervenants*

- et -

Juge en chef, juge en chef associée et juge en chef adjointe de la Cour supérieure du Québec *Appelants*

c.

Procureur général du Québec *Intimé*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Alberta,
Conseil de la magistrature du Québec,
Canadian Association of Provincial Court Judges,
Organisme d'autoréglementation du courtage immobilier du Québec and
Conférence des juges de la Cour du Québec
Interveners

et

Procureur général du Canada,
procureur général de l'Ontario,
procureur général de la Colombie-Britannique,
procureur général de l'Alberta,
Conseil de la magistrature du Québec,
Association canadienne des juges des cours provinciales,
Organisme d'autoréglementation du courtage immobilier du Québec et
Conférence des juges de la Cour du Québec
Intervenants

INDEXED AS: REFERENCE RE *CODE OF CIVIL PROCEDURE* (QUE.), ART. 35

2021 SCC 27

File No.: 38837.

2020: September 24; 2021: June 30.

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

RÉPERTORIÉ : RENVOI RELATIF AU *CODE DE PROCÉDURE CIVILE* (QC), ART. 35

2021 CSC 27

N° du greffe : 38837.

2020 : 24 septembre; 2021 : 30 juin.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Rowe et Martin.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Constitutional law — Courts — Provincial jurisdiction over administration of justice — Role of superior courts — Exclusive monetary jurisdiction over civil claims for less than $85,000 granted to Court of Québec by provincial legislature — Whether grant of that exclusive jurisdiction is constitutional — Constitution Act, 1867, ss. 92(14), 96 — Code of Civil Procedure, CQLR, c. C-25.01, art. 35 para. 1.

Droit constitutionnel — Tribunaux — Compétence provinciale en matière d'administration de la justice — Rôle des cours supérieures — Compétence pécuniaire exclusive sur les réclamations civiles de moins de 85 000 $ attribuée à la Cour du Québec par le législateur provincial — L'attribution de cette compétence exclusive est-elle constitutionnelle? — Loi constitutionnelle de 1867, art. 92(14), 96 — Code de procédure civile, RLRQ, c. C-25.01, art. 35 al. 1.

On January 1, 2016, art. 35 para. 1 of Quebec's new *Code of Civil Procedure* came into force. This provision grants the Court of Québec exclusive jurisdiction over all civil disputes in which the value of the subject matter or the amount being claimed is less than $85,000. The Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec filed an originating application seeking a declaratory judgment of unconstitutionality of art. 35 para. 1 *C.C.P.* in the Superior Court. In their submission, the provision is incompatible with s. 96 of the *Constitution Act, 1867*, because its effect

Le 1er janvier 2016, l'art. 35 al. 1 du nouveau *Code de procédure civile* du Québec est entré en vigueur. Cette disposition confère à la Cour du Québec une compétence exclusive pour tout litige en matière civile dont la valeur de l'objet ou la somme réclamée est inférieure à 85 000 $. Le juge en chef, la juge en chef associée et la juge en chef adjointe de la Cour supérieure du Québec ont déposé une demande introductive d'instance à la Cour supérieure, recherchant une déclaration d'inconstitutionnalité de l'art. 35 al. 1 *C.p.c.* Selon eux, cette disposition serait incompatible avec l'art. 96 de la *Loi constitutionnelle*

is to deny Quebec litigants the right to file any civil claim in the Superior Court in which the value of the subject matter of the dispute is less than $85,000, thereby preventing the Superior Court from stating and advancing the law with respect to such claims. They also contested the appellate jurisdiction granted to the Court of Québec with respect to certain administrative decisions on the basis that the requirement of deference recognized in the case law is incompatible with the superior courts' power of judicial review.

In response to those legal proceedings, the Quebec government filed with the Court of Appeal, by order in council, a notice of reference submitting two questions to it: (1) Is art. 35 para. 1 *C.C.P.* valid with regard to s. 96 of the *Constitution Act, 1867*? and (2) Is the application of the obligation of judicial deference, which characterizes the application for judicial review, to administrative appeals to the Court of Québec compatible with s. 96 of the *Constitution Act,1867*?

On the first question, the Court of Appeal concluded that art. 35 *C.C.P.* is unconstitutional because it infringes on the core jurisdiction of the Superior Court to adjudicate certain substantial civil disputes. On the second question, however, it was of the view that applying the obligation of judicial deference to administrative appeals to the Court of Québec is compatible with s. 96. This is because the Superior Court retains its full superintending and reforming power over administrative decisions and decisions of inferior tribunals as well as its fundamental role as the guardian of an independent and unified system of justice in Canada. The Conférence des juges de la Cour du Québec, the Conseil de la magistrature du Québec and the Canadian Association of Provincial Court Judges, which were interveners in the Court of Appeal, and the Attorney General of Quebec appeal to the Court as of right on the first question. The Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec, who also intervened in the Court of Appeal, appeal to the Court as of right on the second question.

Held (Wagner C.J. and Rowe J. dissenting in part and Abella J. dissenting): The appeals should be dismissed.

Per Moldaver, Karakatsanis, Côté and Martin JJ.: Article 35 para. 1 *C.C.P.* is unconstitutional. The monetary limit of the jurisdiction granted to the Court of Québec is too high when considered in its historical and institutional contexts. Because this grant has the effect of

de 1867, puisqu'elle a pour effet de nier aux justiciables québécois le droit de s'adresser à la Cour supérieure pour toute demande en matière civile dont la valeur de l'objet en litige est inférieure à 85 000 $, empêchant ainsi la Cour supérieure d'énoncer et de faire évoluer le droit à l'égard de ces réclamations. Ils ont également contesté la compétence d'appel attribuée à la Cour du Québec à l'égard de certaines décisions administratives, au motif que l'obligation de déférence reconnue par la jurisprudence y étant liée serait incompatible avec le pouvoir de contrôle judiciaire des cours supérieures.

En réponse à ces procédures judiciaires, le gouvernement du Québec a déposé à la Cour d'appel, par décret, un Avis de renvoi, lui soumettant deux questions : (1) l'art. 35 al. 1 *C.p.c.* est-il valide au regard de l'art. 96 de la *Loi constitutionnelle de 1867*? et (2) l'application de l'obligation de déférence judiciaire, qui caractérise le pourvoi en contrôle judiciaire, aux appels administratifs à la Cour du Québec est-elle compatible avec l'art. 96 de la *Loi constitutionnelle de 1867*?

Quant à la première question, la Cour d'appel a conclu que l'art. 35 *C.p.c.* est inconstitutionnel, puisqu'il entrave la compétence fondamentale de la Cour supérieure de trancher certains différends substantiels en matière civile. Par contre, en ce qui concerne la deuxième question, elle s'est dite d'avis que l'application de l'obligation de déférence judiciaire aux appels administratifs à la Cour du Québec est compatible avec l'art. 96, puisque la Cour supérieure conserve l'intégralité de son propre pouvoir de surveillance et de contrôle sur l'administration et les instances inférieures ainsi que son rôle fondamental de veiller à une justice indépendante et unifiée au Canada. La Conférence des juges de la Cour du Québec, le Conseil de la magistrature du Québec et l'Association canadienne des juges des cours provinciales, qui étaient intervenus devant la Cour d'appel, ainsi que le procureur général du Québec font appel de plein droit devant la Cour sur la première question. Le juge en chef, la juge en chef associée et la juge en chef adjointe de la Cour supérieure du Québec, qui étaient également intervenus devant la Cour d'appel, font appel de plein droit devant la Cour sur la deuxième question.

Arrêt (le juge en chef Wagner et le juge Rowe sont dissidents en partie et la juge Abella est dissidente) : Les pourvois sont rejetés.

Les juges Moldaver, Karakatsanis, Côté et Martin : L'article 35 al. 1 *C.p.c.* est inconstitutionnel. Le seuil pécuniaire de la compétence attribuée à la Cour du Québec est trop élevé, lorsque considéré dans son contexte historique et institutionnel. Cette attribution ayant pour effet

transforming the Court of Québec into a prohibited parallel court, the transfer of jurisdiction contemplated by art. 35 para. 1 *C.C.P.* exceeds the limits established by s. 96 of the *Constitution Act, 1867*. The question concerning the Court of Québec's application of the obligation of judicial deference when it hears an appeal from certain administrative decisions does not need to be answered, since it is now moot as a result of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, and the coming into force of s. 83.1 of the Quebec *Courts of Justice Act*.

The purpose of s. 96 of the *Constitution Act, 1867* is to give effect to the compromise reached at Confederation by protecting the special status of the superior courts of general jurisdiction as the cornerstone of Canada's unitary justice system. The principles of national unity and the rule of law are central to this organization of the judiciary.

Protecting the superior courts' status reinforces the national character of the Canadian judicial system. The superior courts form a network of related courts whose role is to unify and ensure the uniformity of justice in Canada. Protecting the essence of the superior courts thus preserves uniformity throughout the country in the judicial system.

The rule of law is maintained through the separation of judicial, legislative and executive functions. This separation allows the courts to implement the three fundamental facets of the rule of law: equality of all before the law, the creation and maintenance of an actual order of positive laws, and oversight of the exercise of public powers. Historically, the superior courts had primary responsibility for this task. Thus, in order to preserve the superior courts' role as the cornerstone of the judicial system, they must be able to continue acting as primary guardians of the rule of law. This role falls to them because they are ideally placed to ensure the maintenance of the rule of law. Because of their independence and national character, they are best suited to resolving disputes over the division of powers between the provinces and the federal government and ensuring that government actions do not conflict with the fundamental rights of citizens. Moreover, the superior courts' existence and status enjoy constitutional protection against legislative interference. Subject to constitutional guarantees of judicial independence, legislatures may abolish courts with provincially appointed judges or seriously fetter their powers without falling afoul of the Constitution, whereas superior courts are constitutionally protected from such legislative interference. Only the

de transformer la Cour du Québec en une cour parallèle prohibée, le transfert de compétence envisagé par l'art. 35 al. 1 *C.p.c.* excède les limites établies par l'art. 96 de la *Loi constitutionnelle de 1867*. La question portant sur l'application par la Cour du Québec de l'obligation de déférence judiciaire lorsqu'elle siège en appel de certaines décisions administratives ne nécessite pas de réponse, puisqu'elle est devenue théorique en raison du prononcé de l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65, [2019] 4 R.C.S. 653, ainsi que de l'entrée en vigueur de l'art. 83.1 de la *Loi sur les tribunaux judiciaires* du Québec.

L'article 96 de la *Loi constitutionnelle de 1867* vise à donner substance au compromis conclu à l'époque de la Confédération en protégeant le statut particulier des cours supérieures de juridiction générale à titre de pierre angulaire du système de justice unitaire canadien. Les principes de l'unité nationale et de la primauté du droit occupent une place centrale dans cette organisation judiciaire.

La protection du statut des cours supérieures renforce le caractère national du système judiciaire canadien. Les cours supérieures forment un réseau de tribunaux connexes ayant pour rôle d'unifier et d'uniformiser la justice au Canada. En protégeant l'essence des cours supérieures, l'uniformité du système judiciaire dans tout le pays est ainsi préservée.

La primauté du droit est maintenue grâce à la séparation des fonctions judiciaire, législative et exécutive. Cette séparation permet aux cours de justice de mettre en œuvre les trois facettes fondamentales de la primauté du droit que sont l'égalité de tous devant la loi, la création et le maintien d'un ordre réel de droit positif et la surveillance de l'exercice des pouvoirs publics. Historiquement, cette tâche relevait d'abord des cours supérieures. Ainsi, afin de préserver le rôle des cours supérieures à titre de pierre angulaire du système judiciaire, ces dernières doivent pouvoir continuer d'agir comme les premières gardiennes de la primauté du droit. Ce rôle leur revient, puisqu'elles sont dans une position idéale pour assurer le maintien de la primauté du droit. En raison de leur indépendance et caractère national, elles sont mieux outillées pour trancher les litiges en matière de partage de compétences entre les ordres provincial et fédéral et pour veiller à ce que l'action étatique soit conforme aux droits fondamentaux des citoyens. De plus, l'existence et le statut des cours supérieures sont garantis par la Constitution à l'encontre des ingérences législatives. Sous réserve des garanties constitutionnelles d'indépendance judiciaire, les législatures peuvent abolir les cours de nomination provinciale ou sérieusement entraver leurs pouvoirs sans que la Constitution n'y fasse

superior courts have constitutionally protected inherent powers that flow from their very nature, and the particular purpose of those powers is to enable the superior courts to ensure the maintenance of the rule of law in Canada's legal system. Finally, the superior courts have residual jurisdiction as courts of original general jurisdiction, meaning they may — without statutory authorization — hear any matter that has not been assigned to a statutory court, and this provides them with a comprehensive view of the law, allowing them to preserve the coherence of the judicial system and set its overall directions.

To ensure s. 96 of the *Constitution Act, 1867* can play its role to the fullest extent and achieve its purpose, the Court has developed a number of tests over the years in accordance with the living tree doctrine. The jurisprudence on s. 96 must thus not cause judicial functions to be frozen in an 1867 mould, and adaptations must be permitted to allow the legislatures scope to deal effectively with emerging social problems and concerns. However, despite this process of liberalization that has made it possible for s. 96 to be adapted to modern realities, the Court has consistently reiterated the prohibition against establishing parallel courts that usurp the functions reserved to superior courts, as such parallel courts would eviscerate the protection afforded by s. 96.

In *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, the Court articulated the three-step test that limits the granting of power or jurisdiction over a type of dispute where, at the time of Confederation, the power or jurisdiction came exclusively or primarily within the remit of the superior courts. According to this test, it must first be determined whether the transferred jurisdiction conforms to a jurisdiction that was dominated by superior, district or county courts at the time of Confederation. If so, it must be asked whether the jurisdiction in question was exercised in the context of a judicial function and, if the answer is yes, whether the jurisdiction is either subsidiary or ancillary to an administrative function or necessarily incidental to the achievement of a broader policy goal of the legislature.

Before a court proceeds with the first step of the test, it must characterize the jurisdiction at issue. In this case, the jurisdiction granted to the Court of Québec by art. 35 para. 1 *C.C.P.* must be characterized as one over civil disputes concerning contractual and extracontractual

obstacle, tandis que les cours supérieures sont protégées par la Constitution contre ce type d'ingérence législative. En effet, seules les cours supérieures disposent de pouvoirs inhérents protégés constitutionnellement et découlant de leur nature même, ayant spécialement pour objectif de leur permettre d'assurer la primauté du droit au sein du système juridique canadien. Enfin, les cours supérieures sont pourvues d'une compétence résiduelle à titre de tribunal de droit commun leur permettant d'entendre toute affaire non confiée à un tribunal statutaire sans avoir besoin d'une habilitation législative, ce qui leur confère une perspective globale sur le droit à partir de laquelle elles peuvent assurer la cohérence du système judiciaire et en définir les grandes orientations.

Pour que l'art. 96 de la *Loi constitutionnelle de 1867* puisse jouer pleinement son rôle et atteindre son objet, la Cour a développé plusieurs tests au fil des années, conformément à la théorie de l'arbre vivant. La jurisprudence de l'art. 96 ne doit donc pas avoir pour effet de figer les fonctions judiciaires dans un moule datant de 1867 et des adaptations doivent être permises de façon à donner aux législatures la possibilité de faire face aux nouveaux problèmes et intérêts sociaux. Toutefois, nonobstant ce processus de libéralisation ayant permis à l'art. 96 de s'adapter à la réalité moderne, l'interdiction d'établir des cours parallèles qui usurpent les fonctions réservées aux cours supérieures a constamment été réitérée par la Cour, puisque de telles cours parallèles ont l'effet de rendre lettre morte la protection conférée par l'art. 96.

La Cour a articulé dans le *Renvoi sur la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714, le test en trois volets qui restreint l'attribution d'un pouvoir ou d'une compétence sur un type de différend quand, à l'époque de la Confédération, ce pouvoir ou cette compétence relevaient exclusivement ou principalement des cours supérieures. Selon ce test, il convient d'abord de déterminer si le domaine de compétence transféré correspond à un domaine de compétence dont l'exercice était, au moment de la Confédération, dominé par les cours supérieures, de district ou de comté. Le cas échéant, il faut voir si ce domaine de compétence était exercé dans le cadre d'une fonction judiciaire, et, si oui, si ce domaine est complémentaire ou accessoire à une fonction administrative ou nécessairement inséparable de la réalisation des objectifs plus larges de la législature.

Avant d'aborder la première étape du test, il convient de qualifier la compétence en cause. En l'espèce, la compétence attribuée à la Cour du Québec par l'art. 35 al. 1 *C.p.c.* doit être qualifiée de compétence sur les litiges civils en matière d'obligations contractuelles et extracontractuelles.

obligations. While this characterization is not narrow as required by *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238, its generality is a product of the expansive language of art. 35 para. 1 *C.C.P.*

The result of applying the first step of the test to this case is that there was a general shared involvement or a meaningful concurrency of power in the area of jurisdiction at issue: three of the four founding provinces' inferior courts had, at the time of Confederation, sufficient practical involvement in matters relating to contractual and extracontractual obligations. Accordingly, the *Residential Tenancies* test does not lead to the conclusion that art. 35 para. 1 *C.C.P.* is unconstitutional with respect to the types of disputes in question. It is therefore unnecessary to proceed to the second and third steps.

A characterization like the one required by the provision at issue inappropriately favours a finding of general shared involvement, which leads to a rather strange result: the broader a grant of jurisdiction, the greater the chance that it will escape the restrictions of the *Residential Tenancies* test. Thus, even though it was developed to prohibit the creation of parallel courts, that test does not deal effectively with the very jurisdiction-granting provisions that are the most likely to establish such courts because of their generality. This is why such a grant requires a tailored analytical framework for the purpose of determining whether a parallel court that undermines the role of the superior courts has been created.

It is therefore necessary to apply a second test, the core jurisdiction test adopted in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, which must be adapted to better reflect the principles underlying s. 96. This second test aims to do more than simply protect historical jurisdiction, as its purpose is to determine whether a grant of jurisdiction infringes on the superior courts' core jurisdiction either through an alteration of their essential nature or because they are prevented from playing their central role conferred by s. 96. Depending on the circumstances, there are various factors that can be helpful when it comes to determining whether, by granting a jurisdiction to a court with provincially appointed judges, a legislature has created a prohibited parallel court that impairs the superior court by preventing it from playing its constitutional role.

The core jurisdiction of the superior courts includes their ability to act as courts of original general jurisdiction, that is, to hear and determine matters not exclusively assigned by law to other courts. It therefore encompasses, by necessary implication, general jurisdiction over private

Bien que cette qualification ne soit pas étroite comme le requiert l'arrêt *Sobeys Stores Ltd. c. Yeomans et Labour Standards Tribunal (N.-É.)*, [1989] 1 R.C.S. 238, son niveau de généralité provient du libellé très englobant de l'art. 35 al. 1 *C.p.c.*

Appliquant le premier volet du test, il existe en l'espèce un engagement général partagé ou une compétence concurrente appréciable dans le domaine de la compétence en litige : les tribunaux inférieurs de trois des quatre provinces fondatrices exerçaient, au moment de la Confédération, un engagement pratique suffisant en matière d'obligations contractuelles et extracontractuelles. Par conséquent, le test du *Renvoi sur la location résidentielle* ne rend pas l'art. 35 al. 1 *C.p.c.* inconstitutionnel quant aux types de différends concernés, de sorte qu'il n'est pas nécessaire de passer aux deuxième et troisième volets.

Une qualification comme celle imposée par la disposition en cause favorise indûment une conclusion d'engagement général partagé, ce qui mène à un résultat plutôt incongru : plus l'attribution d'une compétence est vaste, plus elle risque d'échapper aux restrictions formulées par le test du *Renvoi sur la location résidentielle*. Ainsi, bien qu'il ait été conçu pour interdire la création de cours parallèles, ce test ne traite pas de manière efficace du type de dispositions attributives de compétence qui sont justement, par leur degré de généralité, les plus enclines à établir des cours parallèles. C'est pourquoi une telle attribution requiert un cadre d'analyse adapté afin de déterminer si une cour parallèle minant le rôle des cours supérieures a été créée.

Il y a donc lieu d'appliquer un second test, celui de la compétence fondamentale reconnu dans l'arrêt *MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725, qu'il convient d'adapter pour mieux refléter les principes qui sous-tendent l'art. 96. Ce second test vise un objectif plus large que la protection des compétences historiques et cherche à déterminer si une attribution de compétence porte atteinte à la compétence fondamentale des cours supérieures, soit en changeant la nature essentielle de ces cours, soit en les empêchant de jouer le rôle central qui leur incombe en vertu de l'art. 96. Différents facteurs, selon le contexte, peuvent s'avérer utiles pour déterminer si, en attribuant une compétence à une cour de nomination provinciale, une législature a établi une cour parallèle prohibée qui affaiblit la cour supérieure en l'empêchant de remplir son rôle constitutionnel.

La compétence fondamentale des cours supérieures comprend leur capacité d'agir à titre de tribunal de droit commun, c'est-à-dire de connaître des affaires que la loi n'attribue pas exclusivement à d'autres tribunaux. Elle englobe donc, par déduction nécessaire, une compétence

law matters, which must be accompanied by a subject-matter jurisdiction that is broad enough to preserve the superior courts' role in providing jurisprudential guidance on private law. This requires significant involvement in the resolution of disputes falling under the most fundamental branches of private law, such as property law, the law of succession and the law of obligations. A province may assign portions or offshoots of these fields to courts whose judges it appoints, but cannot limit the superior court's involvement significantly without contravening s. 96.

In this case, the weighing of the six relevant factors leads to the conclusion that the grant to the Court of Québec of exclusive jurisdiction over civil claims for less than $85,000 prevents the Quebec Superior Court from playing its role under s. 96 in cases concerning private law matters.

First of all, the scope of the jurisdiction granted to the Court of Québec is indicative of a significant encroachment on the general private law jurisdiction of the superior courts of general jurisdiction. Article 35 para. 1 *C.C.P.* grants to the Court of Québec almost the entirety of the law of obligations, the real heart of private law, for claims of less than $85,000. Based on its scope and because of the fundamental nature of the field of law in question, the block of jurisdiction granted to the Court of Québec is unquestionably similar to the general private law jurisdiction exercised by the superior courts of general jurisdiction.

The exclusivity of the transfer accentuates the encroachment on the core jurisdiction of the superior courts. In this case, civil suits concerning contractual and extracontractual matters for less than $85,000 have been removed from the Superior Court's jurisdiction, thereby undermining its role as the cornerstone of a unitary system of justice. The role left to the Quebec Superior Court in this field is minimal in comparison with the role of superior courts elsewhere in Canada.

The monetary ceiling of less than $85,000 fixed by art. 35 para. 1 *C.C.P.* represents an increase of approximately 29 percent over the historical ceiling of $100, which corresponds in today's dollars to an amount of between $63,698 and $66,008. It is true that this increase is not clearly disproportionate to the historical ceiling, and the adopted amount can reasonably be connected to that ceiling insofar as it falls into a similar range. However, a monetary limit is merely one of several factors to weigh, and it cannot be determinative in itself. It must therefore be analyzed in its context and in light of the other factors.

générale en matière de droit privé, laquelle doit s'accompagner d'une juridiction matérielle suffisamment étendue pour préserver le rôle des cours supérieures de développer la jurisprudence en matière de droit privé. Cela requiert un engagement appréciable dans la résolution des litiges relevant des branches les plus fondamentales du droit privé comme le droit des biens, le droit successoral ou le droit des obligations. Une province peut confier des portions ou des ramifications de ces domaines à des tribunaux dont elle nomme les juges, mais elle ne peut restreindre de façon importante l'engagement de la cour supérieure sans contrevenir à l'art. 96.

En l'espèce, la mise en balance des six facteurs pertinents mène à la conclusion que l'attribution à la Cour du Québec d'une compétence exclusive sur les réclamations civiles de moins de 85 000 $ empêche la Cour supérieure du Québec de jouer le rôle qui lui incombe en vertu de l'art. 96 en matière de droit privé.

D'abord, l'étendue de la compétence attribuée à la Cour du Québec tend à démontrer un empiètement significatif sur la compétence générale en droit privé des cours supérieures de juridiction générale. L'article 35 al. 1 *C.p.c.* attribue à la Cour du Québec la quasi-totalité du droit des obligations, véritable cœur du droit privé, pour les réclamations inférieures à 85 000 $. Par son étendue et par le caractère fondamental du domaine de droit concerné, le bloc de compétence attribué à la Cour du Québec s'apparente indéniablement à la compétence générale de droit privé qu'exercent les cours supérieures de juridiction générale.

Le caractère exclusif du transfert accentue l'empiètement sur la compétence fondamentale des cours supérieures. En l'espèce, les poursuites civiles en matière contractuelle et extracontractuelle de moins de 85 000 $ ont été retirées de la compétence de la Cour supérieure, entravant son rôle comme pilier d'un système de justice unitaire. Le rôle laissé à la Cour supérieure du Québec dans ce domaine est minime en comparaison avec celui des cours supérieures ailleurs au Canada.

Le plafond pécuniaire de moins de 85 000 $ fixé par l'art. 35 al. 1 *C.p.c.* représente une hausse d'environ 29 p. 100 par rapport au plafond pécuniaire historique de 100 $, qui correspond en dollars d'aujourd'hui à une somme se situant entre 63 698 $ et 66 008 $. Certes, cette augmentation n'est pas manifestement hors de proportion avec ce plafond et le montant adopté peut raisonnablement s'y rattacher dans la mesure où il appartient à un même ordre de grandeur. Mais le seuil pécuniaire n'est qu'un facteur parmi d'autres à soupeser, et il ne saurait revêtir un caractère déterminant en soi. Il faut donc l'analyser dans son contexte et à la lumière des autres facteurs.

The fact that there is no accessible appeal mechanism that would enable the superior court of general jurisdiction to review decisions of the Court of Québec reinforces the conclusion that the two courts are parallel. This means that there is no hierarchical distinction between the two courts and the superior court of general jurisdiction has no sway over decisions of the court with provincially appointed judges. Furthermore, given that the threshold for an appeal as of right is fixed at $60,000, litigants who wish to have decisions of the Court of Québec reviewed must, in most cases, go through a screening process in order to obtain leave to appeal. The Court of Québec's decisions are thus, to some extent, more shielded from appellate review than those of the Superior Court. This factor suggests that art. 35 para. 1 *C.C.P.* transforms the Court of Québec into a prohibited parallel court that undermines the role of the superior court of general jurisdiction.

Finally, the statistical evidence produced in this case does not make it possible to determine with certainty that art. 35 para. 1 *C.C.P.* has only a minimal impact on the Superior Court's caseload in the area of obligations. Similarly, no evidence was tendered to show that a ceiling of less than $85,000 is needed in order to achieve an important societal objective such as promoting access to justice.

In its current form, therefore, art. 35 para. 1 *C.C.P.* is not valid with regard to s. 96, given that it encroaches impermissibly on the role the Constitution reserves to the superior court of general jurisdiction.

Per Wagner C.J. and Rowe J. (dissenting in part): The appeals relating to the first question should be allowed, but the appeal relating to the second question should be dismissed. Article 35 *C.C.P.* is not contrary to s. 96 of the *Constitution Act, 1867*. When properly characterized in terms of its subject matter, the jurisdiction conferred by art. 35 *C.C.P.* on the Court of Québec is civil jurisdiction over contractual and extracontractual obligations. This jurisdiction was not vested exclusively in the s. 96 courts at the time of Confederation. Moreover, art. 35 *C.C.P.* does not remove from the Quebec Superior Court any power that is within its core jurisdiction.

Sections 96 and 92(14) of the *Constitution Act, 1867*, taken together, reflect one of the important compromises reached by the Fathers of Confederation with respect to the administration of justice in Canada. On the one hand, s. 92(14) gives each province the power and responsibility to legislate in relation to the administration of justice,

L'absence d'un mécanisme d'appel accessible qui permettrait à la cour supérieure de juridiction générale de contrôler les décisions rendues par la Cour du Québec renforce la conclusion quant au parallélisme entre les deux cours. Cela signifie qu'il n'y a aucune différenciation hiérarchique entre les deux cours et que les décisions rendues par la cour de nomination provinciale échappent à l'emprise de la cour supérieure de juridiction générale. De plus, considérant que le seuil d'appel de plein droit est fixé à 60 000 $, les justiciables souhaitant faire contrôler les décisions de la Cour du Québec doivent, dans la majorité des cas, passer par un filtre préalable afin d'obtenir la permission d'en appeler. Les décisions de la Cour du Québec sont donc, dans une certaine mesure, plus à l'abri du contrôle en appel que celles de la Cour supérieure. Ce facteur tend à indiquer que l'art. 35 al. 1 *C.p.c.* transforme la Cour du Québec en une cour parallèle prohibée qui entrave le rôle de la cour supérieure de juridiction générale.

Enfin, la preuve statistique produite en l'espèce ne permet pas de déterminer avec certitude que l'art. 35 al. 1 *C.p.c.* n'a qu'un impact minime sur le volume de dossiers de la Cour supérieure en matière d'obligations. De même, aucune preuve n'a été apportée quant à la nécessité d'un plafond de moins de 85 000 $ pour atteindre un objectif social important tel que la promotion de l'accès à la justice.

Ainsi, sous sa forme actuelle, l'art. 35 al. 1 *C.p.c.* n'est pas valide au regard de l'art. 96, considérant qu'il empiète de façon inacceptable sur le rôle que la Constitution réserve à la cour supérieure de juridiction générale.

Le juge en chef Wagner et le juge Rowe (dissidents en partie) : Les appels portant sur la première question devraient être accueillis, mais le pourvoi portant sur la seconde question devrait être rejeté. L'article 35 *C.p.c.* ne contrevient pas à l'art. 96 de la *Loi constitutionnelle de 1867*. Adéquatement qualifiée en fonction de son objet, la compétence que confère l'art. 35 *C.p.c.* à la Cour du Québec est une compétence en matière civile sur des obligations contractuelles et extracontractuelles. Cette compétence n'appartenait pas exclusivement aux cours visées par l'art. 96 à l'époque de la Confédération. De plus, l'art. 35 *C.p.c.* ne retire à la Cour supérieure du Québec aucun pouvoir relevant de sa compétence fondamentale.

L'article 96 et le par. 92(14) de la *Loi constitutionnelle de 1867* reflètent ensemble un des compromis importants dont ont convenu les Pères de la Confédération en ce qui concerne l'administration de la justice au Canada. D'une part, suivant le par. 92(14), chaque province a le pouvoir et la responsabilité de légiférer à l'égard de l'administration

including for the purpose of creating, transforming or abolishing judicial offices. The provinces' power is a wide one that gives them a great deal of flexibility, allowing them, among other things, to organize their courts in a manner that favours access to justice and strengthens public confidence in the judiciary while at the same time taking their specific needs and challenges into account. On the other hand, this provincial power is subject to what s. 96 subtracts in favour of Parliament, including the power to appoint the judges of the superior courts in each province. This power of appointment implicitly limits provincial competence to endow a provincial tribunal with the powers of s. 96 courts. However, it does not follow that s. 96 freezes the civil jurisdiction of the inferior courts at what it was at the time of Confederation. The scope of s. 96 remains limited to what is necessary to ensure that the underlying objectives of the Confederation compromise are achieved, and primarily the objective of ensuring a unified judicial presence throughout Canada. Section 96 should therefore not be given an overly broad scope that would unduly limit the provinces' ability to address complex and emerging legislative challenges related to the administration of justice.

The s. 96 analytical framework has two stages, which are concerned with the historical jurisdiction and the core jurisdiction of the superior courts. In accordance with *Residential Tenancies*, the first stage of the s. 96 analytical framework is to determine whether the grant of jurisdiction in question is permissible. The second stage is to decide whether the Superior Court's jurisdiction can be ousted, that is, whether an exclusive grant of jurisdiction is permissible.

The analytical framework for the historical jurisdiction of the superior courts consists of a three-step analysis that serves to determine the constitutionality of a provincial grant of jurisdiction. The first step, the historical test, involves answering the following question: Does the impugned power or jurisdiction broadly conform to an exclusive power or jurisdiction exercised by the superior, district or county courts at the time of Confederation? In the application of this test, all courts that existed in pre-Confederation Canada must be considered, and not only those of the province in question. If the impugned jurisdiction was exercised concurrently by the superior and inferior courts at the time of Confederation, it must be determined whether the inferior courts had a general shared involvement or a meaningful concurrency of power in this regard. If so, the grant will be considered valid under

de la justice, notamment pour créer, transformer et abolir des charges judiciaires. Il s'agit d'un pouvoir étendu, lequel accorde aux provinces une grande marge de manœuvre, qui leur permet notamment d'organiser leurs tribunaux d'une manière propre à favoriser l'accès à la justice et à renforcer la confiance du public envers le pouvoir judiciaire, tout en tenant compte de leurs besoins et défis spécifiques. D'autre part, ce pouvoir provincial est assujetti aux soustractions opérées par l'art. 96 en faveur du législateur fédéral, notamment le pouvoir de nommer les juges des cours supérieures dans chaque province. Ce pouvoir de nomination restreint implicitement la compétence des provinces de conférer les pouvoirs des cours visées à l'art. 96 à un tribunal provincial. Toutefois, il ne s'ensuit pas pour autant que l'art. 96 fige la compétence civile des tribunaux inférieurs à celle qu'ils possédaient au moment de la Confédération. La portée de l'art. 96 demeure restreinte à ce qui est nécessaire pour garantir la réalisation des objectifs sous-jacents du compromis confédératif, dont principalement celui d'assurer une présence judiciaire unifiée dans l'ensemble du Canada. Il faut en conséquence éviter d'attribuer à l'art. 96 une portée démesurée, qui limiterait indûment la capacité des provinces de relever des défis législatifs complexes et émergents en matière d'administration de la justice.

Le cadre d'analyse de l'art. 96 comprend deux étapes, soit celles liées à la compétence historique et à la compétence fondamentale des cours supérieures. Conformément au *Renvoi sur la location résidentielle*, la première étape du cadre d'analyse de l'art. 96 consiste à déterminer si l'attribution de compétence en cause est permise. La deuxième étape consiste à décider si la compétence de la Cour supérieure peut être écartée, c'est-à-dire déterminer si une attribution exclusive de compétence est permise.

Le cadre d'analyse de la compétence historique des cours supérieures consiste en une analyse à trois volets qui permet de statuer sur la constitutionnalité d'une attribution de compétence par une province. Le premier volet, soit le critère historique, consiste à répondre à la question suivante : Est-ce que le pouvoir ou la compétence qu'on attaque correspond de façon générale à un pouvoir ou à une compétence de nature exclusive qu'exerçaient les cours supérieures, de district ou de comté au moment de la Confédération? Aux fins d'application de ce critère, il faut tenir compte de tous les tribunaux qui existaient jadis dans le Canada préconfédératif, et non seulement ceux de la province concernée. Si, à l'époque de la Confédération, la compétence contestée était exercée de manière concurrente par les cours supérieures et inférieures, il faut déterminer s'il existait un engagement général partagé ou

the historical test. On the other hand, if the jurisdiction was exclusive to the superior courts, then it is necessary to proceed to the second and third steps of the analytical framework.

The application of the historical test must begin with a proper characterization of the jurisdiction in issue. The characterization of the impugned jurisdiction must go beyond a technical analysis of remedies, it must not be focused on the particular remedy sought, and its effect must not be to freeze the jurisdiction of the inferior courts at what it was in 1867. In addition, the allegedly exclusive nature of the jurisdiction cannot be included in its characterization. If a grant of jurisdiction satisfies both stages of the s. 96 analytical framework, then it can be exclusive. The exclusivity of the grant therefore results from the fact that both stages are met. It cannot be allowed to influence the analysis by being included in the characterization prematurely.

A proper characterization of the jurisdiction in issue must be focused rather on the type of dispute, the area of jurisdiction and the subject-matter of the decision. This is a crucial question, as the manner in which the jurisdiction in issue is characterized can be determinative in the application of the historical test. Monetary limits are only one factor in the overall assessment among several others, including the geographic reach of the jurisdiction and the range of disputes the court could decide. There are two additional factors for assessing the extent of the courts' shared involvement in exercising the jurisdiction in question, namely the percentage of the population that would have used the inferior courts and the frequency with which disputes amenable to their process arose. Depending on the context, certain factors will have more weight than others.

The second stage of the s. 96 analytical framework, that is, the analysis of the core jurisdiction of the superior courts, requires that two questions be answered. First, is the power in question within the core jurisdiction of the superior courts? Second, does the law have the effect of removing the power from their core jurisdiction?

The core jurisdiction of the superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. This jurisdiction is therefore a very narrow one which includes

une compétence concurrente appréciable des tribunaux inférieurs à ce sujet, auquel cas, l'attribution sera jugée valide selon le critère historique. Par contre, s'il s'agit d'une compétence exclusive des cours supérieures, il faut alors procéder aux deuxième et troisième volets du cadre d'analyse.

Dans l'examen du critère historique, il faut d'abord qualifier adéquatement la compétence en cause. La qualification de la compétence contestée ne doit pas se limiter à une analyse formaliste des recours, ne doit pas être axée sur la réparation demandée et ne doit pas avoir pour effet de figer la compétence des tribunaux inférieurs à ce qu'elle était en 1867. Par ailleurs, le prétendu caractère exclusif de la compétence ne peut être inclus dans la qualification de celle-ci. Si l'attribution d'une compétence satisfait aux deux étapes du cadre d'analyse de l'art. 96, elle pourra alors être exclusive. Partant, l'exclusivité de l'attribution résulte du fait que celle-ci satisfait aux deux étapes, et il ne peut être permis qu'elle influe sur l'analyse en l'incluant prématurément dans la qualification.

Pour bien qualifier la compétence en cause, il faut plutôt s'intéresser au type de différend, au domaine de compétence, à l'objet de la décision et à la nature du litige. Il s'agit d'une question cruciale, puisque la manière dont la compétence en cause est qualifiée peut s'avérer déterminante dans l'examen du critère historique. En ce qui concerne les limites pécuniaires, elles ne constituent qu'un facteur parmi d'autres dans l'évaluation globale, notamment les limites géographiques de la compétence et l'éventail des différends que le tribunal peut trancher. Deux autres facteurs s'ajoutent pour apprécier l'étendue de l'engagement partagé des tribunaux dans l'exercice de la compétence en question, soit le pourcentage de la population qui avait recours aux tribunaux inférieurs et la fréquence des différends relevant de la compétence de ces tribunaux. Selon le contexte, certains facteurs seront plus importants que d'autres.

La seconde étape du cadre d'analyse de l'art. 96, soit l'analyse de la compétence fondamentale des cours supérieures, nécessite une réponse à deux questions. Premièrement, le pouvoir examiné fait-il partie de la compétence fondamentale des cours supérieures? Deuxièmement, la loi a-t-elle pour effet de retirer ce pouvoir de la compétence fondamentale des cours supérieures?

La compétence fondamentale des cours supérieures comprend les pouvoirs qui sont essentiels à l'administration de la justice et au maintien de la primauté du droit. Cette compétence est donc très limitée et ne comprend que

only critically important jurisdictions. Removing such powers from a superior court would, in other words, make it something other than a superior court and deprive it of its essential character. Section 96 of the *Constitution Act, 1867* gives the superior courts a core jurisdiction that allows them to resolve disputes between individuals and decide questions of private and public law. This power is meaningful only if the superior courts, as courts of original general jurisdiction, have substantial jurisdiction that allows them to state and develop the civil law in Quebec and the common law in the other provinces. The question is therefore not whether the superior court can still adjudicate substantial civil disputes, but rather whether its jurisdiction in this regard is substantial enough that it is capable of ensuring this development.

Three quantitative and qualitative factors are relevant in determining whether a statutory provision removes from a superior court part of its core jurisdiction in matters of private law: (a) the impact on the number of cases that the superior court continues to deal with; (b) the impact on the proportion of cases within the superior court's jurisdiction compared with those within the jurisdiction of a provincially constituted court; (c) the impact on the nature and importance of the cases within the superior court's jurisdiction. As long as the superior courts continue to hear a volume of cases that is sufficient in number and proportion and varied enough in nature and importance that they are able to state and develop the civil law in Quebec and the common law in the other provinces, they will, as a result, continue to play their unifying role in Canada's constitutional and judicial system. Under such conditions, the legislatures can, without infringing on the superior courts' core jurisdiction in matters of private law, confer subject-matter jurisdiction on provincially constituted courts to empower them to hear a certain number of civil claims.

In this case, the analysis of the historical test shows that the vast majority — at least 80 percent — of civil disputes in pre-Confederation Canada, with the exception of Lower Canada, came before the inferior courts. Although that jurisdiction was subject to monetary limits in several matters, it nevertheless indicates that there was significant coextensive involvement by the inferior courts in contractual and extracontractual matters. With regard to the Superior Court's core jurisdiction in civil matters, the application of the three factors shows that the Superior Court continues to deal with a large number of civil cases,

les pouvoirs qui ont une importance cruciale. En d'autres termes, le fait de retirer ces pouvoirs à une cour supérieure ferait de ce tribunal quelque chose d'autre qu'une cour supérieure, elle en perdrait son caractère essentiel. L'article 96 de la *Loi constitutionnelle de 1867* confère aux cours supérieures une compétence fondamentale leur permettant de résoudre des différends opposant des particuliers et de trancher des questions de droit privé et de droit public. Ce pouvoir n'a de sens que si les cours supérieures, en tant que tribunaux de droit commun, détiennent une compétence substantielle leur permettant de dire et de faire évoluer le droit civil au Québec et la common law dans les autres provinces. Il ne s'agit donc pas de décider si la cour supérieure peut toujours trancher des différends substantiels en matière civile, mais plutôt de se demander si la compétence qu'elle détient à cet égard est à ce point substantielle qu'elle lui permet d'assurer cette évolution.

Pour décider si une disposition législative retire à une cour supérieure une partie de sa compétence fondamentale en matière de droit privé, trois facteurs de nature quantitative et qualitative sont pertinents : a) l'impact sur le nombre de dossiers que la cour supérieure continue de traiter; b) l'impact sur la proportion des dossiers relevant de la cour supérieure par rapport à ceux relevant d'un tribunal de création provinciale; c) l'impact sur la nature et l'importance des dossiers relevant de la compétence de la cour supérieure. Tant et aussi longtemps que les cours supérieures continueront d'entendre un volume suffisant — en nombre et en proportion — d'affaires suffisamment variées en nature et en importance pour être en mesure de dire et de faire évoluer le droit civil au Québec et la common law dans les autres provinces, elles continueront par le fait même à jouer leur rôle unificateur au sein du système constitutionnel et judiciaire canadien. Dans de telles conditions, les législatures peuvent, sans porter atteinte à la compétence fondamentale des cours supérieures en matière de droit privé, accorder aux tribunaux de création provinciale une compétence matérielle leur permettant d'entendre un certain nombre de réclamations civiles.

En l'espèce, l'analyse du critère historique démontre qu'à l'exception du Bas-Canada, les tribunaux inférieurs étaient saisis de la grande majorité, soit au moins 80 p. 100, des litiges civils dans le Canada préconfédératif. Bien qu'en plusieurs matières cette compétence ait été limitée sur le plan pécuniaire, elle révèle néanmoins un engagement parallèle important des tribunaux inférieurs en matière contractuelle et extracontractuelle. Au sujet de la compétence fondamentale de la Cour supérieure en matière civile, l'application des trois facteurs révèle que la Cour supérieure continue à traiter un grand nombre

that the number of cases opened at the Superior Court in comparison with those opened at the Court of Québec remains relatively stable, and that the Superior Court continues to hear claims on a variety of subjects as well as the judicial applications that are the most substantial in monetary terms. Article 35 *C.C.P.* therefore does not have the effect of removing from the Quebec Superior Court its jurisdiction over substantial civil claims.

Per Abella J. (dissenting): The appeal should be allowed. Article 35 *C.C.P.* is valid with regard to s. 96 of the *Constitution Act, 1867*. Both the superior and provincial courts shared jurisdiction over substantial monetary claims at Confederation and the expansion of the jurisdiction of the provincial Court of Québec by $15,000, from $70,000 to $85,000, does not impair the core of the Superior Court's jurisdiction in any way.

Section 92(14) of the *Constitution Act, 1867* empowers provincial governments to create provincial courts and to appoint their judges. Since Confederation, provincial courts have been a key component of Canada's justice system, playing an indispensable role in the development of the law. The significance of the provincial courts in Canada today cannot be overstated. Parties appear before provincial court judges to have their liberty or livelihood or support and custody rights determined. Provincial courts combine with the superior courts to form a strong network of courts for litigants across Canada.

Nonetheless, over the years, the Court has occasionally limited the provinces' authority under s. 92(14) because s. 96 guarantees that some jurisdiction must remain in the hands of federally appointed superior courts. In an effort to operationalize the jurisprudence's approach to resolving the tension between ss. 92(14) and 96, a three-stage test was developed in *Residential Tenancies* for analyzing the validity of a provincial grant of jurisdiction. It is essentially an historical inquiry. The first stage of the test asks whether superior, district or county courts at the time of Confederation had exclusive jurisdiction over the subject matter now being given to the provincial court. If provincial courts in a majority of the four original provinces had a practical involvement in adjudicating cases related to the particular subject matter at Confederation, there could be no finding of exclusive jurisdiction for s. 96 courts, since the jurisdiction was shared at the time. If the

de dossiers en matière civile, que le nombre de dossiers ouverts en Cour supérieure par comparaison avec ceux ouverts en Cour du Québec demeure relativement stable et que la Cour supérieure continue d'entendre des demandes portant sur des sujets variés, de même que les demandes en justice les plus substantielles sur le plan pécuniaire. L'article 35 *C.p.c.* n'a donc pas pour effet de retirer à la Cour supérieure du Québec sa compétence sur les demandes substantielles en matière civile.

La juge Abella (dissidente): L'appel devrait être accueilli. L'article 35 *C.p.c.* est valide au regard de l'art. 96 de la *Loi constitutionnelle de 1867*. Tant les cours supérieures que les cours provinciales se partageaient la compétence à l'égard des réclamations pécuniaires substantielles au moment de la Confédération, et la hausse de 15 000 $ de la compétence de la cour provinciale, la Cour du Québec, qui la fait passer de 70 000 $ à 85 000 $, n'affaiblit d'aucune manière la compétence fondamentale de la Cour supérieure.

Le paragraphe 92(14) de la *Loi constitutionnelle de 1867* habilite les gouvernements provinciaux à créer des tribunaux provinciaux et à nommer les juges qui y siègent. Depuis la Confédération, les tribunaux provinciaux constituent une composante clé du système de justice canadien, jouant un rôle indispensable dans l'évolution du droit. L'importance des cours provinciales au Canada aujourd'hui ne saurait être surestimée. Des parties se présentent devant les juges des cours provinciales pour faire trancher leur droit à la liberté ou à leur gagne-pain, ou encore leurs droits à une pension alimentaire ou à la garde de leurs enfants. Les cours provinciales forment, de concert avec les cours supérieures, un solide réseau de tribunaux servant les plaideurs partout au Canada.

Néanmoins, au fil des ans, la Cour a occasionnellement limité le pouvoir dont disposent les provinces en vertu du par. 92(14), parce que l'art. 96 garantit que certaines compétences doivent demeurer entre les mains des cours supérieures, lesquelles sont composées de juges nommés par le fédéral. Dans un effort en vue d'opérationnaliser la méthode établie par la jurisprudence pour résoudre les conflits entre le par. 92(14) et l'art. 96, une analyse en trois étapes a été élaborée dans le *Renvoi sur la location résidentielle* afin d'examiner la validité d'une attribution de compétence par une province. Il s'agit essentiellement d'une analyse historique. La première étape de l'analyse consiste à se demander si, au moment de la Confédération, les cours supérieures, de district ou de comté avaient compétence exclusive sur la matière qui est maintenant attribuée à la cour provinciale. Si, dans une majorité des quatre provinces originales, les cours

jurisdiction at issue was exclusively held by a s. 96 court at Confederation, the second stage of the analysis asks whether the provincial body is acting in a judicial capacity. If it is, the third stage of the analysis is triggered, which involves the assessment of the provincial court or tribunal in its institutional context in order to determine whether it is exercising a judicial power that is merely subsidiary or ancillary to general administrative functions, or one that is necessary to achieve a broad policy goal. In either of these circumstances, the grant is constitutionally permissible.

A layer was added to the test in *MacMillan Bloedel*, when the Court concluded that the legislature may not, even if its grant of jurisdiction passed the *Residential Tenancies* test, reduce or impair the core of superior court jurisdiction. The focus of this new requirement was determining whether a grant of exclusive jurisdiction to a provincial body frustrated the ability of superior courts to execute their functions.

As the jurisprudence shows, the first step in analyzing the validity of a provincial grant of jurisdiction is to characterize that grant. The boundaries of provincial court jurisdiction need not be drawn along the precise borders that existed at Confederation; rather, the inquiry centers on the type of case being heard. It is a functional approach which examines the purpose of the grant of jurisdiction. In determining the historical involvement of provincial courts in deciding civil claims, it is instructive to look at the proportion of cases that were heard by different courts at Confederation. At the time, in most provinces, a majority of civil claims were heard by provincial courts; therefore, the superior courts did not have exclusive jurisdiction over civil claims in general. Any exclusive jurisdiction was limited to a small proportion of civil claims above a certain monetary threshold. This threshold was not, however, a marker which indicated when claims became substantial, it simply aimed to maintain a balance between the different types of courts in operation at the time. In this case, the comparison of the proportion of cases heard at Confederation with today's distribution shows that a grant of $85,000 of civil jurisdiction not only continues to respect the balance struck at the time of Confederation,

provinciales avaient au moment de la Confédération un engagement pratique dans la résolution de litiges relatifs à la matière en cause, il était impossible de conclure que les cours visées à l'art. 96 avaient compétence exclusive, puisque la compétence était partagée à cette époque. Si la compétence en cause appartenait exclusivement à une cour visée à l'art. 96 au moment de la Confédération, il faut, à la deuxième étape de l'analyse, répondre à la question de savoir si l'organisme provincial agit à titre judiciaire. Si la réponse est affirmative, se met alors en branle la troisième étape de l'analyse, laquelle consiste à considérer le tribunal judiciaire ou administratif provincial dans son contexte institutionnel, afin de déterminer s'il exerce un pouvoir judiciaire qui est simplement complémentaire ou accessoire à des fonctions administratives générales, ou qui est nécessaire à la réalisation d'un vaste objectif de politique générale. Dans l'un ou l'autre cas, l'attribution de compétence est permise par la Constitution.

Dans l'arrêt *MacMillan Bloedel*, la Cour a ajouté une exigence additionnelle à l'analyse lorsqu'elle a conclu que, même si l'attribution de compétence satisfait à l'analyse établie dans le *Renvoi sur la location résidentielle*, la législature ne peut réduire le noyau de la compétence des cours supérieures, leur compétence fondamentale, ou y porter atteinte. Cette nouvelle exigence visait à déterminer si l'attribution d'une compétence exclusive à un organisme provincial entravait la capacité des cours supérieures de s'acquitter de leurs fonctions.

Comme le démontre la jurisprudence, la première étape de l'analyse de la validité d'une attribution de compétence par une province consiste à qualifier cette attribution. Il n'est pas nécessaire que les limites de la compétence des cours provinciales correspondent aux frontières précises qui existaient au moment de la Confédération; l'analyse doit plutôt être axée sur le type d'affaires qu'elles entendent. Il s'agit d'une approche fonctionnelle, qui s'attache à examiner l'objet de l'attribution de compétence. Pour déterminer quel était, sur le plan historique, l'engagement des cours provinciales dans la résolution des litiges civils, il est instructif d'examiner la proportion d'affaires qui étaient entendues par différents tribunaux au moment de la Confédération. À ce moment-là, dans la plupart des provinces, la majorité des litiges civils étaient entendus par les cours provinciales; par conséquent, les cours supérieures n'avaient pas compétence exclusive sur les réclamations civiles en général. Dans les cas où il y avait compétence exclusive, celle-ci se limitait à une petite proportion de réclamations civiles dont la valeur dépassait un seuil pécuniaire donné. Toutefois, ce seuil ne constituait pas une marque indiquant le point où les réclamations devenaient substantielles, il visait simplement à

but leaves superior courts with more civil jurisdiction than they had at that time. The *Residential Tenancies* test is therefore met.

At the "core jurisdiction" stage of the test, the Court has held that legislation cannot have the effect of taking away the authority superior courts need in order to make sure that they can effectively adjudicate the claims which are properly before them and to enforce their orders in those cases. However, core jurisdiction has been held to be a narrow concept, not a malleable one. It is intended to protect only the essential role and function of superior courts. As long as the essential character of superior courts is neither undermined nor impaired, provincial legislatures are constitutionally entitled to exercise their jurisdiction under s. 92(14) by creating and authorizing provincial courts, even exclusively, to respond to local justice needs, not as those needs existed at Confederation, but as they exist now. The notion that superior courts have inherited some core power over the development of private law from the pre-Confederation English courts of inherent jurisdiction is irreconcilable with the fact that superior courts, since Confederation, have shared that role with a number of provincial courts. Superior courts have never had the exclusive responsibility of guiding the development of private law. This role, therefore, cannot be part of superior courts' core jurisdiction.

Although the classic application of the *Residential Tenancies*/*MacMillan Bloedel* test is dispositive of the appeal, this case reveals some of the fault lines of that approach. It may be time to consider replacing the test in a way that updates the law on the relationship between ss. 92(14) and 96 and synchronizes it with the Court's approach to constitutional interpretation generally and, in particular, with the defining admonition that the Constitution is a living tree to be interpreted flexibly. Cooperative federalism is an approach to federalism that not only accepts that an overlap between federal and provincial powers is inevitable, but is also useful because it allows governments to respond to a complex interplay of

maintenir l'équilibre entre les différents types de tribunaux qui existaient à l'époque. En l'espèce, la comparaison entre la proportion des affaires entendues au moment de la Confédération et la proportion actuelle révèle que l'attribution d'une compétence pécuniaire de 85 000 $ en matière civile respecte non seulement l'équilibre établi au moment de la Confédération, mais accorde également aux cours supérieures une compétence civile plus vaste que celle dont elles disposaient alors. Il est en conséquence satisfait à l'analyse établie dans le *Renvoi sur la location résidentielle*.

La Cour a statué que, à l'étape de l'analyse qui porte sur la « compétence fondamentale », une mesure législative ne peut pas avoir pour effet de retirer aux cours supérieures le pouvoir dont elles ont besoin pour statuer efficacement sur les litiges qui leur sont régulièrement soumis et pour faire respecter les ordonnances qu'elle rendent dans ces affaires. Cependant, il a été jugé que la compétence fondamentale est un concept étroit, et non pas un concept malléable. Il vise à protéger uniquement la fonction et le rôle essentiels des cours supérieures. Tant que le caractère essentiel des cours supérieures n'est ni compromis ni affaibli, les législatures provinciales sont constitutionnellement autorisées à exercer la compétence que leur accorde le par. 92(14) en créant des cours provinciales et en les habilitant, même de façon exclusive, à répondre aux besoins locaux en matière de justice, et ce, non pas aux besoins tels qu'ils existaient au moment de la Confédération, mais tels qu'ils existent maintenant. L'idée selon laquelle les cours supérieures ont hérité des tribunaux anglais préconfédératifs dotés d'une compétence inhérente un certain pouvoir fondamental sur l'évolution du droit privé est incompatible avec le fait que, depuis la Confédération, les cours supérieures ont partagé ce rôle avec un certain nombre de cours provinciales. Les cours supérieures n'ont jamais eu la responsabilité exclusive de guider l'évolution du droit privé. Par conséquent, ce rôle ne saurait faire partie de la compétence fondamentale des cours supérieures.

Bien que l'application classique de l'analyse établie dans les arrêts *Renvoi sur la location résidentielle* et *MacMillan Bloedel* permette de trancher le pourvoi, la présente affaire révèle certaines des lacunes de cette approche. Il est peut-être temps d'envisager de remplacer l'analyse de manière à actualiser le droit relatif à l'interaction entre le par. 92(14) et l'art. 96 et à le mettre en phase avec la méthode d'interprétation constitutionnelle de la Cour en général et, plus particulièrement, avec la mise en garde déterminante selon laquelle la Constitution est comme un arbre et doit recevoir une interprétation souple. Le fédéralisme coopératif est une approche à l'égard du fédéralisme qui accepte non seulement qu'un chevauchement entre

issues. There is no reason why such an approach should not be extended to the understanding of the relationship between ss. 92(14) and 96. There is a need for a generous approach to the authority of provincial governments to make jurisdictional grants to provincial adjudicative bodies since provincial governments are closer to the issues affecting most people who use the courts and to the realities of local issues. They are therefore better placed to recognize and address local concerns with the justice system.

The benefits of cooperative federalism were not a particular concern in *Residential Tenancies*. Rather, it was animated by a number of protective aspirations for s. 96 courts. The first was the desire to promote national unity through the preservation of a unitary court system and the second was ensuring that disputes are adjudicated by impartial and independent courts. The Court's approach to s. 96 was said to reinforce the theory that certain cases must be heard by superior courts because they must be decided by independent courts. But the assumption that the Constitution protected the independence only of superior courts disintegrated in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, where the Court recognized that provincial courts also enjoy constitutionally protected independence and are as well placed to uphold the rule of law independently as the superior courts. Appeals to the rule of law and independence, therefore, can no longer serve to narrow the jurisdiction of provincial courts. Increased constitutional recognition of the important role of provincially appointed judges within the Canadian judiciary does nothing to diminish the independence and impartiality of the superior courts. On the contrary, it enhances the judiciary as a whole and the public's perception that the provincial court judges they appear before are no less judicial because they are appointed by a different level of government. This acknowledgment of the independence of provincial courts makes them a partner in protecting national unity.

The $15,000 increase in exclusive provincial court jurisdiction has not prevented the Superior Court of Quebec

les pouvoirs fédéraux et provinciaux est inévitable, mais également qu'il est utile parce qu'il permet aux gouvernements de répondre à un ensemble complexe de questions. Il n'y a aucune raison de ne pas élargir cette approche à la conception de la relation entre le par. 92(14) et l'art. 96. Il est nécessaire d'interpréter libéralement le pouvoir des gouvernements provinciaux d'attribuer des compétences aux organismes juridictionnels provinciaux, étant donné que les gouvernements provinciaux sont plus près des questions qui touchent la plupart des personnes s'adressant aux tribunaux, ainsi que des réalités des enjeux locaux. Ils sont en conséquence mieux placés pour reconnaître les préoccupations locales concernant le système de justice et pour y répondre.

Les avantages du fédéralisme coopératif n'étaient pas une préoccupation particulière dans l'arrêt *Renvoi sur la location résidentielle*. Cette décision était plutôt animée par un certain nombre d'aspirations protectrices à l'égard des cours visées à l'art. 96. La première était le désir de promouvoir l'unité nationale par la préservation d'un système judiciaire unitaire, et la seconde était de veiller à ce que les litiges soient tranchés par des tribunaux impartiaux et indépendants. On a dit que l'approche de la Cour en ce qui concerne l'art. 96 renforçait la théorie selon laquelle certaines affaires doivent être entendues par des cours supérieures, parce qu'elles doivent être tranchées par des tribunaux indépendants. Cependant, la thèse voulant que la Constitution protège uniquement l'indépendance des cours supérieures s'est effritée dans l'arrêt *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, où la Cour a reconnu que les cours provinciales jouissent elles aussi d'une indépendance protégée constitutionnellement et sont aussi bien placées que les cours supérieures pour faire respecter de manière indépendante la primauté du droit. Il n'est donc plus justifié désormais d'invoquer la primauté du droit et l'indépendance pour restreindre la compétence des cours provinciales. La reconnaissance constitutionnelle accrue du rôle important que jouent les juges nommés par les provinces au sein de l'appareil judiciaire canadien ne diminue en rien l'indépendance et l'impartialité des cours supérieures. Au contraire, elle renforce l'ensemble de l'appareil judiciaire ainsi que la perception des membres du public selon laquelle les juges des cours provinciales devant lesquels ils se présentent n'agissent pas moins judiciairement parce qu'ils sont nommés par un ordre de gouvernement différent. Cette reconnaissance de l'indépendance des cours provinciales fait de celles-ci des partenaires dans la protection de l'unité nationale.

L'augmentation de 15 000 $ de la compétence exclusive de la cour provinciale n'a pas empêché de quelque

in any material way from playing its usual role in deciding the kind of civil cases it has always heard. No matter the approach taken in analyzing art. 35 *C.C.P.*, it is a valid exercise of the province's right under s. 92(14) to administer justice and to constitute courts of civil jurisdiction in Quebec.

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manière concrète que ce soit la Cour supérieure du Québec de jouer son rôle habituel et de juger le genre d'affaires civiles qu'elle a toujours entendues. Peu importe l'approche adoptée pour analyser l'art. 35 *C.p.c.*, cette disposition représente un exercice valide du droit dont dispose la province en vertu du par. 92(14) d'administrer la justice et de créer des cours de compétence civile au Québec.

Jurisprudence

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POURVOIS contre un arrêt de la Cour d'appel du Québec (la juge en chef Duval Hesler et les juges Bich, Kasirer, Levesque, Vauclair, Mainville et Hogue), 2019 QCCA 1492, [2019] AZ-51627804, [2019] J.Q. nº 7806 (QL), 2019 CarswellQue 8040 (WL Can.), dans l'affaire d'un renvoi portant sur la validité constitutionnelle des dispositions de l'article 35 du *Code de procédure civile*, RLRQ, c. C-25.01, qui fixent à moins de 85 000 $ la compétence pécuniaire

jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec. Appeals dismissed, Wagner C.J. and Rowe J. dissenting in part and Abella J. dissenting.

François Grondin and *Guy J. Pratte*, for Conférence des juges de la Cour du Québec.

Dominique Rousseau and *Francis Demers*, for the Attorney General of Quebec.

Marc-André Fabien and *Vincent Cérat Lagana*, for Conseil de la magistrature du Québec.

Audrey Mayrand and *Jennifer Klinck*, for the Canadian Association of Provincial Court Judges.

Sean Griffin and *William J. Atkinson*, for the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec.

Bernard Letarte, for the intervener the Attorney General of Canada.

Daniel Huffaker, for the intervener the Attorney General of Ontario.

Gareth Morley, for the intervener the Attorney General of British Columbia.

Written submissions only by *Randy Steele*, for the intervener the Attorney General of Alberta.

No one appeared for the intervener Organisme d'autoréglementation du courtage immobilier du Québec.

P. Jonathan Faulds, *Q.C.*, for the intervener the Canadian Council of Chief Judges.

Ryan D. W. Dalziel, for the intervener the Trial Lawyers Association of British Columbia.

Pierre Bienvenu, for the intervener the Canadian Superior Courts Judges Association.

exclusive de la Cour du Québec et sur la compétence d'appel attribuée à la Cour du Québec. Pourvois rejetés, le juge en chef Wagner et le juge Rowe sont dissidents en partie et la juge Abella est dissidente.

François Grondin et *Guy J. Pratte*, pour la Conférence des juges de la Cour du Québec.

Dominique Rousseau et *Francis Demers*, pour le procureur général du Québec.

Marc-André Fabien et *Vincent Cérat Lagana*, pour le Conseil de la magistrature du Québec.

Audrey Mayrand et *Jennifer Klinck*, pour l'Association canadienne des juges des cours provinciales.

Sean Griffin et *William J. Atkinson*, pour le juge en chef, la juge en chef associée et la juge en chef adjointe de la Cour supérieure du Québec.

Bernard Letarte, pour l'intervenant le procureur général du Canada.

Daniel Huffaker, pour l'intervenant le procureur général de l'Ontario.

Gareth Morley, pour l'intervenant le procureur général de la Colombie-Britannique.

Argumentation écrite seulement par *Randy Steele*, pour l'intervenant le procureur général de l'Alberta.

Personne n'a comparu pour l'intervenant l'Organisme d'autoréglementation du courtage immobilier du Québec.

P. Jonathan Faulds, *c.r.*, pour l'intervenant Canadian Council of Chief Judges.

Ryan D. W. Dalziel, pour l'intervenante Trial Lawyers Association of British Columbia.

Pierre Bienvenu, pour l'intervenante l'Association canadienne des juges des cours supérieures.

English version of the judgment of Moldaver, Karakatsanis, Côté and Martin JJ. delivered by

CÔTÉ AND MARTIN JJ. —

TABLE OF CONTENTS

Le jugement des juges Moldaver, Karakatsanis, Côté et Martin a été rendu par

LES JUGES CÔTÉ ET MARTIN —

TABLE DES MATIÈRES

I. Overview

[1] The unified national judicial system is a defining feature of Canada's judiciary. This system ensures the joint participation of the federal government and the provinces.[1] On the one hand, the Constitution grants exclusive jurisdiction over the administration of justice to the provinces, thereby empowering them to create courts and organize them. On the other hand, it places a specific category of courts, the superior courts, at the centre of the Canadian judiciary and vests the federal government with the power to appoint their judges.

[1] For the sake of readability of these reasons, references only to the provinces will be understood to include Canada's territories.

I. Aperçu

[1] Le système judiciaire national unifié représente une caractéristique déterminante du régime judiciaire canadien. Ce système assure une participation conjointe de l'État fédéral et des provinces[1]. D'une part, la Constitution reconnaît aux provinces une compétence exclusive en matière d'administration de la justice en vertu de laquelle elles peuvent créer des tribunaux et les organiser. D'autre part, elle place une catégorie particulière de cours de justice, les cours supérieures, au centre de l'ordre judiciaire canadien et en confie la nomination de leurs juges à l'État fédéral.

[1] Pour alléger les présents motifs, nous ne référons qu'aux provinces, mais il demeure entendu que les territoires canadiens sont également visés.

[2] Over the years, the courts have endeavoured to give meaning to this characteristic of Canada's judicial system, which stems from ss. 92(14) and 96 to 100 of the *Constitution Act, 1867*. The case law sought to strike a proper balance between provincial initiatives on the administration of justice and respect for one of the important compromises of the Fathers of Confederation, on which the special and inalienable status conferred on the s. 96 courts is grounded.

[3] The first question raised in these appeals is whether art. 35 para. 1 of the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), is consistent with s. 96 of the *Constitution Act, 1867*. Put differently, does granting exclusive jurisdiction over civil claims for less than $85,000 to the Court of Québec create a parallel or shadow court that usurps the role reserved by the Constitution to the superior courts? In this case, the legislature has not transferred a specific jurisdiction to the provincial court, but rather an extensive and exclusive jurisdiction over a vast area at the heart of private law. This case presents an opportunity for this Court to clarify the line that the provinces must not cross in exercising their jurisdiction over the administration of justice. This question represents a new milestone in the evolution of the case law on s. 96, as it concerns a wholesale court-to-court transfer of jurisdiction over contractual and extracontractual obligations below a specific monetary limit, which has the effect of removing these matters from the jurisdiction of the superior courts.

[4] The purpose of s. 96 is to give effect to the compromise reached at Confederation by protecting the special status of the superior courts of general jurisdiction as the cornerstone of our unitary justice system. The principles of national unity and the rule of law are central to this organization of the judiciary. To ensure that s. 96 fulfills its function, this Court has developed various tests over time, the most recent being the three-step test from *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 ("*Residential Tenancies*"), and the core jurisdiction test adopted in *MacMillan Bloedel Ltd. v. Simpson*,

[2] Au fil des années, les tribunaux se sont efforcés de donner un sens à cette particularité du système judiciaire canadien qui découle du par. 92(14) et des art. 96 à 100 de la *Loi constitutionnelle de 1867*. La jurisprudence atteste de la recherche d'un juste équilibre entre les initiatives provinciales en matière d'administration de la justice et le respect d'un des compromis importants acceptés par les Pères de la Confédération, une entente qui confère un statut spécial et inaliénable aux cours visées à l'art. 96.

[3] La première question posée par les présents pourvois nous invite à déterminer si l'art. 35 al. 1 du *Code de procédure civile*, RLRQ, c. C-25.01 (« *C.p.c.* »), se justifie au regard de l'art. 96 de la *Loi constitutionnelle de 1867*. En d'autres termes, l'attribution exclusive à la Cour du Québec d'une compétence sur les réclamations civiles de moins de 85 000 $ crée-t-elle une cour parallèle qui usurpe le rôle réservé par la Constitution aux cours supérieures? En l'espèce, la législature transfère au tribunal provincial non pas une compétence précise ou spécifique, mais une compétence exclusive étendue dans un vaste domaine situé au cœur du droit privé. La présente affaire offre à notre Cour l'occasion de clarifier la frontière que les provinces ne doivent pas franchir dans l'exercice de leur compétence en matière d'administration de la justice. Cette question constitue un nouveau jalon dans l'évolution de la jurisprudence relative à l'art. 96, puisqu'elle concerne un transfert en bloc de compétences d'une cour judiciaire vers une autre en matière d'obligations contractuelles et extracontractuelles se situant sous un seuil pécuniaire particulier, et retirant donc ces matières de la compétence des cours supérieures.

[4] L'article 96 vise à donner substance au compromis conclu à l'époque de la Confédération en protégeant le statut particulier des cours supérieures de juridiction générale à titre de pierre angulaire de notre système de justice unitaire. Les principes de l'unité nationale et de la primauté du droit occupent une place centrale dans cette organisation judiciaire. Pour que l'art. 96 remplisse sa mission, notre Cour a développé toute une variété de tests à travers le temps, dont les manifestations les plus récentes sont le test en trois volets du *Renvoi sur la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714

[1995] 4 S.C.R. 725. These two tests are based on a shared concern reflected in earlier jurisprudence: the nature and role of superior courts are to be protected, and the creation of courts with provincially appointed judges that mirror or usurp the functions of superior courts is not permitted.

[5] The three-step *Residential Tenancies* test limits the granting of power or jurisdiction over a type of dispute where, at the time of Confederation, the power or jurisdiction came exclusively or primarily within the remit of the superior courts. In our view, the application of this test does not on its own render art. 35 para. 1 *C.C.P.* unconstitutional. Indeed, there was sufficient general involvement by the inferior courts in civil disputes pertaining to the law of contractual and extracontractual obligations in three of the four founding provinces.

[6] The second test aims to determine whether a grant of jurisdiction infringes on the superior courts' core jurisdiction either through an alteration of their essential nature or because they are prevented from playing their central role conferred by s. 96. Article 35 para. 1 *C.C.P.* infringes on the superior courts' general private law jurisdiction — an essential feature that forms part of their core jurisdiction — in a way that is inconsistent with the Constitution. Both the Superior Court and the Court of Québec play an important part in maintaining the rule of law, enjoy the guarantees of judicial independence, are composed of professional, qualified judges, and promote access to justice. These shared characteristics are essential to the proper functioning of both courts and to the protection of the public. While we acknowledge these realities, the question is nevertheless whether the province's wholesale transfer of an exclusive jurisdiction to a court with provincially appointed judges complies with s. 96.

(« *Renvoi sur la location résidentielle* »), ainsi que celui de la compétence fondamentale reconnu dans l'arrêt *MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725. Ces deux cadres d'analyse reposent sur une préoccupation commune qui animait déjà la jurisprudence antérieure à leur élaboration : la nature et le rôle des cours supérieures doivent être protégés et la création de cours de nomination provinciale qui sont parallèles aux cours supérieures ou qui usurpent leurs fonctions n'est pas permise.

[5] Le test en trois volets du *Renvoi sur la location résidentielle* restreint l'attribution d'un pouvoir ou d'une compétence sur un type de différend quand, à l'époque de la Confédération, ce pouvoir ou cette compétence relevaient exclusivement ou principalement des cours supérieures. Selon nous, la seule application du test en trois volets du *Renvoi sur la location résidentielle* n'a pas pour effet de rendre inconstitutionnel l'art. 35 al. 1 *C.p.c.* De fait, il existait un engagement général suffisant des tribunaux inférieurs en matière de litiges civils fondés sur le droit des obligations contractuelles et extracontractuelles dans trois des quatre provinces fondatrices.

[6] Le deuxième test cherche à déterminer si une attribution de compétence porte atteinte à la compétence fondamentale des cours supérieures, soit en changeant la nature essentielle de ces cours, soit en les empêchant de jouer le rôle central qui leur incombe en vertu de l'art. 96. L'article 35 al. 1 *C.p.c.* porte atteinte à la compétence générale en droit privé des cours supérieures — une caractéristique essentielle faisant partie de leur compétence fondamentale — d'une manière qui ne saurait être permise par la Constitution. Tant la Cour supérieure que la Cour du Québec jouent un rôle important quant au maintien de la primauté du droit, bénéficient des garanties d'indépendance judiciaire, sont composées de juges professionnels et qualifiés et promeuvent l'accès à la justice. Ces caractéristiques communes sont essentielles au bon fonctionnement des deux cours et à la protection du public. Bien que nous reconnaissions ces réalités, la question demeure celle de savoir si l'art. 96 permet à la province de transférer en bloc une compétence exclusive à une cour de nomination provinciale.

[7] In this distinct context, we have looked to a wide range of factors to answer that question: the scope of the jurisdiction granted by art. 35 para. 1 *C.C.P.*, the exclusivity of the grant, the high monetary limit, the available appeal mechanisms, and the absence of a societal objective capable of justifying the legislation. The weighing of the relevant factors leads us to conclude that the grant to the Court of Québec of exclusive jurisdiction over civil disputes concerning contractual and extracontractual obligations up to a value of less than $85,000 unduly compromises the position of s. 96 courts and is unconstitutional. The scope of the jurisdiction granted by art. 35 para. 1 *C.C.P.*, combined with the various features of the institutional context in which that jurisdiction is exercised, transforms the Court of Québec into a prohibited parallel court and impermissibly infringes on the core jurisdiction of the Superior Court. This necessarily undermines the crucial role the Quebec Superior Court plays in the Canadian judicial system.

[8] We agree with the Court of Appeal that the monetary limit is too high when considered in its historical and institutional contexts. It is noteworthy that the transfer of jurisdiction to the Court of Québec not only grants a broad civil jurisdiction in the area of obligations that is circumscribed by a monetary limit, but also removes that jurisdiction from the Quebec Superior Court. This improperly impinges on the Superior Court's ability to hear and rule on disputes in a field at the heart of Quebec private law. No other court with provincially appointed judges in Canada has a comparable exclusive jurisdiction in civil matters: the other provinces retain a form of concurrent jurisdiction between courts with provincially appointed judges and s. 96 courts.

[9] Other characteristics of the Court of Québec likewise support the conclusion that the impugned article oversteps the bounds of constitutionality. Both courts hear civil cases involving contractual and extracontractual matters and apply the same laws

[7] À la lumière de ce contexte particulier, nous avons examiné une vaste gamme de facteurs afin de répondre à cette question : l'étendue de la compétence attribuée par l'art. 35 al. 1 *C.p.c.*, le caractère exclusif de l'attribution, le seuil pécuniaire élevé, les mécanismes d'appel prévus par la loi et l'absence d'un objectif social susceptible de justifier la mesure législative. La mise en balance des facteurs pertinents nous mène à la conclusion que l'attribution d'une compétence exclusive à la Cour du Québec sur les litiges civils en matière d'obligations contractuelles et extracontractuelles jusqu'à une valeur de moins de 85 000 $ compromet indûment la position des cours visées à l'art. 96 et est inconstitutionnelle. L'ampleur de la compétence attribuée par l'art. 35 al. 1 *C.p.c.*, jumelée avec les différents attributs du contexte institutionnel dans le cadre duquel elle s'exerce, transforme la Cour du Québec en une cour parallèle prohibée et porte une atteinte inadmissible à la compétence fondamentale de la Cour supérieure. Cela affaiblit nécessairement le rôle primordial que la Cour supérieure du Québec est appelée à jouer au sein du système judiciaire canadien.

[8] Nous sommes d'accord avec la Cour d'appel que le seuil pécuniaire est trop élevé, lorsque considéré dans son contexte historique et institutionnel. Il est important de noter que le transfert de compétence à la Cour du Québec ne confère pas seulement une vaste compétence civile en matière d'obligations encadrée par un seuil monétaire, il retire également cette compétence à la Cour supérieure du Québec. Cela affecte d'une manière inadmissible sa capacité d'entendre et de trancher les litiges relevant d'un domaine situé au cœur du droit privé québécois. Aucune autre cour de nomination provinciale au Canada ne possède une compétence exclusive comparable en matière civile : les autres provinces maintiennent une certaine forme de compétence concurrente entre les cours de nomination provinciale et celles visées à l'art. 96.

[9] D'autres caractéristiques de la Cour du Québec appuient aussi la conclusion que l'article contesté franchit la ligne de la constitutionnalité. En effet, les deux cours entendent des litiges civils en matière contractuelle et extracontractuelle et tranchent ces

and procedural rules in adjudicating them. Further, the Court of Québec's decisions can be appealed directly to the Quebec Court of Appeal. As a result, the jurisdiction provided for in art. 35 para. 1 *C.C.P.* gives the Court of Québec every appearance of being a parallel court and undermines the central role reserved to the superior courts in the Canadian judicial system by ss. 96 to 100 of the *Constitution Act, 1867*. It is difficult to see what remains to distinguish the Court of Québec from a constitutionally protected superior court.

[10] In our view, the second reference question, which relates to the Court of Québec's application of the obligation of judicial deference when it hears an appeal from an administrative decision under certain provincial statutes, is now moot as a result of this Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, and the coming into force of s. 83.1 of the *Courts of Justice Act*, CQLR, c. T-16. We therefore decide not to address it.

[11] For the reasons that follow, we would dismiss the appeals on the basis that art. 35 para. 1 *C.C.P.* is unconstitutional and the second question is moot.

II. Background to the Reference to the Quebec Court of Appeal

[12] On January 1, 2016, the new *Code of Civil Procedure*, including art. 35, came into force. Article 35 grants the Court of Québec exclusive jurisdiction over all civil disputes in which the value of the subject matter or the amount being claimed is less than $85,000. However, this jurisdiction excludes family matters other than adoption, and any other jurisdiction that is exclusively assigned by law to another court or adjudicative body. Article 35 para. 1 *C.C.P.* reads as follows:

> The Court of Québec has exclusive jurisdiction to hear and determine applications in which the value of the subject matter of the dispute or the amount claimed, including

derniers en appliquant les mêmes lois et les mêmes règles procédurales. De plus, les décisions rendues par la Cour du Québec peuvent faire l'objet d'un appel directement à la Cour d'appel du Québec. Donc, la compétence édictée à l'art. 35 al. 1 *C.p.c.* confère à la Cour du Québec toutes les apparences d'une cour parallèle et affaiblit la position centrale réservée aux cours supérieures dans le système judiciaire canadien par les art. 96 à 100 de la *Loi constitutionnelle de 1867*. Il est devenu difficile de voir ce qui distingue encore la Cour du Québec d'une cour supérieure constitutionnellement protégée.

[10] À notre avis, la seconde question du renvoi, portant sur l'application par la Cour du Québec de l'obligation de déférence judiciaire lorsqu'elle entend un appel d'une décision administrative en vertu de certaines lois provinciales, est devenue théorique en raison du prononcé de l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65, [2019] 4 R.C.S. 653, ainsi que de l'entrée en vigueur de l'art. 83.1 de la *Loi sur les tribunaux judiciaires*, RLRQ, c. T-16. Nous décidons donc de ne pas y répondre.

[11] Pour les motifs qui suivent, nous sommes d'avis de rejeter les pourvois au motif que l'art. 35 al. 1 *C.p.c.* est inconstitutionnel et que la seconde question est théorique.

II. Contexte du renvoi à la Cour d'appel du Québec

[12] Le 1er janvier 2016, le nouveau *Code de procédure civile*, incluant l'art. 35, est entré en vigueur. L'article 35 confère à la Cour du Québec une compétence exclusive pour tout litige en matière civile dont la valeur de l'objet ou la somme réclamée est inférieure à 85 000 $. Toutefois, cette compétence exclut les matières familiales, autres que l'adoption, et toute autre compétence attribuée exclusivement par la loi à un autre tribunal ou organisme juridictionnel. Le libellé de l'art. 35 al. 1 *C.p.c.* se lit comme suit :

> La Cour du Québec a compétence exclusive pour entendre les demandes dans lesquelles soit la valeur de l'objet du litige, soit la somme réclamée, y compris en matière

in lease resiliation matters, is less than $85,000, exclusive of interest; it also hears and determines applications ancillary to such an application, including those for the specific performance of a contractual obligation. However, it does not have such jurisdiction in cases where jurisdiction is formally and exclusively assigned to another court or adjudicative body, or in family matters other than adoption.

[13] The structure of Quebec's judicial organization, of which art. 35 forms part, can be understood by briefly reviewing the scope of the Superior Court's and the Court of Québec's current jurisdictions in order to get a full picture of the issues raised by these appeals.

[14] The Court of Québec, as a statutory court, may exercise only the jurisdiction conferred on it by the legislature. Under Quebec legislation, the Court of Québec has jurisdiction throughout Quebec over civil, criminal and penal matters, as well as over youth matters. This three-pronged jurisdiction is reflected in the three divisions of the court (ss. 2, 79 and 106 of the *Courts of Justice Act*). The court also sits on administrative matters and on appeals in cases provided for by law (s. 79). Pursuant to art. 35 *C.C.P.*, the Court of Québec's Civil Division has exclusive jurisdiction to hear and determine applications where the value of the subject matter is less than $85,000. Applications not exceeding $15,000 are heard by the Civil Division's Small Claims Division (art. 536 *C.C.P.*).

[15] By contrast, the Quebec Superior Court, as the court of original general jurisdiction, has province-wide jurisdiction to hear and determine any matter that is not formally and exclusively assigned to another court (art. 33 para. 1 *C.C.P.*). As a result, it hears, *inter alia*, civil suits in which the amount at issue is at least $85,000, cases relating to immovable property or its dismemberments, successions and wills, and most family law cases, including divorce applications. The Superior Court also has exclusive jurisdiction over class actions and injunctions (art. 33 para. 2 *C.C.P.*), a general power of judicial review (art. 34 para. 1 *C.C.P.*) and jurisdiction to hear and determine a number of civil proceedings provided for

de résiliation de bail, est inférieure à 85 000 $, sans égard aux intérêts; elle entend également les demandes qui leur sont accessoires portant notamment sur l'exécution en nature d'une obligation contractuelle. Néanmoins, elle n'exerce pas cette compétence dans les cas où la loi l'attribue formellement et exclusivement à une autre juridiction ou à un organisme juridictionnel, non plus que dans les matières familiales autres que l'adoption.

[13] Pour bien comprendre la structure de l'organisation judiciaire québécoise dans laquelle s'inscrit l'art. 35, il convient d'exposer succinctement l'étendue des compétences actuelles de la Cour supérieure et de la Cour du Québec, afin d'avoir une vue d'ensemble des enjeux soulevés par les présents pourvois.

[14] La Cour du Québec, à titre de cour statutaire, n'est compétente que dans les limites prévues par la loi. En vertu de la législation québécoise, la Cour du Québec a compétence sur tout le territoire du Québec en matière civile, criminelle et pénale, ainsi que dans les matières relatives à la jeunesse. Cette triple compétence se reflète dans les trois chambres la constituant (art. 2, 79 et 106 de la *Loi sur les tribunaux judiciaires*). De plus, la cour siège en matière administrative et en appel dans les cas prévus par la loi (art. 79). En vertu de l'art. 35 *C.p.c.*, la Chambre civile de la Cour du Québec est seule compétente pour entendre les demandes dont la valeur de l'objet en litige est inférieure à 85 000 $. Les demandes d'au plus 15 000 $ sont entendues à la Division des petites créances de cette même chambre (art. 536 *C.p.c.*).

[15] En ce qui concerne la Cour supérieure du Québec, étant le tribunal de droit commun, elle est compétente à l'échelle provinciale pour entendre toute demande en toute matière non attribuée de manière formelle et exclusive à une autre juridiction (art. 33 al. 1 *C.p.c.*). Conséquemment, la Cour supérieure entend, entre autres, les litiges en matière civile dont la valeur est de 85 000 $ et plus, ainsi que ceux relatifs à la propriété immobilière ou à ses démembrements, aux affaires successorales et testamentaires et la majorité des litiges en matière familiale, y compris les demandes en divorce. De plus, elle possède la compétence exclusive en matière d'actions collectives et d'injonctions (art. 33 al. 2

in federal legislation, such as applications relating to bankruptcy and insolvency.

[16] The Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec ("Chief Justice of the Superior Court et al.") argue that the effect of art. 35 *C.C.P.* is to deny Quebec litigants the right to file any civil claim in the Superior Court in which the value of the subject matter of the dispute is less than $85,000. They argue this provision prevents the Superior Court from stating and advancing the law with respect to such claims. The Chief Justice of the Superior Court et al. challenge the constitutionality of art. 35 *C.C.P.* on this basis.

[17] For this very reason, at the time of the *Code of Civil Procedure* reform, the Chief Justice of the Superior Court et al. urged the Quebec legislature not to raise the ceiling of the Court of Québec's civil jurisdiction from $70,000 to $85,000. Moreover, they asked the Quebec government to submit a reference to the Quebec Court of Appeal to ask that court to rule on the constitutionality of the Court of Québec's civil jurisdiction. After these requests were denied, the Chief Justice of the Superior Court et al. filed an originating application on July 19, 2017, seeking a declaratory judgment of unconstitutionality in the Superior Court. In their application, they also contested the appellate jurisdiction granted to the Court of Québec with respect to certain administrative decisions on the basis that the requirement of deference recognized in the case law is incompatible with the superior courts' power of judicial review.

[18] In August 2017, in response to those legal proceedings, the Quebec government issued Order in Council 880-2017, *Concernant un renvoi à la Cour d'appel portant sur la validité constitutionnelle des dispositions de l'article 35 du Code de procédure civile qui fixent à moins de 85 000 $ la compétence pécuniaire exclusive de la Cour du Québec et sur la compétence d'appel attribuée à la Cour du Québec*,

C.p.c.), est investie d'un pouvoir général de contrôle judiciaire (art. 34 al. 1 *C.p.c.*) et est compétente pour entendre nombre de recours en matière civile prévus à des lois fédérales, comme les demandes relatives à la faillite et à l'insolvabilité.

[16] Selon le juge en chef, la juge en chef associée et la juge en chef adjointe de la Cour supérieure du Québec (« juge en chef de la Cour supérieure *et al.* »), l'art. 35 *C.p.c.* a pour effet de nier aux justiciables québécois le droit de s'adresser à la Cour supérieure pour toute demande en matière civile dont la valeur de l'objet en litige est inférieure à 85 000 $. Ils prétendent que cette disposition empêche la Cour supérieure d'énoncer et de faire évoluer le droit à l'égard de ces réclamations. Le juge en chef de la Cour supérieure *et al.* remettent ainsi en question la constitutionnalité de l'art. 35 *C.p.c.*

[17] C'est d'ailleurs pourquoi, au moment de la réforme du *Code de procédure civile*, le juge en chef de la Cour supérieure *et al.* ont pressé le législateur québécois de ne pas hausser le plafond de compétence civile de la Cour du Québec de 70 000 $ à 85 000 $. Ils ont également demandé au gouvernement du Québec de soumettre à la Cour d'appel du Québec un renvoi afin qu'elle se prononce sur la constitutionnalité de la compétence civile de la Cour du Québec. Ces demandes ayant été refusées, le juge en chef de la Cour supérieure *et al.* ont déposé, le 19 juillet 2017, une demande introductive d'instance à la Cour supérieure recherchant une déclaration d'inconstitutionnalité. Dans cette même demande, ils contestaient également la compétence d'appel attribuée à la Cour du Québec à l'égard de certaines décisions administratives, au motif que l'obligation de déférence reconnue par la jurisprudence y étant liée serait incompatible avec le pouvoir de contrôle judiciaire des cours supérieures.

[18] En août 2017, en réponse à ces procédures judiciaires, le gouvernement du Québec adoptait le Décret 880-2017, *Concernant un renvoi à la Cour d'appel portant sur la validité constitutionnelle des dispositions de l'article 35 du Code de procédure civile qui fixent à moins de 85 000 $ la compétence pécuniaire exclusive de la Cour du Québec et sur la compétence d'appel attribuée à la Cour du Québec*,

(2017) 149 G.O. II, 4495. In October 2017, the Attorney General of Quebec ("AGQ") filed with the Court of Appeal a notice of reference submitting the following questions:

[TRANSLATION]

1. Are the provisions of the first paragraph of article 35 of the *Code of Civil Procedure* (chapter C-25.01), setting at less than $85,000 the limit to the exclusive monetary jurisdiction of the Court of Québec, valid with regard to section 96 of the *Constitution Act, 1867*, given the jurisdiction of Quebec over the administration of justice under paragraph 14 of section 92 of the *Constitution Act, 1867*?

2. Is it compatible with section 96 of the *Constitution Act, 1867* to apply the obligation of judicial deference, which characterizes the application for judicial review, to the appeals to the Court of Québec provided for in sections 147 of the *Act respecting access to documents held by public bodies and the protection of personal information* (chapter A-2.1), 115.16 of the *Act respecting the Autorité des marchés financiers* (chapter A-33.2), 100 of the *Real Estate Brokerage Act* (chapter C-73.2), 379 of the *Act respecting the distribution of financial products and services* (chapter D-9.2), 159 of the *Act respecting administrative justice* (chapter J-3), 240 and 241 of the *Police Act* (chapter P-13.1), 91 of the *Act respecting the Régie du logement* (chapter R-8.1) and 61 of the *Act respecting the protection of personal information in the private sector* (chapter P-39.1)?

(Order in Council, at p. 4496)

(2017) 149 G.O. II, 4495. En octobre 2017, la procureure générale du Québec (« PGQ ») déposait à la Cour d'appel un Avis de renvoi dans lequel les questions suivantes lui étaient soumises :

1. Les dispositions du premier alinéa de l'article 35 du *Code de procédure civile* (chapitre C-25.01) fixant, à moins de 85 000 $, le seuil de la compétence pécuniaire exclusive de la Cour du Québec, sont-elles valides au regard de l'article 96 de la *Loi constitutionnelle de 1867*, étant donné la compétence du Québec sur l'administration de la justice aux termes du paragraphe 92 (14) de la *Loi constitutionnelle de 1867*?

2. Est-il compatible avec l'article 96 de la *Loi constitutionnelle de 1867* d'appliquer l'obligation de déférence judiciaire, qui caractérise le pourvoi en contrôle judiciaire, aux appels à la Cour du Québec prévus aux articles 147 de la *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels* (chapitre A-2.1), 115.16 de la *Loi sur l'Autorité des marchés financiers* (chapitre A-33.2), 100 de la *Loi sur le courtage immobilier* (chapitre C-73.2), 379 de la *Loi sur la distribution des produits et services financiers* (chapitre D-9.2), 159 de la *Loi sur la justice administrative* (chapitre J-3), 240 et 241 de la *Loi sur la police* (chapitre P-13.1), 91 de la *Loi sur la Régie du logement* (chapitre R-8.1) et 61 de la *Loi sur la protection des renseignements personnels dans le secteur privé* (chapitre P-39.1)?

(Décret, p. 4496)

III. Quebec Court of Appeal, 2019 QCCA 1492

[19] The Court of Appeal first outlined the origin and purpose of the provisions of the *Constitution Act, 1867* relating to the courts and the organization of justice, namely ss. 96 to 100, 129 and 133. Noting that these provisions are intended to reflect the United Kingdom's judicial system, the court concluded that the Constitution does not allow superior courts to be abolished or deprived of their core powers. Similarly, the court held that there is [TRANSLATION] "a prohibition against creating courts with provincially appointed judges that exercise, in whole or in part, the jurisdiction of the superior courts as 'shadows' or 'mirrors' thereof" (paras. 35 and 46-47

III. Cour d'appel du Québec, 2019 QCCA 1492

[19] La Cour d'appel a d'abord brossé un tableau de l'origine et de l'objet des dispositions de la *Loi constitutionnelle de 1867*, portant sur les tribunaux et l'organisation de la justice, soit les art. 96 à 100, 129 et 133. Rappelant que ces dispositions cherchent à refléter le système judiciaire du Royaume-Uni, la Cour d'appel a conclu que la Constitution interdit d'abolir les cours supérieures ou de leur retirer leurs pouvoirs fondamentaux. Similairement, la cour a conclu qu'il est « interdit d'établir des cours de nomination provinciale qui exerceraient, en tout ou en partie, la compétence des cours supérieures comme cours "parallèles" ou "miroirs" de celles-ci » (par. 35

(CanLII)). The Court of Appeal noted that the test developed in *Residential Tenancies* is generally used for this purpose.

[20] The Court of Appeal considered whether art. 35 *C.C.P.* infringes on the core jurisdiction of the Quebec Superior Court (para. 102). Relying on *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, the court held that the Quebec legislature may increase the amount of the Court of Québec's monetary jurisdiction only if it can do so without altering the core jurisdiction of the superior courts to "resolve disputes between individuals and decide questions of private . . . law" (para. 141, quoting *Trial Lawyers*, at para. 32).

[21] To identify the monetary limit beyond which an infringement on the core jurisdiction could not be justified, the Court of Appeal reviewed the structure of the courts in the other provinces. It then concluded that, [TRANSLATION] "[i]n light of the historical context as well as the objectives tied to the rule of law and national unity arising from section 96 of the *Constitution Act, 1867* . . . the Superior Court can retain its core jurisdiction to adjudicate civil disputes only if that jurisdiction applies to 'substantial' claims of litigants" (para. 148 (emphasis added)).

[22] The Court of Appeal took the amount of $100 as the starting point for its analysis, because that was the amount of [TRANSLATION] "the maximum monetary jurisdiction exercised in 1867 by some of the inferior courts charged with hearing certain civil matters" (para. 144). However, it stressed that updating the amount [TRANSLATION] "is only one of the elements for determining whether a claim is substantial for a present-day litigant" (para. 153). An increase over and above the actual updated amount would not automatically infringe on the core jurisdiction of the superior courts (para. 154). Other factors must be considered, such as [TRANSLATION] "(1) the monetary threshold for appeals as of right to the Court of Appeal; (2) the legislative objectives

et 46-47 (CanLII)). La Cour d'appel a rappelé que le test généralement utilisé à cette fin est celui élaboré dans le *Renvoi sur la location résidentielle*.

[20] La Cour d'appel s'est penchée sur la question de savoir si l'art. 35 *C.p.c.* portait atteinte à la compétence fondamentale de la Cour supérieure du Québec (par. 102). Se fondant sur l'arrêt *Trial Lawyers Association of British Columbia c. Colombie-Britannique (Procureur général)*, 2014 CSC 59, [2014] 3 R.C.S. 31, la cour a conclu que le législateur québécois ne pouvait accroître la compétence pécuniaire de la Cour du Québec que s'il le faisait sans altérer la compétence fondamentale des cours supérieures de « résoudre des différends opposant des particuliers et de trancher des questions de droit privé » (par. 141, citant *Trial Lawyers*, par. 32).

[21] Pour identifier le seuil pécuniaire à partir duquel une atteinte injustifiée à la compétence fondamentale se produirait, la Cour d'appel a considéré la structure des tribunaux dans les autres provinces. Elle a ensuite conclu « qu'en tenant compte tant du contexte historique que des objectifs de primauté du droit et d'unité nationale découlant de l'article 96 de la *Loi constitutionnelle de 1867*, la Cour supérieure ne peut conserver sa compétence fondamentale de trancher des différends en matière civile que si celle-ci s'applique à l'égard des réclamations "substantielles" des justiciables » (par. 148 (nous soulignons)).

[22] La Cour d'appel a retenu le montant de 100 $ comme point de départ de l'analyse, puisqu'il correspond « à la compétence pécuniaire maximale qu'exerçaient, en 1867, quelques-unes des cours inférieures chargées d'entendre certaines matières civiles » (par. 144). Elle a souligné que l'actualisation de la somme « ne constitue cependant qu'un des éléments permettant de déterminer le caractère substantiel d'une réclamation pour un justiciable contemporain » (par. 153). Une augmentation au-delà de l'actualisation réelle n'enfreindrait pas automatiquement la compétence fondamentale des cours supérieures (par. 154). D'autres facteurs doivent être considérés tels que « (1) le seuil pécuniaire prévu pour l'appel de plein droit à la Cour d'appel; (2) les

of the limits set on the jurisdiction of the Court of Québec and, consequently, of the Superior Court; and (3) empirical and statistical data" (para. 155).

[23] The Court of Appeal concluded that art. 35 *C.C.P.* is unconstitutional because it infringes on the core jurisdiction of the Superior Court to adjudicate certain substantial civil disputes by granting the Court of Québec jurisdiction over civil claims for less than $85,000, with the exception of certain excluded civil matters. In reaching this conclusion, the court considered, among other things, (i) the updated value of an amount of $100, which was a "substantial" amount in 1867, (ii) the threshold of $60,000 established by the Quebec legislature for an appeal as of right, and (iii) the legislative background regarding the determination of the ceiling. In light of the evidence and the applicable principles, the maximum limit for the jurisdiction of the Court of Québec must, to be consistent with s. 96, fall between $55,000 and $70,000, subject to future updates (para. 188).

[24] After reviewing increases in the threshold for appeals as of right and in the monetary ceiling of the civil jurisdiction of the Court of Québec, the Court of Appeal observed [TRANSLATION] "that there has long been parity between the threshold for appeals as of right to the Court of Appeal and the ceiling for the Court of Québec's exclusive jurisdiction" (para. 174). It emphasized that when these amounts were increased in 1995, the purpose was [TRANSLATION] "to foster greater efficiency within the judicial system, by [among other things] adjusting the jurisdiction of the Court of Québec and reducing waiting times for hearings in the Superior Court" (para. 178). In the Court of Appeal's opinion, the situation became problematic when legislative amendments in 2002 raised the jurisdictional ceiling from $30,000 to $70,000 with a view to reducing costs and delays, as that increase was greater than the one that would result from converting the 1867 amount of $100 to 2002 dollars ($37,175.75) (para. 181). The Court of Appeal noted that the legislative debates revealed that the idea [TRANSLATION] "that inflation had eroded the Court of Québec's jurisdiction" seemed to have been the primary motivation behind these

objectifs du législateur lorsqu'il fixe les limites de la compétence de la Cour du Québec, et, de ce fait, celles de la Cour supérieure; et (3) les données empiriques et statistiques » (par. 155).

[23] La Cour d'appel a conclu que l'art. 35 *C.p.c.* est inconstitutionnel, puisqu'il entrave la compétence fondamentale de la Cour supérieure de trancher certains différends substantiels en matière civile en attribuant à la Cour du Québec une compétence sur les réclamations civiles de moins de 85 000 $, hormis dans certaines matières civiles exclues. La cour est arrivée à cette conclusion en considérant notamment (i) l'actualisation de la somme « substantielle » de 100 $ en 1867, (ii) le seuil de 60 000 $ établi par le législateur québécois pour un appel de plein droit et (iii) le contexte législatif relatif à la fixation du plafond. Au regard de la preuve et des principes applicables, la limite maximale de la compétence de la Cour du Québec doit se situer entre 55 000 $ et 70 000 $, sous réserve d'actualisations futures, afin de respecter l'art. 96 (par. 188).

[24] En examinant les augmentations du seuil de l'appel de plein droit et du plafond pécuniaire de la compétence de la Cour du Québec en matière civile, la Cour d'appel a constaté « qu'il a longtemps existé une parité entre le seuil de l'appel de plein droit à la Cour d'appel et la limite supérieure de la compétence exclusive de la Cour du Québec » (par. 174). Elle a souligné que lorsque les seuils ont été augmentés en 1995, l'objectif était de « favoriser une plus grande efficacité du système judiciaire, notamment par la revalorisation de la compétence de la Cour du Québec et par une réduction des délais d'audition en Cour supérieure » (par. 178). De l'avis de la Cour d'appel, la situation devient problématique lors de la modification législative de 2002, lorsque le plafond de la compétence passe de 30 000 $ à 70 000 $ dans un objectif de réduction des coûts et des délais, puisque cette hausse est supérieure à l'actualisation du montant de 100 $ en 1867 à la valeur du dollar courant en 2002 (37 175,75 $) (par. 181). La Cour d'appel a noté que les débats parlementaires révèlent que « l'idée que l'inflation gruge la compétence de la Cour du Québec » semble avoir été la principale motivation de ces augmentations (par. 182). Pour la plus récente

increases (para. 182). For the most recent increase brought about as part of the *C.C.P.* reform in 2014, the legislature merely considered the previous ceiling of $70,000 and updated it to $85,000. The Court of Appeal concluded that this last increase was [TRANSLATION] "the extension of an ever-growing erosion of the constitutional jurisdiction of the Quebec Superior Court over civil matters" (para. 187).

[25] On the second reference question, the Court of Appeal held that applying the obligation of judicial deference to administrative appeals to the Court of Québec is compatible with s. 96. This is because the Superior Court retains [TRANSLATION] "its full superintending and reforming power over administrative decisions and decisions of inferior tribunals as well as its fundamental role as the guardian of an independent and unified system of justice in Canada" (paras. 365 and 367). We note, however, that the Court of Appeal issued its opinion before our decision in *Vavilov*.

IV. Analysis on the First Question

A. *Scope of the First Reference Question*

[26] The first question before this Court differs from the one it considered in *Renvoi touchant la constitutionnalité de la Loi concernant la juridiction de la Cour de Magistrat*, [1965] S.C.R. 772. That decision dealt with the constitutionality of amending legislation that had raised the monetary jurisdiction of the Magistrate's Court from $200 to $500. In that case, this Court reversed the Quebec Court of Appeal's opinion on the basis that it had ruled on the whole of the Magistrate Court's jurisdiction rather than specifically addressing the particular concern underlying the reference question and the recitals contained in the order in council giving rise to the reference.

[27] The reference question in this case has been stated in much broader terms, and we are not limited to looking only at the legislation that increased the amount of the Court of Québec's monetary jurisdiction from $70,000 to $85,000. With respect for the Court of Appeal, we do not agree that the question confines our analysis to "the monetary ceiling

hausse effectuée au moment de la réforme du *C.p.c.* en 2014, le législateur n'a fait que retenir le plafond antérieur de 70 000 $ pour l'actualiser à 85 000 $. La Cour d'appel a conclu que la dernière hausse est « la continuation d'une érosion de plus en plus prononcée de la compétence constitutionnelle de la Cour supérieure du Québec en matière civile » (par. 187).

[25] Quant à la seconde question du renvoi, la Cour d'appel a conclu qu'appliquer l'obligation de déférence judiciaire aux appels administratifs à la Cour du Québec est compatible avec l'art. 96, puisque la Cour supérieure conserve « l'intégralité de son propre pouvoir de surveillance et de contrôle sur l'administration et les instances inférieures ainsi que son rôle fondamental de veiller à une justice indépendante et unifiée au Canada » (par. 365 et 367). Nous soulignons, toutefois, que la Cour d'appel a émis cet avis avant que notre Cour rende l'arrêt *Vavilov*.

IV. Analyse de la première question

A. *La portée de la première question du renvoi*

[26] La première question dont notre Cour est saisie diffère de celle en cause dans le *Renvoi touchant la constitutionnalité de la Loi concernant la juridiction de la Cour de Magistrat*, [1965] R.C.S. 772. Cette décision concernait la constitutionnalité d'une loi modificative portant sur la compétence pécuniaire de la Cour de Magistrat de 200 $ à 500 $. Dans cette affaire, notre Cour a renversé l'opinion de la Cour d'appel du Québec au motif que celle-ci s'était prononcée sur l'ensemble de la juridiction de la Cour de Magistrat, au lieu de répondre spécifiquement à la préoccupation sous-jacente à la question et aux considérants contenus au décret à l'origine du renvoi.

[27] La question soumise par renvoi en l'espèce est formulée en termes beaucoup plus généraux et il ne s'agit pas ici d'examiner uniquement la mesure législative qui a porté la compétence pécuniaire de la Cour du Québec de 70 000 $ à 85 000 $. Avec égards pour la Cour d'appel, nous ne croyons pas que la question restreigne l'analyse au « plafond monétaire

imposed by article 35 *C.C.P.*" (C.A. reasons, at para. 102; see also paras. 137-38). As worded, the question expressly mentions the monetary limit and the exclusivity of the Court of Québec's jurisdiction. These are distinctive characteristics of Quebec's court structure. Unlike in other provinces, the principal distinction in Quebec between the court with provincially appointed judges and the superior court, aside from certain remedies, is the monetary limit for the disputes each court may hear. Apart from this distinction, the two courts hear and determine identical applications, apply the same *Code of Civil Procedure*, and the decisions of both can be appealed to the Quebec Court of Appeal. Quebec's judicial system is also unique in that all civil disputes falling within the scope of art. 35 *C.C.P.* are removed from the Superior Court's jurisdiction and assigned exclusively to the Court of Québec.

imposé par l'article 35 *C.p.c.* » (motifs de la C.A., par. 102; voir aussi par. 137-138). La question telle que formulée mentionne expressément le seuil pécuniaire et la compétence exclusive de la Cour du Québec. Ces derniers sont des traits distinctifs de la structure judiciaire québécoise. Contrairement aux autres provinces, la distinction principale au Québec entre la cour de justice de nomination provinciale et la cour supérieure, exception faite de certaines réparations, s'avère le seuil pécuniaire en ce qui a trait aux litiges que chacune peut entendre. Hormis cette distinction, les deux cours connaissent des demandes identiques, appliquent le même *Code de procédure civile* et leurs décisions peuvent toutes deux faire l'objet d'un appel à la Cour d'appel du Québec. Le système judiciaire québécois est également unique en ce que tous les litiges civils relevant du champ de l'art. 35 *C.p.c.* sont retranchés de la compétence de la Cour supérieure et attribués exclusivement à la Cour du Québec.

[28] Although the monetary limit and the exclusivity of the grant of jurisdiction are both important to the analysis, the language of the reference question requires a more wide-ranging analysis that takes into account how courts with provincially appointed judges and superior courts operate. The question requires a more comprehensive answer on the constitutionality of art. 35 para. 1 *C.C.P.* in light of ss. 92(14) and 96 of the *Constitution Act, 1867*. Whether the grant is constitutional must therefore be examined having regard not only to the distinctive characteristics underlined above, but also to other characteristics relating to the broader context of the grant. Such an approach is necessary to determine the impact the grant might have on the jurisdiction of the province's superior court. In cases where this Court has examined s. 96, it has always been careful to consider the provisions at issue in their context rather than in the abstract (*Tomko v. Labour Relations Board (N.S.)*, [1977] 1 S.C.R. 112, at p. 120; *Residential Tenancies*, at p. 735; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; *MacMillan Bloedel*, at paras. 12 and 59). That is the approach that must be taken here.

[28] Bien que le seuil pécuniaire et l'exclusivité de l'attribution de compétence soient deux dimensions importantes de l'analyse, le libellé de la question posée par renvoi requiert une analyse plus vaste qui doit tenir compte du fonctionnement des cours de nomination provinciale et des cours supérieures. En effet, cette question appelle une réponse plus large sur la constitutionnalité de l'art. 35 al. 1 *C.p.c.* au regard du par. 92(14) et de l'art. 96 de la *Loi constitutionnelle de 1867*. La constitutionnalité de l'attribution doit donc être examinée non seulement en fonction des traits distinctifs soulevés plus haut, mais également à la lumière d'autres caractéristiques s'inscrivant dans le contexte plus général de l'attribution. Une telle approche est nécessaire afin de déterminer l'impact éventuel de cette attribution sur la compétence de la cour supérieure de la province. La jurisprudence de notre Cour relative à l'art. 96 s'est d'ailleurs toujours montrée soucieuse de considérer les dispositions à l'étude dans leur contexte plutôt que dans l'abstrait (*Tomko c. Labour Relations Board (N.-É.)*, [1977] 1 R.C.S. 112, p. 120; *Renvoi sur la location résidentielle*, p. 735; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, p. 234; *MacMillan Bloedel*, par. 12 et 59). C'est l'approche qui doit être retenue ici.

B. *Constitutional Framework*

[29] Superior courts are the centrepiece of the unitary judicial system created by ss. 92(14), 96 to 100 and 129 of the *Constitution Act, 1867*. These provisions lay one of the key foundations of Canada's Constitution, as they represent the balance struck between our federation's national and provincial aspirations (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 23; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 87).

[30] Constitutional provisions must be "placed in [their] proper linguistic, philosophic and historical contexts" and interpreted in a broad and purposive manner (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; see also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 52; *Reference re Supreme Court Act*, at para. 19). To properly understand the scope of the protection of the superior courts under s. 96, we must therefore consider the historical context, that is, the compromise reached at Confederation that is central to Canada's judicial system, as well as the role and purpose of s. 96.

[31] This Court's juriprudence on s. 96 of the *Constitution Act, 1867* upholds the two fundamental principles underlying this provision, namely national unity and the rule of law. The case law has sought to safeguard the compromise reached at Confederation by preserving the unitary nature of our judicial system. To achieve this objective, the Court has, over the years, developed various tests designed to protect the status of the superior courts. The creation of courts that mirror the superior courts has always been considered an important limit that cannot be overstepped. All the tests have had the purpose, among others, of precluding such an outcome. If the role of the superior courts were undermined by the creation of parallel courts, Canada's judicial system would be stripped of its unitary nature and could be

B. *Le cadre constitutionnel*

[29] Les cours supérieures sont la pièce maîtresse du système judiciaire unitaire mis en œuvre par le par. 92(14) ainsi que les art. 96 à 100 et 129 de la *Loi constitutionnelle de 1867*. Ces dispositions établissent l'un des fondements importants de la Constitution du Canada, puisqu'elles représentent l'équilibre atteint entre les aspirations nationales et provinciales de notre fédération (*Renvoi relatif à la réforme du Sénat*, 2014 CSC 32, [2014] 1 R.C.S. 704, par. 23; *Renvoi relatif à la Loi sur la Cour suprême, art. 5 et 6*, 2014 CSC 21, [2014] 1 R.C.S. 433, par. 87).

[30] Les textes constitutionnels doivent être « situé[s] dans [leurs] contextes linguistique, philosophique et historique appropriés » et être interprétés de manière généreuse conformément à leur objet (*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344; voir aussi *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 155-156; *R. c. Comeau*, 2018 CSC 15, [2018] 1 R.C.S. 342, par. 52; *Renvoi relatif à la Loi sur la Cour suprême*, par. 19). Pour bien comprendre la portée de la protection des cours supérieures découlant de l'art. 96, il importe donc de se pencher sur le contexte historique, c'est-à-dire le compromis conclu à l'époque de la Confédération qui se situe au cœur du système judiciaire canadien, ainsi que sur le rôle et l'objet de l'art. 96.

[31] La jurisprudence de notre Cour relative à l'art. 96 de la *Loi constitutionnelle de 1867* repose sur deux grands principes fondamentaux, soit l'unité nationale et la primauté du droit. Les décisions de notre Cour visent à donner substance au compromis conclu à l'époque de la Confédération en préservant le caractère unitaire de notre système judiciaire. Pour atteindre cet objectif, notre Cour a développé à travers le temps une variété de tests destinés à sauvegarder le statut des cours supérieures. De tout temps, la création de cours parallèles aux cours supérieures a été considérée comme une importante limite à ne pas franchir. Tous les tests ont eu pour objectif, entre autres, de prévenir une telle situation. Si le rôle des cours supérieures s'affaiblit par la création de cours parallèles, le système judiciaire canadien

transformed into a dualistic system like that of the United States.

(1) Compromise Reached at Confederation

[32] Historically, the English judicial system was based on a dichotomy between so-called inferior courts and the superior courts whose judges were appointed by the monarch (W. Blackstone, *Commentaries on the Laws of England* (1765), Book I, at pp. 258 and 327). The term "inferior court" was based on the fact that the powers and jurisdiction of such courts were strictly limited by their constitutions. The superior courts, on the other hand, had an inherent general jurisdiction. The advantage of the inferior courts was their accessibility; their decentralization allowed for justice to be delivered to the door of everyone in the country, whereas the royal courts were less accessible to the ordinary citizen. However, royal courts historically had more extensive legal expertise than inferior courts. For this reason, royal courts exercised a power of control and supervision over decisions of inferior courts (G. Pépin, *Les tribunaux administratifs et la Constitution — Étude des articles 96 à 101 de l'A.A.N.B.* (1969), at pp. 134-35, quoting Halsbury, *The Laws of England* (3rd ed. 1954), vol. 9, at pp. 348-50).

[33] This fundamental dichotomy was imported into the colonies of British North America. Although the colonies established a three-tiered system consisting of a superior court, intermediate courts and inferior courts, the classification of the courts of the Canadian provinces reflected the dichotomy of the English system. There were superior courts on the one hand, and the non-superior courts on the other hand (Pépin, at pp. 134-35). This judicial system was maintained until the *Constitution Act, 1867* was enacted (J. Baker, *An Introduction to English Legal History* (5th ed. 2019), at pp. 57-59).

serait dépouillé de sa nature unitaire et risquerait de se transformer en un système dualiste, comme celui existant aux États-Unis.

(1) Le compromis conclu à l'époque de la Confédération

[32] Historiquement, le système judiciaire anglais s'appuyait sur une dichotomie entre les cours dites inférieures et les cours supérieures dont les juges étaient nommés par le monarque (W. Blackstone, *Commentaires sur les lois anglaises* (1822), t. I, p. 488-489, et t. II, p. 1). L'expression « cours inférieures » découlait du fait que leurs pouvoirs et compétences étaient strictement limités par leur constitution. Pour leur part, les cours supérieures détenaient une compétence générale inhérente. L'avantage des cours inférieures était leur accessibilité; leur décentralisation permettait d'amener la justice au pas de la porte de chaque personne à travers le pays, alors que les cours royales étaient moins accessibles pour le citoyen ordinaire. Cependant, les cours royales bénéficiaient historiquement d'une expertise plus approfondie du droit que les cours inférieures. Pour cette raison, les cours royales exerçaient un pouvoir de contrôle et de surveillance des décisions des cours inférieures (G. Pépin, *Les tribunaux administratifs et la Constitution — Étude des articles 96 à 101 de l'A.A.N.B.* (1969), p. 134-135, citant Halsbury, *The Laws of England* (3e éd. 1954), vol. 9, p. 348-350).

[33] Cette dichotomie fondamentale a été importée dans les colonies de l'Amérique du Nord britannique. En effet, quoique les colonies aient mis en place un système à trois niveaux comportant une cour supérieure, des cours intermédiaires et des tribunaux inférieurs, la classification des cours de justice des provinces canadiennes reflétait aussi cette dichotomie fondamentale d'origine anglaise. Il y avait les cours supérieures d'une part, et les autres cours d'autre part (Pépin, p. 134-135). Ce système judiciaire est demeuré en place jusqu'au moment de l'adoption de la *Loi constitutionnelle de 1867* (J. Baker, *An Introduction to English Legal History* (5e éd. 2019), p. 57-59).

[34] At the time of Confederation, the founding fathers chose to establish a constitution similar in principle to that of the United Kingdom, as recognized in the preamble to the *Constitution Act, 1867*. The judicial system and the constitutional arrangements passed on to us by the United Kingdom therefore constitute the historical foundation of our judicial system.

[35] However, because the founding provinces opted for a federal union rather than a unitary system like the one that existed in the United Kingdom, the British judicial system required adaptation. It was modified to take into account the fact that powers in Canada are shared by two levels of government — the provinces and the federal government.

[36] To guarantee both national unity and provincial autonomy, the Fathers of Confederation reached a compromise, creating a unitary justice system characterized by federal-provincial cooperation.[2] To begin, all courts of civil and criminal jurisdiction of the founding provinces would continue to exist (s. 129 of the *Constitution Act, 1867*). Thus, the distinction between superior and non-superior courts that characterized the British system was expressly maintained.

[37] In addition, s. 92(14) of the *Constitution Act, 1867* ensured that the provinces' exclusive power over the administration of justice would remain intact, thereby preserving their autonomy in that regard. A province could therefore reorganize its courts to reflect its own reality and needs. However, ss. 96 to 100 created an exception to the provinces' power by conferring on the federal government the power to appoint judges to the superior courts, fix their remuneration and remove them (*Residential Tenancies*, at p. 728). Another exception, s. 101 of the *Constitution Act, 1867*, gave the federal government the power to create federal statutory courts.

[2] The constitutional provisions reflecting this compromise reached at Confederation are reproduced in the Appendix.

[34] Au moment de la Confédération, les Pères fondateurs ont fait le choix d'établir une constitution reposant sur les mêmes principes que celle du Royaume-Uni, tel que le reconnaît le préambule de la *Loi constitutionnelle de 1867*. Le système judiciaire et les ententes constitutionnelles qui nous ont été transmises par le Royaume-Uni constituent donc le fondement historique de notre système judiciaire.

[35] Cependant, les provinces fondatrices ayant opté pour une union fédérale plutôt qu'un système unitaire comme celui qui prévalait au Royaume-Uni, le système judiciaire britannique ne pouvait être transposé sans adaptations. Ce système a donc dû être modifié afin de tenir compte du fait qu'au Canada, les compétences sont partagées entre deux ordres de gouvernement — les provinces et le fédéral.

[36] Pour garantir à la fois l'unité nationale et l'autonomie des provinces, les Pères de la Confédération en sont venus à un compromis en créant un système de justice unitaire marqué par la coopération fédérale-provinciale[2]. D'abord, tous les tribunaux de juridiction civile et criminelle au sein des provinces fondatrices continueraient d'exister (art. 129 de la *Loi constitutionnelle de 1867*). Ainsi, la distinction entre les cours supérieures et les cours non supérieures, caractérisant le système britannique, était expressément maintenue.

[37] En outre, le par. 92(14) de la *Loi constitutionnelle de 1867* laissait intact le pouvoir exclusif des provinces d'administrer la justice, préservant ainsi leur autonomie en la matière. Les provinces pouvaient donc réorganiser leurs tribunaux en fonction de leur propre réalité et de leurs besoins. Toutefois, les art. 96 à 100 créaient une exception au pouvoir des provinces en conférant au fédéral le pouvoir de nommer les juges des cours supérieures, de fixer leur rémunération et de les destituer (*Renvoi sur la location résidentielle*, p. 728). Autre exception, l'art. 101 de la *Loi constitutionnelle de 1867* attribuait au fédéral le pouvoir de créer des cours statutaires fédérales.

[2] Les dispositions constitutionnelles reflétant ce compromis conclu à l'époque de la Confédération sont reproduites en annexe.

This power was limited, however, as such courts would be confined by their constitutional boundaries to the administration of federal laws (*Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 33).

[38] The Fathers of Confederation thus rejected the creation of a dualistic system like the ones established in other federations, including the United States. They preferred instead to establish a unitary system whose objective was national unity (*Residential Tenancies*, at p. 728).

[39] The superior courts of the various provinces were called upon to form the cornerstone of this system and to act as a "unifying force", thereby enabling the development of the law nationwide (*MacMillan Bloedel*, at paras. 11, 29 and 37; see also *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 327; *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252, at p. 264; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 (*Reference re Residential Tenancies Act (N.S.)*), at para. 72; *Windsor*, at para. 32). Because the superior courts were given an inherent general jurisdiction like that of their British predecessors, they were empowered to interpret and apply both provincial and federal law (*Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at pp. 249-50, per La Forest J., dissenting on another point).

[40] In short, the aim of the compromise reached at Confederation was not simply to maintain the pre-existing justice system. It created a system in which responsibilities were shared between the provinces and the federal government, enabling each province to shape the judicial landscape in its own territory in accordance with local realities. Thus, there is no requirement that the judiciary be structured uniformly from one province to the next; for a province to have established its own standards or made unique choices does not in itself amount to a constitutional defect. On the contrary, ss. 92(14) and 96 work together to advance access to justice by allowing the superior courts to coexist with tribunals and courts

Ce pouvoir était toutefois limité, puisque celles-ci demeuraient astreintes à leurs limites constitutionnelles, c'est-à-dire l'administration des lois fédérales (*Windsor (City) c. Canadian Transit Co.*, 2016 CSC 54, [2016] 2 R.C.S. 617, par. 33).

[38] De ce fait, les Pères de la Confédération ont rejeté la création d'un système dualiste tel que celui mis en place dans d'autres fédérations comme les États-Unis. Ils ont plutôt préféré établir un système unitaire ayant pour objectif l'unité nationale (*Renvoi sur la location résidentielle*, p. 728).

[39] Les cours supérieures de chacune des provinces étaient appelées à être la pierre angulaire de ce système et à agir comme une « force unificatrice » permettant de développer le droit à l'échelle nationale (*MacMillan Bloedel*, par. 11, 29 et 37; voir aussi *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, p. 327; *Renvoi relatif à la Loi sur les jeunes contrevenants (Î.-P.-É.)*, [1991] 1 R.C.S. 252, p. 264; *Renvoi relatif à certaines modifications à la Residential Tenancies Act (N.-É.)*, [1996] 1 R.C.S. 186 (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*), par. 72; *Windsor*, par. 32). En effet, les cours supérieures étant dotées d'une compétence générale inhérente à l'image de leurs ancêtres britanniques, elles avaient la capacité d'interpréter et d'appliquer tant le droit provincial que le droit fédéral (*Scowby c. Glendinning*, [1986] 2 R.C.S. 226, p. 249-250, le juge La Forest, dissident sur un autre point).

[40] En bref, le compromis conclu à l'époque de la Confédération ne visait pas uniquement à maintenir le système de justice tel qu'il existait antérieurement. Il a établi un régime à responsabilité partagée entre les provinces et le fédéral permettant à celles-ci de façonner le paysage judiciaire sur leur territoire en fonction des particularités locales. Ainsi, il n'y a aucune exigence relative à l'uniformité de la structure judiciaire entre les provinces; que ces dernières aient établi leurs propres normes ou fait des choix singuliers ne donne pas en soi naissance à un vice constitutionnel. Au contraire, le par. 92(14) conjugué à l'art. 96 favorise l'accès à la justice en permettant la coexistence des cours supérieures et des cours ou

with provincially appointed members, as long as the unitary system, of which the superior courts are the cornerstone, is preserved.

(2) Role and Purpose of Section 96

[41] The superior courts recognized by s. 96 "have always occupied a position of prime importance in the constitutional pattern of this country" (*Law Society of British Columbia*, at p. 327; see also *Windsor*, at para. 32). Although s. 96 may on its face appear to relate solely to the federal government's power to appoint judges, it has been interpreted by this Court as guaranteeing a nucleus to the superior courts (*Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238, at p. 264; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 27; see also *Tomko*, at p. 120). In this way, s. 96 forms a safeguard against erosion of the historic compromise. This means that neither the provinces nor the federal government may confer functions reserved to the superior courts on other courts to which s. 96 does not apply (*Residential Tenancies*, at p. 728; *Scowby*, at para. 34; *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704, at pp. 720-21; *Windsor*, at para. 32). If a province or the federal government could, by statute, confer the essential functions of the superior courts on another court, the role of the superior courts as the cornerstone of the judicial system would evidently be eroded and the system's unitary nature would, in turn, be undermined. A transfer of jurisdiction from the superior courts to the provincial courts could ultimately transform the Canadian system into a dualistic system. If that were to happen, it would be impossible to achieve the purpose of the compromise reached at Confederation (*Residential Tenancies*, at p. 728).

[42] The superior courts' role as the cornerstone of Canada's judicial system is based on two key principles: national unity and the rule of law.

tribunaux administratifs de nomination provinciale, tant et aussi longtemps que le système unitaire, dont les cours supérieures sont la pierre angulaire, est préservé.

(2) Le rôle et l'objet de l'art. 96

[41] Les cours supérieures reconnues par l'art. 96 « ont toujours occupé une position de premier plan à l'intérieur du régime constitutionnel de ce pays » (*Law Society of British Columbia*, p. 327; voir aussi *Windsor*, par. 32). Bien que le texte de l'art. 96 puisse, en apparence, sembler ne concerner que le pouvoir du gouvernement fédéral de nommer les juges, notre Cour a interprété cet article comme garantissant « un noyau de compétence » aux cours supérieures (*Sobeys Stores Ltd. c. Yeomans et Labour Standards Tribunal (N.-É.)*, [1989] 1 R.C.S. 238, p. 264; *Canada (Commission des droits de la personne) c. Canadian Liberty Net*, [1998] 1 R.C.S. 626, par. 27; voir aussi *Tomko*, p. 120). En ce sens, l'art. 96 constitue une protection contre l'érosion du compromis historique. Tant les provinces que le fédéral ne peuvent donc conférer les fonctions réservées aux cours supérieures à d'autres tribunaux qui ne sont pas visés par l'art. 96 (*Renvoi sur la location résidentielle*, p. 728; *Scowby*, par. 34; *McEvoy c. Procureur général du Nouveau-Brunswick*, [1983] 1 R.C.S. 704, p. 720-721; *Windsor*, par. 32). Si une province ou le fédéral pouvait, par législation, attribuer les fonctions essentielles des cours supérieures à un autre tribunal, le rôle de pierre angulaire du système judiciaire des cours supérieures serait évidemment sapé et la nature unitaire de ce système risquerait d'être minée à son tour. Le transfert de compétences des cours supérieures aux cours provinciales pourrait ultimement transformer le système canadien en système dualiste. Dans de telles circonstances, l'objectif visé par le compromis conclu à l'époque de la Confédération ne pourrait être atteint (*Renvoi sur la location résidentielle*, p. 728).

[42] Le rôle des cours supérieures à titre de pierre angulaire du système judiciaire canadien repose sur deux grands principes, soit l'unité nationale et la primauté du droit.

(a) *National Unity*

[43] One of the main objectives of the historic compromise reflected in s. 96 is to reinforce the national character of the Canadian judicial system (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at p. 7-3). The superior courts form a network of related courts whose role is to unify and ensure the uniformity of justice in Canada (*ibid.*; see also *Residential Tenancies*, at p. 728). Protecting the essence of the superior courts thus preserves "uniformity throughout the country in the judicial system" (*Reference re Young Offenders Act (P.E.I.)*, at p. 264).

[44] Moreover, s. 96 has the effect of counterbalancing the provinces' exclusive power over the administration of justice by entrusting to the federal government the task of appointing the judges who will sit on the superior courts. In accordance with the intentions of the Fathers of Confederation, the administration of justice thus depends on the cooperation of governments at both levels.

[45] In light of the objective of national unity, the limits imposed by s. 96 must be consistent across the country (*Sobeys*, at pp. 265-66). To make "[a] rule which would permit a transfer of power in one province and deny it in another would undercut the unifying force of the s. 96 courts" (*Reference re Residential Tenancies Act (N.S.)*, at para. 78). Ultimately, the constitutionally guaranteed existence of a federally appointed bench across the country has served as a unifying force and a vital safeguard of the rule of law in Canada (*ibid.*, at para. 72).

(b) *Rule of Law*

[46] The rule of law is maintained through the separation of judicial, legislative and executive functions ((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 pp. 1100-1101). In keeping with

a) *L'unité nationale*

[43] Un des objectifs principaux du compromis historique reflété à l'art. 96 est de renforcer le caractère national du système judiciaire canadien (P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl. (feuilles mobiles)), vol. 1, p. 7-3). Les cours supérieures forment un réseau de tribunaux connexes ayant pour rôle d'unifier et d'uniformiser la justice au Canada (*ibid.*; voir également *Renvoi sur la location résidentielle*, p. 728). En protégeant l'essence des cours supérieures, l'« uniformité du système judiciaire dans tout le pays » est ainsi préservée (*Renvoi relatif à la Loi sur les jeunes contrevenants (Î.-P.-É.)*, p. 264).

[44] De plus, l'art. 96 a pour effet de contrebalancer le pouvoir exclusif des provinces d'administrer la justice en confiant au fédéral la tâche de nommer les juges qui siègeront aux cours supérieures. Conformément à l'intention des Pères de la Confédération, l'administration de la justice dépend donc de la coopération des deux ordres de gouvernement.

[45] À la lumière de l'objectif d'unité nationale, les limites imposées par l'art. 96 doivent être uniformes partout au pays (*Sobeys*, p. 265-266). L'établissement d'« [u]ne règle qui permettrait un transfert de compétences dans une province et l'interdirait dans une autre minerait l'effet unificateur des cours visées à l'art. 96 » (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 78). Ultimement, la présence d'une magistrature nommée par le gouvernement fédéral à l'échelle du pays, garantie par la Constitution, sert d'élément unificateur et s'avère une protection fondamentale de la primauté du droit au Canada (*ibid.*, par. 72).

b) *La primauté du droit*

[46] La primauté du droit est maintenue grâce à la séparation des fonctions judiciaire, législative et exécutive ((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, p. 1100-1101). Conformément au principe

the principle of the separation of powers, the task of interpreting, applying and stating the law falls primarily to the judiciary (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 744; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 50).

[47] This separation allows the courts to implement the three fundamental facets of the rule of law: equality of all before the law, the creation and maintenance of an actual order of positive laws, and oversight of the exercise of public powers (*Reference re Manitoba Language Rights*, at pp. 748-51; *Imperial Tobacco*, at para. 58; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 16). Historically, the superior courts had primary responsibility for this task.

[48] Thus, in order to preserve the superior courts' role as the cornerstone of the judicial system, they must be able to continue acting as primary guardians of the rule of law as they always have (*MacMillan Bloedel*, at para. 29; *Reference re Residential Tenancies Act (N.S.)*, at para. 26, per Lamer C.J., concurring; W. R. Lederman, "The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769, 1139, at p. 1178; A. Lamer, "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996), 45 *U.N.B.L.J.* 3, at p. 11; L. Huppé, *Le régime juridique du pouvoir judiciaire* (2000), at pp. 10-11). This role falls to the superior courts because they are ideally placed to ensure the maintenance of the rule of law (*Reference re Residential Tenancies Act (N.S.)*, at paras. 26, per Lamer C.J., concurring, and 72, per McLachlin J. for the majority).

[49] In light of Canada's constitutional architecture, the superior courts are in the best position to preserve the various facets of the rule of law. Because of their independence and national character, they are best suited to resolving disputes over the division of powers between the provinces and the federal government and ensuring that government actions do not conflict with the fundamental rights of citizens (see *Amax Potash Ltd. v. Government of*

de la séparation des pouvoirs, la tâche d'interpréter, d'appliquer et de dire le droit relève principalement du pouvoir judiciaire (*Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, p. 744; *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473, par. 50).

[47] Cette séparation permet aux cours de justice de mettre en œuvre les trois facettes fondamentales de la primauté du droit que sont l'égalité de tous devant la loi, la création et le maintien d'un ordre réel de droit positif et la surveillance de l'exercice des pouvoirs publics (*Renvoi relatif aux droits linguistiques au Manitoba*, p. 748-751; *Imperial Tobacco*, par. 58; *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854, par. 16). Historiquement, cette tâche relevait d'abord des cours supérieures.

[48] Ainsi, afin de préserver le rôle des cours supérieures à titre de pierre angulaire du système judiciaire, elles doivent pouvoir continuer d'agir comme les premières gardiennes de la primauté du droit tel qu'elles l'ont toujours fait (*MacMillan Bloedel*, par. 29; *Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 26, le juge en chef Lamer, concordant; W. R. Lederman, « The Independence of the Judiciary » (1956), 34 *R. du B. can.* 769, 1139, p. 1178; A. Lamer, « The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change » (1996), 45 *R.D. U.N.-B.* 3, p. 11; L. Huppé, *Le régime juridique du pouvoir judiciaire* (2000), p. 10-11). Ce rôle revient aux cours supérieures, puisqu'elles sont dans une position idéale pour assurer le maintien de la primauté du droit (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 26, le juge en chef Lamer, concordant, et par. 72, la juge McLachlin, majoritaire).

[49] Compte tenu de l'architecture constitutionnelle canadienne, les cours supérieures représentent l'organe le mieux placé pour préserver les différentes facettes de la primauté du droit. En raison de leur indépendance et caractère national, elles sont mieux outillées pour trancher les litiges en matière de partage de compétences entre les ordres provincial et fédéral et pour veiller à ce que l'action étatique soit conforme aux droits fondamentaux des

Saskatchewan, [1977] 2 S.C.R. 576, at p. 590; D. P. Jones, "A Constitutionally Guaranteed Role for the Courts" (1979), 57 *Can. Bar Rev*. 669, at p. 675). Moreover, the superior courts' existence and status enjoy constitutional protection against legislative interference (*Reference re Residential Tenancies Act (N.S.)*, at paras. 72-73; *Trial Lawyers*, at para. 30). As a result, the superior courts need not rely on statutorily conferred powers to fully exercise their judicial functions.

[50] While it is true that this Court, in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Reference re Remuneration of Judges (1997)*"), recognized the independence of provincial court judges and reaffirmed the important role played by provincial courts in maintaining the rule of law, the fact remains that the superior courts are the *primary* guardians of the rule of law. Subject to constitutional guarantees of judicial independence, legislatures may abolish courts with provincially appointed judges or seriously fetter their powers without falling afoul of the Constitution, whereas superior courts are constitutionally protected from such legislative interference.

[51] Only the superior courts have inherent powers that flow from their very nature, and the particular purpose of those powers is to enable the superior courts to ensure the maintenance of the rule of law in our legal system (*Reference re Residential Tenancies Act (N.S.)*, at para. 56, per Lamer C.J., concurring; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at para. 61; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 19 and 26). As will be seen below, these fundamental powers are constitutionally protected and therefore cannot be removed from them or unduly fettered. For example, the superior courts have the power to control their own process and enforce their orders. They also have the power to review exercises of public power for legality and to ensure that citizens are protected from arbitrary government action (*Crevier*; *U.E.S., local 298 v. Bibeault*, [1988] 2 S.C.R. 1048,

citoyens (voir *Amax Potash Ltd. c. Gouvernement de la Saskatchewan*, [1977] 2 R.C.S. 576, p. 590; D. P. Jones, « A Constitutionally Guaranteed Role for the Courts » (1979), 57 *R. du B. can.* 669, p. 675). De plus, l'existence et le statut des cours supérieures sont garantis par la Constitution à l'encontre des ingérences législatives (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 72-73; *Trial Lawyers*, par. 30). Ainsi, les cours supérieures ne dépendent pas des pouvoirs qui leur sont conférés par le législateur pour s'acquitter pleinement de leurs fonctions judiciaires.

[50] S'il est vrai que notre Cour, dans le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi relatif à la rémunération des juges (1997)* »), a reconnu l'indépendance des juges des cours provinciales et confirmé le rôle important de ces cours dans le maintien de la primauté du droit, il n'en demeure pas moins que ce sont les cours supérieures qui sont les *premières* gardiennes de la primauté du droit. Sous réserve des garanties constitutionnelles d'indépendance judiciaire, les législatures peuvent abolir les cours de nomination provinciale ou sérieusement entraver leurs pouvoirs sans que la Constitution n'y fasse obstacle, tandis que les cours supérieures sont protégées par la Constitution contre ce type d'ingérence législative.

[51] Seules les cours supérieures disposent de pouvoirs inhérents découlant de leur nature même et ayant spécialement pour objectif de leur permettre d'assurer la primauté du droit au sein de notre système juridique (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 56, le juge en chef Lamer, concordant; *R. c. Ahmad*, 2011 CSC 6, [2011] 1 R.C.S. 110, par. 61; *Ontario c. Criminal Lawyers' Association of Ontario*, 2013 CSC 43, [2013] 3 R.C.S. 3, par. 19 et 26). Comme nous le verrons, ces pouvoirs fondamentaux bénéficient d'une protection constitutionnelle et ils ne peuvent donc leur être retirés ou être indûment entravés. Par exemple, les cours supérieures ont le pouvoir de contrôler leur propre procédure et de mettre à exécution leurs ordonnances. Elles ont également le pouvoir de réviser l'exercice des pouvoirs publics afin de s'assurer que cet exercice soit conforme à la loi et que les citoyens

at p. 1090; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 31; *Vavilov*, at para. 24). Finally, the superior courts have residual jurisdiction as courts of original general jurisdiction, meaning they may — without statutory authorization — hear any matter that has not been assigned to a statutory court. As we will explain, this provides superior courts with a comprehensive view of the law, allowing them to preserve the coherence of the judicial system and set its overall directions (R. Pepin, "Les parlements peuvent-ils vider les cours supérieures de leur juridiction? Ont-elles des pouvoirs 'inhérents', 'inaliénables'? Réflexions sur la décision *MacMillan Bloedel Ltd. c. Simpson*" (1997), 22 *Queen's L.J.* 487, at pp. 512-13; Huppé, at pp. 12-14).

[52] Although the provincial courts also play an important part in safeguarding the rule of law, none of their powers receive the same protection. Their role as guardians of the rule of law therefore rests on a less stable foundation. This led Lamer C.J. to remark that no statutory court can be "as crucial to the rule of law" as the superior courts (*MacMillan Bloedel*, at para. 37; see also *Reference re Residential Tenancies Act (N.S.)*, at para. 72; *Trial Lawyers*, at para. 39).

(3) Concept Common to the Section 96 Tests: Prohibition Against Creating Parallel Courts That Undermine the Role of the Superior Courts

[53] To ensure s. 96 can play its role to the fullest extent and achieve its purpose, this Court has developed various tests over the years. The most recent are the three-step *Residential Tenancies* test and the core jurisdiction test. The Court has often reiterated that s. 96 must be able to evolve in accordance with the living tree doctrine (*Reference re Residential Tenancies Act (N.S.)*, at para. 27, per Lamer C.J., concurring; see Hogg, at pp. 15-51 to 15-57). The jurisprudence on s. 96 must thus not

soient protégés contre l'arbitraire de l'État (*Crevier*; *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1090; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 31; *Vavilov*, par. 24). Enfin, les cours supérieures sont pourvues d'une compétence résiduelle à titre de tribunal de droit commun leur permettant d'entendre toute affaire non confiée à un tribunal statutaire sans avoir besoin d'une habilitation législative. Comme nous l'expliquerons, ceci confère aux cours supérieures une perspective globale sur le droit à partir de laquelle elles peuvent préserver la cohérence du système judiciaire et en définir les grandes orientations (R. Pepin, « Les parlements peuvent-ils vider les cours supérieures de leur juridiction? Ont-elles des pouvoirs "inhérents", "inaliénables"? Réflexions sur la décision *MacMillan Bloedel Ltd. c. Simpson* » (1997), 22 *Queen's L.J.* 487, p. 512-513; Huppé, p. 12-14).

[52] Même si les cours provinciales participent aussi d'une manière importante à la sauvegarde de la primauté du droit, aucun de leurs pouvoirs ne bénéficie d'une telle protection. Leur rôle de gardiennes de la primauté du droit repose donc sur des fondations moins solides. Ceci a fait dire au juge en chef Lamer qu'aucune cour statutaire « n'est aussi importante pour le maintien de la primauté du droit » que ne le sont les cours supérieures (*MacMillan Bloedel*, par. 37; voir aussi *Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 72; *Trial Lawyers*, par. 39).

(3) Une notion commune aux tests découlant de l'art. 96 : l'interdiction de créer des cours parallèles qui affaiblissent le rôle des cours supérieures

[53] Pour que l'art. 96 puisse jouer pleinement son rôle et atteindre son objet, notre Cour a développé toute une variété de tests au fil des années, les plus récents étant le test en trois volets du *Renvoi sur la location résidentielle* ainsi que celui de la compétence fondamentale. Notre Cour a réitéré à de nombreuses reprises que l'art. 96 doit être en mesure d'évoluer conformément à la théorie de l'arbre vivant (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 27, le juge en chef Lamer, concordant;

cause "judicial functions [to] be frozen in an 1867 mold", and "[a]daptations must be permitted to allow the legislatures scope to deal effectively with emerging social problems and concerns" (*Scowby*, at pp. 250-51, per La Forest J., dissenting; see also p. 253; *Residential Tenancies*, at pp. 749-50).

[54] In accordance with this evolutive approach, s. 96 has gone through a "process of liberalization" to adapt to modern realities (*Residential Tenancies*, at p. 730). Despite this liberalization, this Court has consistently reiterated the prohibition against establishing parallel courts that usurp the functions reserved to superior courts, as such parallel courts would eviscerate the protection afforded by s. 96.

(a) *Historical Jurisdiction*

[55] First, the decisions on s. 96 gave effect to the prohibition against creating parallel courts by protecting the historical jurisdiction of superior courts. Section 96 was originally given a "sweeping" interpretation (*Residential Tenancies*, at p. 729). In 1938, the Privy Council held that the functions conferred on the superior courts in 1867 could under no circumstances be granted to a court with provincially appointed judges, as such a grant would be invalid (*Toronto Corporation v. York Corporation*, [1938] A.C. 415 (P.C.)). For the first time, Lord Atkin expressed concern about the creation of a parallel court by framing the issue as whether the administrative body in question was "in pith and substance . . . a Superior Court, or a tribunal analogous thereto" (p. 426 (emphasis added)).

[56] This Court rejected the Privy Council's "sweeping" approach that same year in *Reference re Adoption Act*, [1938] S.C.R. 398, on the basis that it was too rigid and fixed the jurisdiction of the courts as it stood in 1867 (p. 418). Nevertheless, this Court agreed with Lord Atkin's statement that provinces

voir Hogg, p. 15-51 à 15-57). La jurisprudence de l'art. 96 ne doit donc pas avoir pour effet « de figer les fonctions judiciaires dans un moule datant de 1867 » et des « adaptations doivent être permises de façon à donner aux législatures la possibilité de faire face aux nouveaux problèmes et intérêts sociaux » (*Scowby*, p. 250-251, le juge La Forest, dissident; voir aussi p. 253; *Renvoi sur la location résidentielle*, p. 749-750).

[54] Conformément à cette approche évolutive, l'art. 96 est passé par un « processus de libéralisation » afin de s'adapter à la réalité moderne (*Renvoi sur la location résidentielle*, p. 730). Nonobstant cette libéralisation, l'interdiction d'établir des cours parallèles qui usurpent les fonctions réservées aux cours supérieures a constamment été réitérée par la Cour puisque de telles cours parallèles ont l'effet de rendre lettre morte la protection conférée par l'art. 96.

a) *Les compétences historiques*

[55] Dans un premier temps, la jurisprudence de l'art. 96 a donné effet à l'interdiction de créer des cours parallèles en protégeant les compétences historiques des cours supérieures. Au départ, l'art. 96 a été interprété de manière « radicale » (*Renvoi sur la location résidentielle*, p. 729). En 1938, le Conseil privé avait jugé que les fonctions confiées en 1867 aux cours supérieures ne pouvaient en aucun cas être attribuées à une cour de nomination provinciale sous peine d'invalidité (*Toronto Corporation c. York Corporation*, [1938] A.C. 415 (C.P.)). Lord Atkin a fait état pour la première fois de sa préoccupation concernant la création d'une cour parallèle en formulant la question à trancher comme celle de savoir si l'organisme administratif en question était, [TRADUCTION] « de par son caractère véritable, [. . .] une cour supérieure ou un tribunal analogue » (p. 426 (nous soulignons)).

[56] L'approche « radicale » du Conseil privé a été écartée la même année par notre Cour dans l'arrêt *Reference re Adoption Act*, [1938] R.C.S. 398, car elle était trop rigide et figeait la compétence des tribunaux au contexte existant en 1867 (p. 418). Néanmoins, notre Cour a exprimé son accord avec

could not, directly or indirectly, create courts analogous to superior courts (p. 414).

[57] The Privy Council then relaxed the applicable test in *Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd.*, [1949] A.C. 134 (P.C.), to better account for the emergence of administrative tribunals. Lord Simonds reiterated that the ultimate objective of the analysis was to determine whether "the jurisdiction exercisable by the board is not such as to constitute it a court within s. 96 of the British North America Act" (p. 152 (emphasis added); see also *Cour de Magistrat*, at p. 781).

[58] In *Tomko*, the Court developed the principle that the validity of a grant of jurisdiction must be considered having regard to the "institutional framework" (p. 131) in which the jurisdiction is exercised, a principle that was subsequently incorporated into the *Residential Tenancies* test. Here again, the prohibition against creating parallel courts played an important role. Laskin C.J. stated that the creation of agencies whose members are appointed by a province and invested with jurisdiction or powers "conformable or analogous to [those] exercised . . . by Courts which are within s. 96" represents the line that may not be crossed (p. 120 (emphasis added)).

[59] Finally, in *Residential Tenancies*, our Court articulated the three-step test that remains in use today, subject to a few modifications introduced in subsequent cases:

- Characterization of the grant of jurisdiction: To determine whether a grant of jurisdiction is constitutionally infirm, a court must first properly characterize the jurisdiction being transferred.
- Three steps:

  (1) Does the transferred jurisdiction conform to a jurisdiction that was dominated by superior, district or county courts at the time of Confederation?

l'affirmation de Lord Atkin voulant que les provinces ne puissent créer, directement ou indirectement, des cours qui seraient analogues aux cours supérieures (p. 414).

[57] Puis, le Conseil privé a assoupli le test applicable dans l'affaire *Labour Relations Board of Saskatchewan c. John East Iron Works, Ltd.*, [1949] A.C. 134 (C.P.), afin de mieux prendre en compte l'émergence des tribunaux administratifs. Lord Simonds a alors répété qu'en fin de compte, l'objectif de l'analyse vise à déterminer si [TRADUCTION] « la compétence que peut exercer la commission n'en fait pas un tribunal visé à l'art. 96 de l'Acte de l'Amérique du Nord britannique » (p. 152 (nous soulignons); voir aussi *Cour de Magistrat*, p. 781).

[58] Dans l'arrêt *Tomko*, la Cour a développé le principe voulant que la constitutionnalité d'une attribution doit être examinée au regard du « cadre institutionnel » (p. 131) dans lequel la compétence est exercée, lequel principe a ensuite été intégré dans le test du *Renvoi sur la location résidentielle*. Encore une fois, l'interdiction de créer des cours parallèles était très présente. Le juge en chef Laskin affirmait alors que la création d'organismes de nomination provinciale auxquels seraient confiés une juridiction ou des pouvoirs « assimilables ou analogues à [ceux] exercés par les cours visées à l'art. 96 » constitue la limite ne pouvant être franchie (p. 120 (nous soulignons)).

[59] Enfin, notre Cour a articulé dans le *Renvoi sur la location résidentielle* le test en trois volets qui est toujours d'usage, sous réserve des quelques modifications apportées par la jurisprudence subséquente :

- Qualification de l'attribution de compétence : Pour déterminer si l'attribution d'une compétence est constitutionnellement invalide, il faut d'abord bien qualifier la compétence transférée.
- Trois volets :

  (1) Le domaine de compétence transféré correspond-il à un domaine de compétence dont l'exercice était, au moment de la Confédération, dominé par les cours supérieures, de district ou de comté?

(2) If so, was the jurisdiction in question exercised in the context of a judicial function?

(3) If the first two questions are answered in the affirmative, is the jurisdiction either subsidiary or ancillary to an administrative function or necessarily incidental to the achievement of a broader policy goal of the legislature?

(pp. 734-36; *Attorney General of Quebec v. Grondin*, [1983] 2 S.C.R. 364; *Sobeys*, at p. 266; *Reference re Residential Tenancies Act (N.S.)*, at paras. 32, per Lamer C.J., concurring, and 74, per McLachlin J. (as she then was) for the majority)

[60] In *Residential Tenancies*, Dickson J. (as he then was) firmly reiterated the relationship between the prohibition against creating parallel courts and the role and purpose of s. 96:

> Section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined. [p. 728]

[61] In its jurisprudence subsequent to *Residential Tenancies*, this Court has consistently refused to allow the creation of parallel courts. In *McEvoy*, the Court held that the contemplated court could not be established, because it would "effectively be a s. 96 court" (pp. 718-19). The same fundamental concept was applied in *Sobeys*, in which Wilson J., writing for the majority, stated that "s. 96 operates . . . to prevent the creation of provincial tribunals charged with exercising the jurisdiction of superior courts" (p. 245). Similarly, in *Reference re Young Offenders Act (P.E.I.)*, Lamer C.J. observed that s. 96 would be rendered meaningless if it were permissible to "constitute, maintain and organize provincial courts staffed with provincially appointed judges having

(2) Le cas échéant, ce domaine de compétence était-il exercé dans le cadre d'une fonction judiciaire?

(3) Si la réponse aux deux questions précédentes est oui, ce domaine de compétence est-il complémentaire ou accessoire à une fonction administrative ou nécessairement inséparable de la réalisation des objectifs plus larges de la législature?

(p. 734-736; *Procureur général du Québec c. Grondin*, [1983] 2 R.C.S. 364; *Sobeys*, p. 266; *Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 32, le juge en chef Lamer, concordant, et par. 74, la juge McLachlin (plus tard juge en chef), majoritaire)

[60] Dans le *Renvoi sur la location résidentielle*, le juge Dickson (plus tard juge en chef) a fermement réitéré la relation entre l'interdiction de créer des cours parallèles et le rôle et l'objet de l'art. 96 :

> Le paragraphe 92(14) et les art. 96 à 100 représentent un des compromis importants des Pères de la Confédération. Il est clair qu'on détruirait l'objectif visé par ce compromis et l'effet qu'on voulait donner à l'art. 96 si une province pouvait adopter une loi créant un tribunal, nommer ses juges et lui attribuer la compétence des cours supérieures. Ce qu'on concevait comme un fondement constitutionnel solide de l'unité nationale, au moyen d'un système judiciaire unitaire, serait gravement sapé à sa base. [p. 728]

[61] Dans la jurisprudence subséquente au *Renvoi sur la location résidentielle*, notre Cour est d'ailleurs demeurée constante dans son refus de permettre la création de cours parallèles. Dans l'arrêt *McEvoy*, la Cour concluait que le tribunal envisagé ne pouvait être établi puisque ce dernier serait « en réalité une cour au sens de l'art. 96 » (p. 718-719). La même notion fondamentale est reprise dans l'arrêt *Sobeys* où la juge Wilson, rédigeant pour la majorité, affirmait que « l'art. 96 [avait] pour effet [. . .] d'interdire la création de tribunaux provinciaux chargés d'exercer la compétence des cours supérieures » (p. 245). Similairement, dans le *Renvoi relatif à la Loi sur les jeunes contrevenants (Î.-P.-É.)*, le juge en chef Lamer rappelait que l'art. 96 serait vidé de son sens s'il était

the same jurisdiction and powers as superior courts" (p. 264).

[62] More recently, in *MacMillan Bloedel*, McLachlin J., dissenting, but not on this point, noted that, "[c]learly, Parliament and the legislatures cannot be allowed to set up shadow courts exercising all or some of the powers of s. 96 courts" (para. 54). The following year, in *Reference re Residential Tenancies Act (N.S.)*, McLachlin J. reiterated, this time for the majority, that "[s]hadow courts and tribunals usurping the functions of the superior courts guaranteed by s. 96 are prohibited" (para. 73). She explained that "[i]t follows from the constitutional status of the s. 96 courts that neither Parliament nor the legislatures may impair their status" (*ibid.*). Their status would be impaired if it were possible to transfer their work to tribunals with provincially appointed members, "[s]o the wholesale transfer of superior court powers cannot be allowed" (*ibid.*).

(b) *Core Jurisdiction*

[63] The core jurisdiction test aims to do more than simply protect historical jurisdiction. It also ensures that superior courts are not impaired in such a way that they are unable to play their role under s. 96. The superior courts' core jurisdiction includes the powers and jurisdiction essential to their role as the cornerstone of the unitary justice system and the primary guardians of the rule of law. These essential functions are not limited to inherent jurisdiction and powers in the traditional sense, but include any subject-matter jurisdiction that meets this criterion. If these essential powers and areas of jurisdiction were transferred exclusively to another court, that court would become a parallel court — an outcome prohibited by the Constitution. It follows that the creation of a parallel court would prevent the superior courts from playing their constitutional role. That being said, even if no parallel court is created,

permis de « créer, maintenir et organiser des cours provinciales présidées par des juges nommés par les provinces qui auraient les mêmes compétences et pouvoirs que les cours supérieures » (p. 264).

[62] Plus récemment, dans l'affaire *MacMillan Bloedel*, la juge McLachlin, dissidente, mais non sur ce point, soulignait que « [d]e toute évidence, le Parlement et les législatures ne sauraient être autorisés à constituer des cours de justice parallèles qui exerceraient tous les pouvoirs des cours visées à l'art. 96, ou une partie seulement de ceux-ci » (par. 54). L'année suivante, dans le *Renvoi relatif à la Residential Tenancies Act (N.-É.)*, la juge McLachlin réitérait, cette fois au nom de la majorité, qu'« [i]l est interdit d'établir des tribunaux parallèles et des tribunaux administratifs qui usurpent les fonctions réservées aux cours supérieures visées par l'art. 96 » (par. 73). Elle précisait du même souffle que « [p]arce que les cours visées à l'art. 96 sont protégées par la Constitution, ni le Parlement ni les législatures ne peuvent porter atteinte à leur statut » (*ibid.*). C'est pourtant ce qui se produirait si leurs tâches pouvaient être transférées à des tribunaux de nomination provinciale; « voilà pourquoi le transfert en bloc de pouvoirs des cours supérieures ne saurait être autorisé » (*ibid.*).

b) *La compétence fondamentale*

[63] Le test de la compétence fondamentale vise un objectif plus large que la protection des compétences historiques. Il s'assure également d'empêcher que les cours supérieures soient affaiblies d'une telle façon qu'elles ne puissent accomplir le rôle qui leur est dévolu par l'art. 96. La compétence fondamentale inclut les pouvoirs et compétences essentiels au rôle des cours supérieures en tant que pierre angulaire du système de justice unitaire et premières gardiennes de la primauté du droit. Ces fonctions essentielles ne se limitent pas aux compétences et pouvoirs inhérents au sens classique de ces termes, mais incluent également les compétences matérielles qui satisfont ce critère. Si ces pouvoirs et domaines de compétence essentiels étaient transférés exclusivement à un autre tribunal, ce dernier se transformerait alors en une cour parallèle — un résultat prohibé par la Constitution. Il va de soi que la création d'une cour

the superior courts could be impaired to such an extent that they can no longer play their constitutional role. This would be the case if the legislature were to interfere impermissibly with the exercise of core jurisdiction by, for example, circumscribing it to the point of "maim[ing]" the superior courts in their very essence (*MacMillan Bloedel*, at para. 37).

[64] Until *MacMillan Bloedel*, this Court's decisions protected the superior courts' role by limiting grants of their historical jurisdiction. In *MacMillan Bloedel*, the Court applied the three-step *Residential Tenancies* test to an exclusive grant to youth courts of the power to punish young persons for *ex facie* contempt of court — a power that was traditionally exercised by superior courts. The application of that test was seen as deficient because it did not prevent the removal of this significant power from the superior courts. This Court thought it was necessary to interpret the nucleus of the superior courts as also protecting their core jurisdiction (*Sobeys*, at p. 264). Otherwise, there was a risk that gaps in the *Residential Tenancies* test would undermine the role of superior courts either by allowing the creation of parallel courts with certain powers essential to the superior courts' role or by allowing the defining features of superior courts to be removed.

[65] To preserve the essence of the superior courts, this Court therefore added a second test to the analysis of constitutionality under s. 96. It held that when the core jurisdiction of superior courts is affected, courts must ask whether the legislation has the effect of removing any of the attributes of the superior courts' core jurisdiction (*MacMillan Bloedel*, at paras. 18 and 27). Core jurisdiction includes "critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system" (*Reference re Residential Tenancies Act (N.S.)*, at para. 56, per Lamer C.J., concurring). These defining features enable a superior

parallèle empêche les cours supérieures de jouer leur rôle constitutionnel. Cela dit, même en l'absence de création d'une cour parallèle, les cours supérieures peuvent être affaiblies au point de ne plus pouvoir s'acquitter de leur rôle constitutionnel. Il en est ainsi lorsque le législateur s'ingère de manière inadmissible dans l'exercice de la compétence fondamentale, par exemple, en l'encadrant au point de « mutile[r] » l'essence même des cours supérieures (*MacMillan Bloedel*, par. 37).

[64] Jusqu'à l'arrêt *MacMillan Bloedel*, la jurisprudence de notre Cour a protégé le rôle des cours supérieures en restreignant les attributions de leurs compétences historiques. Dans cet arrêt, la Cour a appliqué le test en trois volets du *Renvoi sur la location résidentielle* à l'attribution exclusive, au tribunal pour adolescents, du pouvoir de punir l'outrage au tribunal *ex facie* commis par un adolescent — un pouvoir qui relevait traditionnellement des cours supérieures. L'application de ce test a été perçue comme défaillante puisqu'elle ne faisait pas obstacle au retrait de cet important pouvoir des mains des cours supérieures. Notre Cour a jugé nécessaire d'interpréter le « noyau de compétence » des cours supérieures comme protégeant également leur compétence fondamentale (*Sobeys*, p. 264). Autrement, les failles du test du *Renvoi sur la location résidentielle* risquaient de miner le rôle des cours supérieures, soit en permettant la création de cours parallèles détenant certains des pouvoirs essentiels à leur mission, soit en autorisant le retrait de leurs caractéristiques essentielles.

[65] Pour préserver l'essence des cours supérieures, la Cour a donc ajouté un second test à l'analyse de la constitutionnalité sous l'art. 96. Elle a conclu que lorsque la compétence fondamentale des cours supérieures est touchée, il faut se demander si la mesure législative a pour effet de retirer aux cours supérieures l'un des attributs de leur compétence fondamentale (*MacMillan Bloedel*, par. 18 et 27). Cette dernière inclut « les pouvoirs qui ont une importance cruciale et qui sont essentiels à l'existence d'une cour supérieure dotée de pouvoirs inhérents et au maintien de son rôle vital au sein de notre système juridique » (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 56, le juge en chef Lamer,

court "to fulfil itself as a court of law" (*MacMillan Bloedel*, at paras. 30, 35 and 38 (emphasis deleted), quoting I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23, at p. 27). Their "inherent" nature is attributable to the fact that they are derived not from legislation, but "from the very nature of the court as a superior court of law" (para. 30, quoting Jacob, at p. 27). If such an attribute is removed, the measure is unconstitutional.

[66] In addition to calling a removal of jurisdiction into question, this new doctrine operates to prevent the creation of parallel courts, like the *Residential Tenancies* test also does. The core jurisdiction test prevents the legislature from transferring to other courts the features that are essential to the role of the superior courts as the centrepiece of the unitary justice system and the primary guardians of the rule of law, for such transfers could transform those other courts into mirrors of the superior courts. The prohibition against parallel courts and the protection of the superior courts' core jurisdiction are thus closely related; the creation of parallel courts affects the superior courts' essential functions and place in the judicial system, thereby undermining or usurping their role and exceeding the limits imposed by s. 96. However, the core jurisdiction test does not merely place limits on what can be transferred to other courts. It also curbs impermissible interference by the legislature with the exercise of the jurisdiction and powers that constitute the very essence of the superior courts in order to prevent these courts from being "maim[ed]" (*MacMillan Bloedel*, at para. 37).

[67] The emergence of a test protecting core jurisdiction thus marks a change in direction. Unlike the *Residential Tenancies* test, the core jurisdiction analysis is not primarily historical in nature. It is the very essence of the superior courts that is protected. The content of the core jurisdiction is therefore not limited to what the superior courts exercised exclusively at the time of Confederation. It extends to whatever is needed in order to preserve the vigour

concordant). Ces caractéristiques essentielles permettent aux cours supérieures « de se réaliser en tant que cour de justice » (*MacMillan Bloedel*, par. 30, 35 et 38 (soulignement omis), citant I. H. Jacob, « The Inherent Jurisdiction of the Court » (1970), 23 *Current Legal Problems* 23, p. 27). Leur caractère dit inhérent est attribuable au fait qu'ils ne découlent pas de la loi, mais « de la nature même de la cour en tant que cour supérieure de justice » (par. 30, citant Jacob, p. 27). Lorsqu'un tel attribut est retiré, la mesure est inconstitutionnelle.

[66] En plus de remettre en question les retraits de compétence, cette nouvelle doctrine prévient la création de cours parallèles au même titre que le test du *Renvoi sur la location résidentielle*. Le test de la compétence fondamentale limite les transferts par une législature à d'autres tribunaux d'une caractéristique essentielle au rôle des cours supérieures en tant que pièce maîtresse du système de justice unitaire et premières gardiennes de la primauté du droit, car de tels transferts seraient susceptibles de transformer ces autres tribunaux en cours parallèles aux cours supérieures. L'interdiction des cours parallèles et la protection de la compétence fondamentale des cours supérieures sont donc fortement reliées; la création de cours parallèles porte atteinte aux fonctions essentielles et à la place particulière des cours supérieures dans le système judiciaire, affaiblissant ou usurpant ainsi leur rôle et excédant les limites imposées par l'art. 96. Le test de la compétence fondamentale ne limite toutefois pas que les transferts à d'autres tribunaux. Elle restreint aussi les ingérences inadmissibles du législateur au sein de l'exercice de la compétence et des pouvoirs constituant l'essence même des cours supérieures afin d'éviter que ces dernières ne soient « mutil[ées] » (*MacMillan Bloedel*, par. 37).

[67] L'émergence d'un test protégeant la compétence fondamentale signale donc un changement de direction. Contrairement à ce qui prévaut dans le cadre du test du *Renvoi sur la location résidentielle*, l'analyse de la compétence fondamentale n'est pas principalement historique. C'est l'essence même des cours supérieures qui est protégée. Ainsi, le contenu de la compétence fondamentale n'est pas limité à ce que les cours supérieures exerçaient exclusivement

and strength of those courts. The protected powers and jurisdiction are solidly anchored in the role the superior courts are called upon to play in the maintenance of the rule of law in our unitary justice system (*MacMillan Bloedel*, at paras. 37-38 and 41).

[68] The content of the core jurisdiction includes the inherent jurisdiction and inherent powers of a superior court recognized in *MacMillan Bloedel*: namely, review of the legality and constitutional validity of laws, enforcement of its orders, control over its own process, and its residual jurisdiction as a court of original general jurisdiction.

[69] The constitutional protection of the residual jurisdiction of the superior courts as courts of original general jurisdiction was reiterated in *Trial Lawyers*, in which the Court held that the imposition of hearing fees that had the effect of denying some individuals access to a court of original general jurisdiction impermissibly infringed on the core jurisdiction of the superior courts (para. 32). The hearing fees at issue caused undue hardship to litigants of modest means and therefore deprived them of access to the superior court for the adjudication of disputes over which no other court had jurisdiction. Because such litigants were not indigent, they did not qualify for any exemption from paying the hearing fees. Consequently, the superior court was deprived of its ability to hear, as the court of original general jurisdiction, disputes that involved individuals who were neither poor nor rich and over which no other court had jurisdiction. Such individuals fell through the cracks in the judicial system; their disputes could no longer be resolved by the law, which jeopardized the maintenance of an actual order of positive laws and thus the rule of law. It is impossible to conceive of a superior court being stripped of a feature so essential as its status as a court of original general jurisdiction.

au moment de la Confédération. Elle s'étend à ce qui est nécessaire pour préserver la vigueur et la robustesse des cours supérieures. Les pouvoirs et compétences protégés sont solidement ancrés dans le rôle que les cours supérieures doivent être appelées à jouer dans le maintien de la primauté du droit au sein de notre système de justice unitaire (*MacMillan Bloedel*, par. 37-38 et 41).

[68] Le contenu de la compétence fondamentale inclut la compétence inhérente et les pouvoirs inhérents reconnus dans l'arrêt *MacMillan Bloedel*, c'est-à-dire le contrôle de la légalité et de la constitutionnalité des lois, la mise à exécution de leurs ordonnances, le contrôle de leur propre procédure et la compétence résiduelle à titre de tribunal de droit commun.

[69] La protection constitutionnelle de la compétence résiduelle des cours supérieures à titre de tribunal de droit commun a d'ailleurs été réitérée dans l'arrêt *Trial Lawyers*. Dans cet arrêt, la Cour a conclu que l'imposition de frais d'audience qui auraient pour effet de nier à des justiciables l'accès à un tribunal de droit commun porte atteinte de façon inacceptable à la compétence fondamentale des cours supérieures (par. 32). Les frais d'audience en question causaient des difficultés excessives aux plaideurs disposant de moyens modestes et les privaient donc de l'accès à la cour supérieure pour faire trancher des litiges à l'égard desquels aucun autre tribunal n'a compétence. Ces plaideurs n'étant pas démunis, ils ne pouvaient se prévaloir d'aucune exemption leur permettant de présenter une réclamation sans être tenus de payer les frais d'audience. La cour supérieure était donc privée de sa capacité d'entendre à titre de tribunal de droit commun les litiges impliquant des justiciables ni pauvres ni riches à l'égard desquels aucun autre tribunal n'a compétence. Ces justiciables tombaient dans les interstices du système judiciaire; leurs litiges ne pouvaient plus être résolus par le droit, mettant en danger le maintien d'un ordre réel de droit positif et conséquemment la primauté du droit. On ne peut concevoir une cour supérieure qui serait dépouillée d'une caractéristique aussi essentielle que son statut de tribunal de droit commun.

(c) *Conclusion*

[70] In short, a review of this Court's jurisprudence highlights the prohibition against creating parallel courts or striking at the very essence of superior courts, which gives full effect to the compromise reached at Confederation. Although the applicable tests may have changed over the years, they are not ends in and of themselves; they are simply expressions of the principles that underlie s. 96. Accordingly, it is important not to apply these tests in a purely mechanical fashion; on the contrary, they must be approached with those principles in mind.

C. *Application*

[71] We will begin by applying the *Residential Tenancies* test to determine whether art. 35 para. 1 *C.C.P.* affects a jurisdiction that has historically been exercised by the superior courts and cannot be granted to a court with provincially appointed judges. Because we conclude that the application of that test does not enable us to answer the question before the Court, we will then turn to the core jurisdiction test. As we will explain, that test must be adapted to better reflect the underlying purposes of the two tests, including that of prohibiting the creation of parallel courts. In this case, we find that the impugned provision is unconstitutional, because it impermissibly infringes on the superior courts' general private law jurisdiction, which forms part of their core jurisdiction. In its current form, art. 35 para. 1 *C.C.P.* has the effect of transforming the Court of Québec into a parallel court that undermines the constitutional role of the Superior Court of general jurisdiction. In other words, the Court of Québec's exclusive jurisdiction over civil claims for less than $85,000 is unconstitutional.

(1) Three-Step *Residential Tenancies* Test

(a) *Characterizing the Jurisdiction*

[72] Before proceeding with the first step of the test, we must characterize the jurisdiction at issue

c) *Conclusion*

[70] En somme, la revue de la jurisprudence de la Cour met en exergue l'interdiction de créer des cours parallèles ou de s'attaquer à l'essence même des cours supérieures de façon à donner plein effet au compromis conclu à l'époque de la Confédération. Quoique les tests applicables aient pu changer à travers les époques, ces tests ne sont pas des fins en soi; ils ne sont que l'expression des principes qui sous-tendent l'art. 96. Conséquemment, il faut se garder d'appliquer ces tests de façon purement mécanique; on doit au contraire les aborder avec ces principes en tête.

C. *Application*

[71] Nous appliquerons d'abord le test du *Renvoi sur la location résidentielle* afin de déterminer si l'art. 35 al. 1 *C.p.c.* touche une compétence historiquement exercée par les cours supérieures qui ne peut être attribuée à un tribunal de nomination provinciale. Puisque nous concluons que l'application de ce test ne nous permet pas de trancher la question dont nous sommes saisis, nous nous pencherons ensuite sur le test de la compétence fondamentale. Comme nous l'expliquerons, ce test doit être adapté pour mieux tenir compte des objectifs qui sous-tendent les deux tests, dont celui d'interdire la création de cours parallèles. Dans ce cas, nous sommes d'avis que la disposition concernée est inconstitutionnelle, puisqu'elle porte atteinte de manière inadmissible à la compétence générale en droit privé des cours supérieures, laquelle relève de leur compétence fondamentale. Sous sa forme actuelle, l'art. 35 al. 1 *C.p.c.* a pour effet de transformer la Cour du Québec en une cour parallèle qui affaiblit le rôle constitutionnel de la Cour supérieure de juridiction générale. Autrement dit, la juridiction exclusive de la Cour du Québec sur les réclamations civiles de moins de 85 000 $ est inconstitutionnelle.

(1) Le test en trois volets du *Renvoi sur la location résidentielle*

a) *La qualification de la compétence*

[72] Avant d'aborder la première étape du test, il convient de qualifier la compétence en cause (*Sobeys*,

(*Sobeys*, at pp. 252-55; *Reference re Young Offenders Act (P.E.I.)*, at p. 265; *Reference re Residential Tenancies Act (N.S.)*, at para. 76). The parties and interveners proposed a variety of characterizations for the jurisdiction granted to the Court of Québec by art. 35 para. 1 *C.C.P.*

[73] We agree with those who argued that this provision grants jurisdiction over civil disputes concerning contractual and extracontractual obligations (A.F., AGQ, at para. 56; A.F., Conférence des juges de la Cour du Québec ("CJCQ"), at para. 93; I.F., Attorney General of Canada, at paras. 39 and 45; A.F., Conseil de la magistrature, at paras. 29 and 93; A.F., Canadian Association of Provincial Court Judges, at paras. 62 and 68). While this characterization is not "narrow" as required by *Sobeys* (p. 254; see also *MacMillan Bloedel*, at para. 25; *Reference re Young Offenders Act (P.E.I.)*, at p. 266), its generality is a product of the expansive language of art. 35 para. 1 *C.C.P.*

[74] We reject the respondents' claim that this provision refers to a [TRANSLATION] "general civil jurisdiction, exclusive throughout the territory of Quebec, up to $85,000 in 2016 dollars" (R.F., Chief Justice of the Superior Court et al., at para. 78; see also I.F., Trial Lawyers Association, at para. 24). That is the kind of characterization this Court has warned against. It focuses on the type of remedy sought — monetary relief in a quantifiable amount — rather than on "the type of dispute involved" (*Reference re Residential Tenancies Act (N.S.)*, at para. 76). A monetary ceiling or geographical limitations should not be introduced into the very definition of the jurisdiction, as they provide no information about the type of dispute in question; they are merely factors that help determine whether lower courts were sufficiently involved in an area of jurisdiction at the time of Confederation (*Sobeys*, at p. 261; *Reference re Residential Tenancies Act (N.S.)*, at para. 77).

p. 252-255; *Renvoi relatif à la Loi sur les jeunes contrevenants (Î.-P.-É.)*, p. 265; *Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 76). Les parties et les intervenants ont proposé diverses qualifications pour décrire la compétence attribuée à la Cour du Québec par l'art. 35 al. 1 *C.p.c.*

[73] Nous sommes d'accord avec ceux et celles ayant soutenu que cette disposition conférait une compétence sur les litiges civils en matière d'obligations contractuelles et extracontractuelles (m.a., PGQ, par. 56; m.a., Conférence des juges de la Cour du Québec (« CJCQ »), par. 93; m. interv., procureur général du Canada, par. 39 et 45; m.a., Conseil de la magistrature, par. 29 et 93; m.a., Association canadienne des juges des cours provinciales, par. 62 et 68). Bien que cette qualification ne soit pas « étroite » comme le requiert l'arrêt *Sobeys* (p. 254; voir aussi *MacMillan Bloedel*, par. 25; *Renvoi relatif à la Loi sur les jeunes contrevenants (Î.-P.-É.)*, p. 266), son niveau de généralité provient du libellé très englobant de l'art. 35 al. 1 *C.p.c.*

[74] Nous rejetons la prétention des intimés selon laquelle cette disposition réfère à une « compétence générale en matière civile, exclusive sur la totalité du territoire québécois, jusqu'à concurrence de 85 000 $ en dollars de 2016 » (m.i., juge en chef de la Cour supérieure *et al.*, par. 78; voir aussi m. interv., Trial Lawyers Association, par. 24). La qualification suggérée par les intimés incarne le genre de propositions contre lesquelles notre Cour a mis en garde. Elle se focalise sur le type de réparations demandées — une réparation pécuniaire d'une valeur chiffrable — plutôt que sur « le type de différend concerné » (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 76). On ne saurait introduire un plafond pécuniaire ou des limitations territoriales dans la qualification même de la compétence, car de tels éléments ne nous renseignent en rien sur le type de différend concerné; ce ne sont que des facteurs permettant de déterminer si les tribunaux inférieurs étaient suffisamment engagés dans un domaine de compétence au moment de la Confédération (*Sobeys*, p. 261; *Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 77).

(b) *Historical Analysis*

[75] Guidance on the methodology to be used in addressing this issue can be found in *Sobeys* and in *Reference re Residential Tenancies Act (N.S.)*. At this first step, the Court must ask whether inferior courts of the four founding provinces had a "general shared involvement" or a "meaningful concurrency of power" in the area of jurisdiction in question at the time of Confederation (*Sobeys*, at pp. 260-61 (emphasis deleted); *Reference re Residential Tenancies Act (N.S.)*, at para. 77). If they did, the grant of jurisdiction satisfies the requirements of the *Residential Tenancies* test. Otherwise, the second step of the test must be undertaken.

[76] In our view, there was a general shared involvement in the area of jurisdiction at issue: three of the four founding provinces' inferior courts had, at the time of Confederation, sufficient practical involvement in matters relating to contractual and extracontractual obligations. In Lower Canada, 60 percent of civil litigation took place in two s. 96 courts, the Superior Court or the Circuit Court (A.R., AGQ, vol. III, at p. 170). The scope and monetary ceiling of the inferior courts' jurisdiction were far too limited to establish significant involvement in such a vast area of jurisdiction. In all the other provinces, however, inferior courts played a predominant role in the administration of civil justice. They had broad jurisdiction and heard between 80 percent (in Upper Canada and Nova Scotia) and 90 percent (in New Brunswick) of all civil cases (pp. 183, 192 and 198). In most of the provinces, therefore, there was sufficient practical involvement of the inferior courts in matters relating to contractual and extracontractual obligations. Accordingly, the *Residential Tenancies* test does not lead to the conclusion that art. 35 para. 1 *C.C.P.* is unconstitutional with respect to the types of disputes in question. It is therefore unnecessary to proceed to the second and third steps, which are of questionable relevance to the transfer before us in any event.

b) *L'analyse historique*

[75] L'arrêt *Sobeys* et le *Renvoi relatif à la Residential Tenancies Act (N.-É.)* fournissent les indications méthodologiques qu'il faut suivre pour répondre à cette question. Dans le cadre de ce premier volet, la Cour doit se demander si les tribunaux inférieurs des quatre provinces fondatrices exerçaient, au moment de la Confédération, un « engagement général partagé » ou une « compétence concurrente appréciable » dans le domaine de compétence en question (*Sobeys*, p. 260-261 (soulignement omis); *Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 77). Le cas échéant, l'attribution de compétence satisfait aux exigences du test du *Renvoi sur la location résidentielle*. Autrement, il faut passer à la deuxième étape du test.

[76] À notre avis, il existe un engagement général partagé dans le domaine de compétence en litige : les tribunaux inférieurs de trois des quatre provinces fondatrices exerçaient, au moment de la Confédération, un engagement pratique suffisant en matière d'obligations contractuelles et extracontractuelles. Au Bas-Canada, 60 p. 100 des activités civiles se déroulaient devant deux cours visées à l'art. 96, la Cour supérieure ou la Cour de circuit (d.a., PGQ, vol. III, p. 170). L'étendue et le plafond pécuniaire de la compétence des tribunaux inférieurs étaient beaucoup trop limités pour établir un engagement appréciable dans un domaine de compétence aussi vaste. Par contre, dans toutes les autres provinces, c'étaient les tribunaux inférieurs qui occupaient le rôle prépondérant dans l'administration de la justice civile. Ils exerçaient une juridiction importante et entendaient entre 80 p. 100 (au Haut-Canada et en Nouvelle-Écosse) et 90 p. 100 (au Nouveau-Brunswick) des affaires civiles (p. 183, 192 et 198). Ainsi, il existait dans la majorité des provinces un engagement pratique suffisant des tribunaux inférieurs en matière d'obligations contractuelles et extracontractuelles. Par conséquent, le test du *Renvoi sur la location résidentielle* ne rend pas l'art. 35 al. 1 *C.p.c.* inconstitutionnel quant aux types de différends concernés, de sorte qu'il n'est pas nécessaire de passer aux deuxième et troisième volets, dont, du reste, la pertinence pourrait être remise en question dans le contexte du transfert qui nous occupe.

[77] Indeed, the *Residential Tenancies* test was established at a time when administrative bodies were growing in number and a modern administrative state was emerging in Canada. The Court was sensitive to this new reality, which had not existed at Confederation. The purpose of the test was to avoid stifling institutional innovations designed to provide administrative rather than judicial solutions for social or political problems (see *Sobeys*, at pp. 253-54). Subsequent decisions did not point to any functional gap in the test, given that a large proportion of those cases involved administrative tribunals (see, e.g., *Massey-Ferguson Industries Ltd. v. Government of Saskatchewan*, [1981] 2 S.C.R. 413; *Crevier*; *Grondin*; *Sobeys*; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394; *Reference re Residential Tenancies Act (N.S.)*). While the first step of the test — the only one that applies in the instant case — was drawn from cases involving transfers to courts (*Sobeys*, at p. 254), it cannot readily be applied to a court-to-court transfer of a vast area of jurisdiction. Such broad transfers have rarely been at issue in cases where the *Residential Tenancies* test was applied. This strand of jurisprudence has generally been concerned with provisions granting limited and specific powers.

[78] The case at bar instead concerns the implementation of a comprehensive scheme that divides civil disputes involving contractual and extracontractual obligations in Quebec between two courts. Given that art. 35 para. 1 *C.C.P.* grants a broad jurisdiction over civil matters, the jurisdiction cannot be characterized more narrowly. Therefore, as this Court noted about the characterization stage that precedes the first step of the analysis, the broader the granted jurisdiction is, "the more likely it will be that at least some aspects of the jurisdiction will have been within the purview of inferior courts at Confederation" (*Sobeys*, at p. 253). As a consequence, the expansive characterization required by the provision at issue inappropriately favours a finding of general shared involvement. This leads to a rather strange result: the broader a grant of jurisdiction, the greater the chance that it will escape the

[77] En effet, à l'époque où ce test a été élaboré, les organismes administratifs se multipliaient et le Canada vivait l'émergence d'un État administratif moderne. La Cour était sensible à cette nouvelle réalité qui n'existait pas au moment de la Confédération. L'objectif du test était d'éviter de freiner les innovations institutionnelles destinées à aborder les problèmes sociaux ou politiques par la voie administrative, plutôt que par la voie judiciaire (voir *Sobeys*, p. 253-254). Les décisions subséquentes n'ont pas mis en exergue l'existence d'une faille fonctionnelle dans le test, puisqu'une large proportion de ces affaires portait sur des tribunaux administratifs (voir, p. ex., *Massey-Ferguson Industries Ltd. c. Gouvernement de la Saskatchewan*, [1981] 2 R.C.S. 413; *Crevier*; *Grondin*; *Sobeys*; *Chrysler Canada Ltd. c. Canada (Tribunal de la concurrence)*, [1992] 2 R.C.S. 394; *Renvoi relatif à la Residential Tenancies Act (N.-É.)*). Bien que le premier volet du test, le seul à trouver application en l'espèce, soit issu de la jurisprudence portant sur les transferts vers une cour de justice (*Sobeys*, p. 254), il ne s'applique pas sans écueil dans le contexte du transfert d'un vaste domaine de compétence à une autre cour de justice. Un vaste transfert de ce type a rarement été mis en cause dans la jurisprudence relative au test du *Renvoi sur la location résidentielle*, qui a plus souvent examiné des dispositions attributives de pouvoirs restreints et spécifiques.

[78] Or, la présente situation porte plutôt sur la mise en œuvre d'un régime complet répartissant entre deux tribunaux judiciaires les litiges civils qui concernent les obligations contractuelles et extracontractuelles au Québec. Dans la mesure où le libellé de l'art. 35 al. 1 *C.p.c.* confère une vaste compétence en matière civile, il est impossible de qualifier le domaine de compétence d'une manière plus étroite. Ainsi, comme notre Cour l'a fait remarquer à propos de l'étape de qualification préalable à l'analyse du premier volet, plus la compétence attribuée est large, « plus il est probable qu'au moins certains aspects de la compétence puissent être retrouvés parmi les attributions des tribunaux inférieurs à l'époque de la Confédération » (*Sobeys*, p. 253). Conséquemment, la qualification très large imposée par la disposition en cause favorise indûment une conclusion d'engagement général partagé. Ceci mène à un résultat

restrictions of the *Residential Tenancies* test. Thus, even though it was developed to prohibit the creation of parallel courts, that test does not deal effectively with the very jurisdiction-granting provisions that are the most likely to establish such courts because of their generality. This is why such a grant requires a tailored analytical framework for the purpose of determining whether a parallel court that undermines the role of the superior courts has been created.

[79] As is clear from its application, the *Residential Tenancies* test does not provide a satisfactory framework where, as here, a broad jurisdiction at the heart of private law has been transferred to a court. Thus, this question must be considered from the standpoint of the modified core jurisdiction test so as to better protect the constitutional status of s. 96 courts.

(2) Core Jurisdiction Test

[80] As we explained above, even if a grant of jurisdiction passes the *Residential Tenancies* test, it does not necessarily follow that the grant is constitutional. Its impact on the core jurisdiction of superior courts still has to be assessed, even if the grant is not exclusive. It must first be determined whether one of the attributes of the superior courts' core jurisdiction is affected. If so, it must then be determined whether the legislation has the effect of depriving the superior courts of an aspect of their core jurisdiction or whether it otherwise impermissibly invades that core jurisdiction.

[81] In this case, art. 35 para. 1 *C.C.P.* involves the superior courts' general private law jurisdiction. To decide whether the transfer of jurisdiction effected by art. 35 impermissibly infringes on this aspect of the superior courts' core jurisdiction, we must weigh certain factors. We conclude that the grant to the Court of Québec of exclusive jurisdiction over civil claims for less than $85,000 prevents the Quebec

plutôt incongru : plus l'attribution d'une compétence est vaste, plus elle risque d'échapper aux restrictions formulées par le test du *Renvoi sur la location résidentielle*. De ce fait, bien qu'il ait été conçu pour interdire la création de cours parallèles, ce test ne traite pas de manière efficace du type de dispositions attributives de compétence qui sont justement, par leur degré de généralité, les plus enclines à établir des cours parallèles. C'est pourquoi une telle attribution requiert un cadre d'analyse adapté afin de déterminer si une cour parallèle minant le rôle des cours supérieures a été créée.

[79] Comme il en ressort de son application, le test du *Renvoi sur la location résidentielle* ne permet pas d'encadrer de façon satisfaisante le transfert, vers une cour de justice, d'une large compétence située au cœur du droit privé comme celle dont il s'agit en l'espèce. Cette question doit donc être examinée sous l'angle du test de la compétence fondamentale remanié de façon à mieux protéger le statut constitutionnel des cours visées à l'art. 96.

(2) Le test de la compétence fondamentale

[80] Comme nous l'avons expliqué, même si l'attribution d'une compétence passe le test du *Renvoi sur la location résidentielle*, sa constitutionnalité n'est pas acquise pour autant. On doit encore évaluer son effet au regard de la compétence fondamentale des cours supérieures, et ce, même si l'attribution n'est pas exclusive. Dans un premier temps, il faut déterminer si l'un des attributs de la compétence fondamentale des cours supérieures est en jeu. Dans l'affirmative, il s'agit ensuite de déterminer si la mesure législative a pour effet de priver les cours supérieures d'un aspect de leur compétence fondamentale ou si elle constitue une autre forme d'ingérence inadmissible à cet égard.

[81] En l'espèce, l'art. 35 al. 1 *C.p.c.* met en jeu la compétence générale des cours supérieures en droit privé. Afin de décider si le transfert de compétence opéré par l'art. 35 porte une atteinte inadmissible à cet aspect de la compétence fondamentale des cours supérieures, certains facteurs doivent être soupesés. Nous concluons que l'attribution à la Cour du Québec d'une compétence exclusive sur les réclamations

Superior Court from playing its role under s. 96 in cases concerning private law matters. In short, this grant has the effect of transforming the Court of Québec into a prohibited parallel court. Accordingly, the transfer of jurisdiction contemplated by art. 35 para. 1 *C.C.P.* exceeds the limits established by s. 96 of the *Constitution Act, 1867* and is thus unconstitutional.

(a) *General Private Law Jurisdiction*

[82] The core jurisdiction of the superior courts includes their ability to act as courts of general jurisdiction, that is, to hear and determine matters not exclusively assigned by law to other courts (*MacMillan Bloedel*, at paras. 29, 32 and 37; *Canadian Liberty Net*, at para. 35; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at para. 27). It therefore encompasses, by necessary implication, general jurisdiction over private law matters (*Canadian Liberty Net*, at para. 26; Huppé, at p. 12). However, the existence of this general jurisdiction requires a broad subject-matter jurisdiction, as it is inconceivable for the superior courts to have general jurisdiction over private law matters in a context in which every branch of private law has been exclusively assigned to other courts. This would alter the nature of superior courts by stripping them of one of their essential features, that of exercising judicial functions and stating the law in private disputes. As this Court noted in *Trial Lawyers*, "[t]he resolution of these disputes and resulting determination of issues . . . are central to what the superior courts do. . . . To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*" (para. 32).

[83] In our view, the superior courts' core jurisdiction presupposes a broad subject-matter jurisdiction whose scope corresponds, at the very least, to the central divisions of private law to which more specific fields of law are often attached. This can be explained by the superior courts' historical origins and their nature as courts of original general jurisdiction,

civiles de moins de 85 000 $ empêche la Cour supérieure du Québec de jouer le rôle qui lui incombe en vertu de l'art. 96 en matière de droit privé. En un mot, cette attribution a pour effet de transformer la Cour du Québec en une cour parallèle prohibée. Par conséquent, le transfert de compétence envisagé par l'art. 35 al. 1 *C.p.c.* excède les limites établies par l'art. 96 de la *Loi constitutionnelle de 1867* et s'avère donc inconstitutionnel.

a) *La compétence générale en droit privé*

[82] La compétence fondamentale des cours supérieures comprend leur capacité d'agir à titre de tribunal de juridiction générale (ou juridiction de droit commun), c'est-à-dire leur capacité de connaître des affaires que la loi n'attribue pas exclusivement à d'autres tribunaux (*MacMillan Bloedel*, par. 29, 32 et 37; *Canadian Liberty Net*, par. 35; *Noël c. Société d'énergie de la Baie James*, 2001 CSC 39, [2001] 2 R.C.S. 207, par. 27). Elle englobe donc, par déduction nécessaire, une compétence générale en matière de droit privé (*Canadian Liberty Net*, par. 26; Huppé, p. 12). Or celle-ci a besoin d'une vaste compétence matérielle pour se réaliser. En effet, on ne saurait concevoir une compétence générale en matière de droit privé dans un contexte où toutes les ramifications du droit privé auraient été attribuées exclusivement à d'autres tribunaux. Cela changerait la nature des cours supérieures en les dépouillant d'une de leurs caractéristiques essentielles, celle d'exercer des fonctions judiciaires et de dire le droit dans des litiges privés. Comme l'a reconnu notre Cour dans l'arrêt *Trial Lawyers*, « la résolution de ces différends et les décisions qui en résultent [. . .] sont des aspects centraux des activités des cours supérieures. [. . .] Empêcher l'exercice de ces activités attaque le cœur même de la compétence des cours supérieures que protège l'art. 96 de la *Loi constitutionnelle de 1867* » (par. 32).

[83] À notre avis, la compétence fondamentale des cours supérieures présuppose une vaste compétence matérielle dont l'étendue recoupe, à tout le moins, les divisions centrales du droit privé auxquelles se rattachent souvent des domaines de droit plus spécifiques. Cela s'explique par les origines historiques des cours supérieures et leur nature de tribunal de

as well as by the principles of national unity and of the rule of law that underpin s. 96.

[84] Historically, the English royal courts had general civil jurisdiction and were responsible for the major developments in private law (Lederman, at p. 773). The Canadian superior courts, which are descended from those courts, inherited their role of prime importance in the judicial system (*Law Society of British Columbia*, at pp. 326-27; *MacMillan Bloedel*, at paras. 29, 32 and 36). At the time of Confederation, they had jurisdiction over all important civil cases (G. T. G. Seniuk and N. Lyon, "The Supreme Court of Canada and The Provincial Court in Canada" (2000), 79 *Can. Bar Rev*. 77, at pp. 95-96).

[85] The paramount role given to the superior courts derives in part from the fact that they are courts of original general jurisdiction. A court of original general jurisdiction is the antithesis of a specialized tribunal. A specialized tribunal draws legal conclusions based on a limited number of principles and rules falling within its area of expertise, whereas a court of original general jurisdiction considers and interprets many principles and general rules that may apply in a number of fields of law. In giving the superior courts this breadth of perspective, the framers of the Constitution intended them to ensure the maintenance and coherent development of an actual order of positive laws, as well as to ensure stability and predictability in private law relationships (*Reference re Manitoba Language Rights*, at pp. 747-52; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70; T. Bingham, *The Rule of Law* (2010), at pp. 38-39; Huppé, at p. 13). If the legislatures were free to diminish, by means of unlimited transfers of jurisdiction, the superior courts' ability to lay down the broad lines of the case law, it would no longer be possible for these courts to perform their constitutional role as the primary guardians of the rule of law.

[86] This is why a general jurisdiction over private law matters must be accompanied by a subject-matter jurisdiction that is broad enough to preserve the superior courts' role in providing jurisprudential

droit commun, ainsi que par les principes de l'unité nationale et de la primauté du droit qui sous-tendent l'art. 96.

[84] Historiquement, les cours royales anglaises disposaient d'une compétence générale en matière civile et elles étaient responsables des évolutions les plus marquantes du droit privé (Lederman, p. 773). Descendantes de ces cours, les cours supérieures canadiennes ont hérité de leur rôle de premier plan à l'intérieur de l'organisation judiciaire (*Law Society of British Columbia*, p. 326-327; *MacMillan Bloedel*, par. 29, 32 et 36). Au moment de la Confédération, tous les litiges civils importants relevaient d'elles (G. T. G. Seniuk et N. Lyon, « The Supreme Court of Canada and The Provincial Court in Canada » (2000), 79 *R. du B. can.* 77, p. 95-96).

[85] Le rôle prépondérant confié à ces cours découle entre autres de leur nature de tribunaux de droit commun. Un tribunal de droit commun est l'antithèse d'un tribunal spécialisé. Un tribunal spécialisé tire des conséquences juridiques à partir d'un nombre restreint de principes et de règles relevant de son champ d'expertise, tandis qu'un tribunal de droit commun embrasse et interprète un grand nombre de principes et de règles générales applicables à plusieurs domaines de droit. Avec cette ampleur de perspective qu'elle leur reconnaît, la Constitution destine les cours supérieures à veiller au maintien et à l'évolution cohérente d'un ordre réel de droit positif, de même qu'à la stabilité et à la prévisibilité au sein des rapports de droit privé (*Renvoi relatif aux droits linguistiques au Manitoba*, p. 747-752; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 70; T. Bingham, *The Rule of Law* (2010), p. 38-39; Huppé, p. 13). Si les législatures étaient libres d'atrophier leur capacité d'établir les grandes orientations de la jurisprudence par des transferts de compétence sans limites, ces cours ne pourraient plus assumer leur vocation constitutionnelle de premières gardiennes de la primauté du droit.

[86] C'est pourquoi une compétence générale en droit privé doit s'accompagner d'une juridiction matérielle suffisamment étendue pour préserver le rôle des cours supérieures de développer la jurisprudence

guidance on private law (N. Lyon, "Is Amendment of Section 96 Really Necessary?" (1987), 36 *U.N.B.L.J.* 79, at pp. 83-84). In our view, this requires significant — though not necessarily predominant — involvement in the resolution of disputes falling under the most fundamental branches of private law, such as property law, the law of succession and the law of obligations. A province may assign portions or offshoots of these fields to courts whose judges it appoints, within the restrictions of *Residential Tenancies*. But if, in so doing, it limits the superior court's involvement significantly, then it "alters [that court's] essence, making it something less than a superior court" (*MacMillan Bloedel*, at para. 1). In short, a province which takes away an aspect of the court's core jurisdiction contravenes s. 96 — a provision whose purpose lies in the "maintenance of the rule of law through the protection of the judicial role" (*Reference re Remuneration of Judges (1997)*, at para. 88 (emphasis added); *Trial Lawyers*, at para. 39). In every case, the line that must not be crossed will be dependent upon a contextual and multi-factored analysis.

en matière de droit privé (N. Lyon, « Is Amendment of Section 96 Really Necessary? » (1987), 36 *R.D. U.N.-B.* 79, p. 83-84). À notre avis, cela requiert un engagement appréciable — sans nécessairement être dominant — dans la résolution des litiges relevant des branches les plus fondamentales du droit privé comme le droit des biens, le droit successoral ou le droit des obligations. Une province peut confier des portions ou des ramifications de ces domaines à des tribunaux dont elle nomme les juges, sous réserve des restrictions imposées par le test du *Renvoi sur la location résidentielle*. Mais si, ce faisant, elle restreint de façon importante l'engagement de la cour supérieure, elle « transform[e] la nature même [de cette cour], la réduisant à quelque chose de moins qu'une cour supérieure » (*MacMillan Bloedel*, par. 1). En somme, une province qui lui retire un aspect de sa compétence fondamentale contrevient à l'art. 96 — une disposition dont l'objet réside dans le « maintien de la primauté du droit par la protection du rôle des tribunaux » (*Renvoi relatif à la rémunération des juges (1997)*, par. 88 (nous soulignons); *Trial Lawyers*, par. 39). Dans tous les cas, la ligne à ne pas franchir dépend d'une analyse contextuelle et multifactorielle.

(b) *Purpose of the Analysis and Factors to Consider*

[87] Article 35 para. 1 *C.C.P.* assigns one of the fundamental branches of Quebec civil law to the Court of Québec where the value of the subject matter of a dispute is less than $85,000. It unavoidably affects an aspect of the superior courts' core jurisdiction: their general jurisdiction over private law matters. What remains to be determined, therefore, is whether it impermissibly invades that jurisdiction. In our view, the following question must be asked: Does the grant of jurisdiction impair the superior court of general jurisdiction in such a way as to alter its essential nature or prevent it from playing its role under s. 96? If the jurisdiction-granting provision transforms the provincial court into a parallel court prohibited by the Constitution, the answer to this question must be yes.

[88] There are various factors that can be helpful when it comes to determining whether, by granting

b) *L'objet de l'analyse et les facteurs à considérer*

[87] L'article 35 al. 1 *C.p.c.* attribue à la Cour du Québec l'une des branches fondamentales du droit civil québécois dans la mesure où l'objet du litige est d'une valeur inférieure à 85 000 $. Il met inévitablement en jeu un aspect de la compétence fondamentale des cours supérieures, à savoir leur compétence générale en droit privé. Reste donc à déterminer s'il constitue une ingérence inadmissible à cet égard. À notre avis, il faut se poser la question suivante : l'attribution de la compétence affaiblit-elle la cour supérieure de juridiction générale de façon à changer sa nature essentielle ou à l'empêcher de jouer le rôle qui lui incombe en vertu de l'art. 96? Si la disposition attributive de compétence transforme la cour provinciale en une cour parallèle prohibée par la Constitution, une réponse positive s'impose.

[88] Différents facteurs peuvent s'avérer utiles pour déterminer si, en attribuant à une cour de nomination

a court with provincially appointed judges a jurisdiction as broad as the one at issue in this case, a legislature has created a prohibited parallel court that impairs the superior court by preventing it from playing its constitutional role. In this case, six factors are of particular relevance: the scope of the jurisdiction being granted, whether the grant is exclusive or concurrent, the monetary limits to which it is subject, whether there are mechanisms for appealing decisions rendered in the exercise of the jurisdiction, the impact on the caseload of the superior court of general jurisdiction, and whether there is an important societal objective. This list is not exhaustive. Other factors may be relevant in different contexts: one need only think, for example, of geographical limitations. However, in the circumstances of this case and in light of the evidence before us, we are of the view that the question can be decided on the basis of these six factors.

[89] In our opinion, these factors give effect to the compromise reached at Confederation concerning the special status of the superior courts of general jurisdiction in a unitary justice system. They make it possible to draw a sufficiently clear line between, on the one hand, legitimate exercises of the provinces' power in relation to the administration of justice and, on the other hand, grants of jurisdiction to parallel courts that usurp the superior courts' general private law jurisdiction and prevent them from playing their constitutional role. The superior courts of general jurisdiction are and must remain central to the Canadian justice system (*MacMillan Bloedel*, at paras. 22 and 51-52). However, this Court has repeatedly noted that Canada's Constitution is a living tree and that a court's jurisdiction must not be frozen at what it was in 1867 (*Reference re Residential Tenancies Act (N.S.)*, at paras. 32, per Lamer C.J., concurring, and 69, per McLachlin J. for the majority; *Reference re Young Offenders Act (P.E.I.)*, at p. 266; *Sobeys*, at p. 255). But the living tree must "gro[w] and expan[d] within its natural limits" (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 56, quoting *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). Section 96 is one of these limits.

provinciale une compétence aussi large que celle en l'espèce, une législature a établi une cour parallèle prohibée qui affaiblit la cour supérieure en l'empêchant de remplir son rôle constitutionnel. En l'espèce, six facteurs s'avèrent particulièrement pertinents : l'étendue de la compétence attribuée, le caractère exclusif ou concurrent de cette attribution, les limites pécuniaires auxquelles elle est assujettie, l'existence de mécanismes d'appel à l'encontre des décisions rendues dans l'exercice de cette compétence, l'impact sur le volume de dossiers de la cour supérieure de juridiction générale et la poursuite d'un objectif social important. La liste n'est pas exhaustive. D'autres facteurs pourraient s'avérer pertinents dans d'autres contextes : il suffit de penser, par exemple, aux limites géographiques. Toutefois, dans les circonstances de l'espèce et à la lumière de la preuve dont nous disposons, nous sommes d'avis que la question peut être tranchée à l'aide de ces six facteurs.

[89] À notre avis, ces facteurs permettent de donner substance au compromis conclu à l'époque de la confédération quant au statut particulier des cours supérieures de juridiction générale au sein d'un système de justice unitaire. Ils permettent de tracer une ligne suffisamment claire entre, d'une part, les exercices légitimes du pouvoir des provinces en matière d'administration de la justice et, d'autre part, les attributions de compétence vers des cours parallèles qui usurpent la compétence générale des cours supérieures en droit privé et les empêche de jouer leur rôle constitutionnel. Les cours supérieures de juridiction générale sont et doivent demeurer le pivot du système judiciaire canadien (*MacMillan Bloedel*, par. 22 et 51-52). Cependant, notre Cour a maintes fois rappelé que la Constitution canadienne est un arbre vivant et qu'il faut se garder de figer les compétences des tribunaux à ce qu'elles étaient en 1867 (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 32, le juge en chef Lamer, concordant, et 69, la juge McLachlin, majoritaire; *Renvoi relatif à la Loi sur les jeunes contrevenants (Î.-P.-É.)*, p. 266; *Sobeys*, p. 255). Mais l'arbre vivant doit « croître et [. . .] se développer à l'intérieur de ses limites naturelles » (*Renvoi relatif à la Loi sur les valeurs mobilières*, 2011 CSC 66, [2011] 3 R.C.S. 837, par. 56, citant *Edwards c. Attorney-General for Canada*, [1930] A.C. 124 (C.P.), p. 136). L'article 96 est l'une de ces limites.

[90] Before we turn to the heart of the analysis, two preliminary remarks are in order.

[91] First, these appeals do not concern the Small Claims Division of the Court of Québec's Civil Division. Even though the Small Claims Division's jurisdiction is covered by art. 35 *C.C.P.*, the parties' submissions did not relate to that division. There is therefore no need to apply our multi-factored analysis to the Small Claims Division in the case before us.

[92] Second, the institutional characteristics of courts with provincially appointed judges have changed considerably since 1867. Today, although the existence of courts with provincially appointed judges is not itself protected by the Constitution, those courts offer the same guarantees of judicial independence and impartiality as the superior courts.

[93] Even though ss. 96 to 100 do not apply to the judges of those courts, their independence is protected as a result of the preamble to the Constitution of Canada. In *Reference re Remuneration of Judges (1997)*, this Court held that the constitutional principle of judicial independence extends to courts with provincially appointed judges, including in civil matters. Lamer C.J., writing for the majority, noted that "judicial independence [has] grown into a principle that now extends to all courts, not just the superior courts of this country" (para. 106).

[94] In addition, whereas at the time of Confederation, provincial court judges generally had no legal training (J. Deslauriers, "La Cour provinciale et l'art. 96 de l'A.A.N.B." (1977), 18 *C. de D.* 881, at p. 910; Lyon, at p. 82), the present situation is quite different. As the AGQ rightly notes, their training now meets the highest standards required of the judiciary (A.F., at para. 152). There is therefore no doubt that courts with provincially appointed judges offer the same constitutional guarantees as the superior courts and provide justice of the same quality. The provincial legislatures have considerable latitude to

[90] Avant d'entrer dans le vif de l'analyse, deux remarques préliminaires s'imposent.

[91] En premier lieu, la Division des petites créances de la Chambre civile de la Cour du Québec n'est pas remise en question devant nous. Bien que sa compétence soit incluse dans l'art. 35 *C.p.c.*, les représentations des parties ne portaient pas sur cette division. Il n'est donc pas nécessaire d'appliquer notre analyse multifactorielle à la Division des petites créances dans le cadre de l'affaire dont nous sommes saisis.

[92] En second lieu, les caractéristiques institutionnelles des cours de nomination provinciale ont évolué de façon importante depuis 1867. Quoique leur existence même ne soit pas protégée par la Constitution, les cours de nomination provinciale présentent aujourd'hui les mêmes garanties d'indépendance et d'impartialité judiciaire que les cours supérieures.

[93] Bien que les juges de ces cours ne soient pas visés par les art. 96 à 100, leur indépendance est néanmoins protégée par l'effet du préambule de la Constitution canadienne. En effet, notre Cour a reconnu, dans le *Renvoi relatif à la rémunération des juges (1997)*, que le principe constitutionnel de l'indépendance judiciaire s'étendait aux cours de nomination provinciale, y compris en matière civile. Le juge en chef Lamer, pour la majorité de la Cour, souligne que « l'indépendance de la magistrature est devenue un principe qui vise maintenant tous les tribunaux, et non seulement les cours supérieures du pays » (par. 106).

[94] De plus, alors qu'à l'époque de la Confédération, les juges des tribunaux provinciaux n'avaient généralement pas de formation juridique (J. Deslauriers, « La Cour provinciale et l'art. 96 de l'A.A.N.B. » (1977), 18 *C. de D.* 881, p. 910; Lyon, p. 82), la réalité d'aujourd'hui est toute autre. Comme le souligne avec justesse le PGQ, leur formation satisfait maintenant les plus hautes normes exigées de la magistrature (m.a., par. 152). Ainsi, il ne fait aucun doute que les cours de nomination provinciale offrent les mêmes garanties constitutionnelles que les cours supérieures ainsi qu'une justice

establish courts whose judges are appointed by the provinces and which play a part in maintaining the rule of law. However, they cannot in so doing deprive the superior courts of general jurisdiction of their essential features, nor can they create parallel courts that prevent the latter from playing the role assigned to them by s. 96.

[95] With this in mind, let us now consider the relevant factors.

(i) Scope of the Jurisdiction Being Granted

[96] The first factor is the scope of the jurisdiction that is granted to the court with provincially appointed judges. Is it a vast or limited area of jurisdiction? As McLachlin J. wrote in *MacMillan Bloedel*, the concern is that "vast areas of contract, tort and criminal jurisdiction [not] be transferred to shadow courts with impunity, thus destroying the compromise of the Fathers of Confederation and the intended effect of s. 96" (para. 67, dissenting, but not on this point).

[97] The scope of the jurisdiction being granted is not a strictly quantitative factor linked to the number of disputes concerned. On the contrary, this factor requires that the jurisdiction in question be situated in relation to the main branches of private law. In determining whether the transfer is "vast" or "limited", we must bear in mind the role of the superior courts of general jurisdiction, which, more than any other court, are responsible for ensuring the coherence of private law. If a provincial court is granted a large block of jurisdiction at the heart of private law — such as contract law or property law — that would suggest that that court is, in exercising the jurisdiction in question, acting as a prohibited parallel court and that the superior courts are impaired as a result. Whether such a grant is constitutional will then depend on the scope of the limits placed on it. In contrast, a grant of a limited jurisdiction — over matters with respect to lease, for example — will not weigh as heavily in favour of such a conclusion,

de qualité équivalente. Les législatures provinciales bénéficient d'une grande latitude pour établir des tribunaux dont les juges sont nommés par les provinces et qui participent au maintien de la primauté du droit. Ce faisant, elles ne sauraient toutefois priver les cours supérieures de juridiction générale de leurs caractéristiques essentielles, ni créer des cours parallèles qui les empêchent de jouer le rôle que leur confie l'art. 96.

[95] Ceci étant dit, considérons maintenant les facteurs pertinents.

(i) L'étendue de la compétence attribuée

[96] Le premier facteur est l'étendue de la compétence attribuée à la cour de nomination provinciale. S'agit-il d'un domaine de compétence vaste ou restreint? Comme l'écrivait la juge McLachlin dans *MacMillan Bloedel*, on cherche à éviter que « de vastes domaines de la compétence en matière contractuelle, délictuelle et criminelle soient transférés impunément à des cours de justice parallèles, ce qui détruirait le compromis des Pères de la Confédération et l'effet voulu de l'art. 96 » (par. 67, dissidente, mais non sur ce point).

[97] L'étendue de la compétence attribuée n'est pas un facteur strictement quantitatif lié au nombre de différends visés. Elle exige au contraire que l'on situe la compétence attribuée par rapport aux principales branches du droit privé. Pour qualifier le transfert de « vaste » ou de « restreint », il faut garder à l'esprit le rôle des cours supérieures de juridiction générale à qui incombe, plus qu'à n'importe quelle autre cour, la responsabilité d'assurer la cohérence du droit privé. L'attribution à une cour provinciale d'un vaste bloc de compétence situé au cœur du droit privé — comme le droit des contrats ou le droit des biens — tend à indiquer que la cour provinciale se comporte, dans l'exercice de cette compétence, comme une cour parallèle prohibée et que les cours supérieures en ressortent affaiblies. La constitutionnalité d'une telle attribution dépendra alors de l'importance des limites auxquelles elle est assujettie. À l'inverse, l'attribution d'une compétence restreinte — une compétence sur le louage,

since it is only a very specific branch and not the very centre of contract law.

[98] Whether a grant of jurisdiction is vast or limited is a question of degree. For example, jurisdiction over civil disputes is more vast than jurisdiction over contract law, which is in turn more vast than jurisdiction over employment contracts, which is more vast than jurisdiction over individual contracts of employment, which, finally, is more vast than jurisdiction over unjust dismissals. The more vast the granted jurisdiction is, the more likely it is that the provincial court will resemble a superior court of general jurisdiction. In contrast, a limited or specific grant will be less likely to make the provincial court resemble a superior court of general jurisdiction.

[99] In the case at bar, art. 35 para. 1 *C.C.P.* grants to the Court of Québec almost the entirety of the law of obligations for claims of less than $85,000. This is not just any area of jurisdiction. The law of obligations, the real heart of private law, is the foundation of a multitude of specialized subfields. In fact, it is difficult to imagine a more central field:

> [TRANSLATION] At the very heart of th[e] social order, the law of obligations is the legal foundation of the daily lives of the members of a civil society. Indeed, the law of obligations is everyday life put in a legal equation. The essential function of this branch of private law is in fact to supply the rules required to meet the needs of human beings in their everyday relationships with one another.

(P.-A. Crépeau, "La fonction du droit des obligations" (1998), 43 *McGill L.J.* 729, at p. 732.)

[100] Based on its scope and because of the fundamental nature of the field of law in question, the block of jurisdiction granted to the Court of Québec in art. 35 para. 1 *C.C.P.* is unquestionably similar to the general private law jurisdiction exercised by the superior courts of general jurisdiction. Whether such

par exemple — ne milite pas aussi sérieusement en faveur d'une telle conclusion, dans la mesure où il ne s'agit que d'une ramification bien précise et non du cœur même du droit des contrats.

[98] Le caractère vaste ou restreint d'une attribution de compétence soulève une question de degrés. Une compétence sur les litiges civils, par exemple, est plus vaste qu'une compétence sur le droit des contrats, laquelle est plus vaste qu'une compétence sur les contrats de travail, laquelle est plus vaste qu'une compétence sur les contrats individuels de travail, laquelle enfin est plus vaste qu'une compétence sur les congédiements abusifs. Plus vaste est la compétence attribuée, plus elle aura tendance à identifier la cour provinciale à une cour supérieure de juridiction générale. Inversement, une attribution restreinte ou spécifique aura moins tendance à assimiler la cour provinciale à une cour supérieure de juridiction générale.

[99] En l'espèce, l'art. 35 al. 1 *C.p.c.* attribue à la Cour du Québec la quasi-totalité du droit des obligations pour les réclamations inférieures à 85 000 $. Il ne s'agit pas d'un domaine de compétence comme les autres. Véritable cœur du droit privé, le droit des obligations est le fondement d'une multitude de sous-domaines spécialisés. Difficile en effet d'imaginer un domaine plus central :

> Au cœur même de [l']ordre social, le droit des obligations constitue le fondement juridique de la vie quotidienne des membres d'une société civile. Le droit des obligations, c'est, en effet, la vie de tous les jours mise en équation juridique. La fonction essentielle de cette branche du droit privé est précisément de fournir les règles nécessaires à la satisfaction des besoins de l'être humain dans ses relations quotidiennes avec ses semblables.

(P.-A. Crépeau, « La fonction du droit des obligations » (1998), 43 *R.D. McGill* 729, p. 732.)

[100] Par son étendue et par le caractère fondamental du domaine de droit concerné, le bloc de compétence attribué à la Cour du Québec par l'art. 35 al. 1 *C.p.c.* s'apparente indéniablement à la compétence générale en droit privé qu'exercent les cours supérieures de juridiction générale. La validité d'une

a broad grant is valid will depend on what limits are imposed on it.

(ii) Whether the Grant Is Exclusive or Concurrent

[101] As courts of original general jurisdiction, the superior courts have "inherent jurisdiction over all matters, both federal and provincial, unless a different forum is specified" (*Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at p. 311). Jurisdiction granted *exclusively* to a court with provincially appointed judges is removed from the superior court in the process (*MacMillan Bloedel*, at para. 27). By depriving the superior courts of their capacity to resolve a particular class of disputes, exclusivity threatens their status as the cornerstone of a unitary system of justice. In contrast, a *concurrent* grant preserves that capacity. The superior courts' role is therefore not undermined to the same extent.

[102] In the instant case, civil suits concerning contractual and extracontractual matters for less than $85,000 have been removed from the Superior Court's jurisdiction. According to the statistics that were adduced in evidence, this accounts for more than 20,000 cases a year, not including those opened in the Small Claims Division (R.R., Chief Justice of the Superior Court et al., at pp. 3-4). This removal of jurisdiction undermines the Superior Court's role as the cornerstone of a unitary system of justice. It means that in Quebec, a large volume of cases under one of the most fundamental branches of private law cannot be brought before a superior court of general jurisdiction. Given that the superior courts are at the heart of a nationwide *unitary* justice system, the scope of their jurisdiction should not vary disproportionately from one province to another.

[103] It may therefore be helpful in this analysis to consider the situation elsewhere in Canada. Even though s. 92(14) allows for and encourages flexibility in how the justice system is organized in each province, the superior courts of general jurisdiction must retain a certain uniformity in the sense that

attribution aussi large dépendra de la teneur des limites qui lui sont imposées.

(ii) Le caractère exclusif ou concurrent de l'attribution

[101] À titre de tribunaux de droit commun, les cours supérieures possèdent « une compétence inhérente sur toutes les matières relevant de la compétence fédérale ou provinciale, sauf si un autre tribunal est désigné » (*Hunt c. T&N plc*, [1993] 4 R.C.S. 289, p. 311). La compétence attribuée *exclusivement* à une cour de nomination provinciale se trouve, par la même occasion, retirée de la cour supérieure (*MacMillan Bloedel*, par. 27). En dépossédant les cours supérieures de leur capacité de trancher une certaine catégorie de différends, l'exclusivité menace leur statut de pierre angulaire d'un système de justice unitaire. À l'inverse, le caractère *concurrent* de l'attribution préserve cette capacité. L'atteinte au rôle des cours supérieures n'est donc pas aussi importante.

[102] En l'espèce, les poursuites civiles en matière contractuelle et extracontractuelle de moins de 85 000 $ ont été retirées de la compétence de la Cour supérieure. Selon les statistiques mises en preuve, cela représente plus de 20 000 dossiers par année, sans compter les dossiers ouverts à la Division des petites créances (d.i., juge en chef de la Cour supérieure *et al.*, p. 3-4). Ce retrait de compétence entrave le rôle de la Cour supérieure comme pilier d'un système de justice unitaire. Il signifie en effet qu'au Québec un volume considérable de dossiers relevant d'une des branches les plus fondamentales du droit privé ne peut être porté devant une cour supérieure de juridiction générale. Or, comme ces cours sont le pivot d'un système de justice *unitaire* à l'échelle du pays, l'étendue de leur juridiction ne devrait pas varier de façon disproportionnée d'une province à l'autre.

[103] Dans le cadre de cette analyse, il peut donc être pertinent de prendre en considération la situation qui prévaut ailleurs au Canada. Bien que le par. 92(14) permette et encourage une flexibilité quant à l'organisation de la justice dans chaque province, les cours supérieures de juridiction générale

they must be able to play their essential role in a similar manner. Across the country, a vast majority of provinces have established courts with provincially appointed judges that have jurisdiction over civil matters. Almost all are identified as small claims courts, are governed by a simplified procedure, and their decisions can be appealed to the superior courts. The highest monetary jurisdiction is $50,000, in Alberta. While these courts retain some form of concurrent jurisdiction with the superior courts, Quebec has conferred exclusive jurisdiction over civil disputes concerning contractual and extracontractual obligations on a court with provincially appointed judges. It must be borne in mind in the analysis that the terms of this grant would also be permissible in the other provinces.

[104] The role left to the Quebec Superior Court in this field is minimal in comparison with the role of superior courts elsewhere in Canada. Although the Quebec Superior Court has retained its jurisdiction over major disputes relating to obligations, such as class actions or disputes in which the value of the subject matter is $85,000 or more, it is in the process of becoming inaccessible to ordinary Quebecers. Section 92(14) gives the provinces the authority to create courts in the context of their power over the administration of justice (*Reference re Residential Tenancies Act (N.S.)*, at para. 72), but that power, while broad, is limited by the scope of ss. 96 to 100, which operate in favour of the superior courts. In accordance with this Court's case law, a grant of exclusive jurisdiction whose effect would be to completely remove one of the attributes of the core jurisdiction "would maim" the superior courts (*MacMillan Bloedel*, at para. 37) and could never be acceptable regardless of the result of applying the other factors.

(iii) Monetary Limit

[105] Monetary limits reflect a certain division of labour between the courts pursuant to which the superior courts play the central role. As this Court held in *Sobeys*, "the nature of the inferior-superior court

doivent conserver une certaine uniformité en ce sens qu'elles doivent être en mesure de jouer leur rôle essentiel d'une façon similaire. À travers le pays, une grande majorité de provinces ont constitué des cours de nomination provinciale compétentes en matière civile. La plupart sont désignées comme étant des cours de petites créances, sont régies par une procédure simplifiée et leurs décisions peuvent faire l'objet d'un appel auprès des cours supérieures. La compétence pécuniaire la plus élevée est de 50 000 $ et se trouve en Alberta. Alors que ces cours conservent une forme de concurrence avec les cours supérieures quant à leur compétence, le Québec a conféré une compétence exclusive sur les litiges civils en matière d'obligations contractuelles et extracontractuelles à une cour de nomination provinciale. L'analyse doit être menée en gardant à l'esprit que les modalités de cette attribution seraient également permissibles dans les autres provinces.

[104] Le rôle laissé à la Cour supérieure du Québec dans ce domaine est minime en comparaison avec celui des cours supérieures ailleurs au Canada. Bien que la Cour supérieure du Québec conserve sa compétence sur d'importants litiges en matière d'obligations, comme les actions collectives ou les litiges dont l'objet est d'une valeur de 85 000 $ ou plus, elle est en voie de devenir hors d'atteinte pour les citoyens ordinaires. Si les provinces sont habilitées par le par. 92(14) à créer des tribunaux dans le cadre de leur pouvoir d'administrer la justice (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 72), ce pouvoir, bien qu'étendu, est limité par la portée des art. 96 à 100 opérant en faveur des cours supérieures. Selon la jurisprudence de notre Cour, une attribution de compétence exclusive qui aurait pour effet de retirer complètement un des attributs de la compétence fondamentale « mutilerait » les cours supérieures (*MacMillan Bloedel*, par. 37) et ne saurait en aucun cas être acceptable, peu importe le résultat de l'application des autres facteurs.

(iii) Le seuil pécuniaire

[105] Les limites pécuniaires reflètent une certaine division du travail entre les tribunaux au sein de laquelle les cours supérieures occupent le rôle central. Comme l'écrit notre Cour dans *Sobeys*, « la nature

distinction will invariably mean that the former's jurisdiction was limited in some way", including monetarily (p. 260). The lack of a monetary ceiling or the existence of a very high monetary ceiling can blur the distinction between a superior court of general jurisdiction and a court with provincially appointed judges, thereby showing that the latter is, in reality, operating as a prohibited parallel court that prevents the former from playing its constitutional role.

[106] That being said, a monetary limit is merely one of several factors to weigh; it cannot be determinative in itself. If considered in isolation, a decision to impose a particular monetary limit will always appear to be discretionary. This is why such a limit must be analyzed in its context and in light of the other factors. The approach to be taken in this regard is one that gives the provinces flexibility without making the constitutional limit imposed by s. 96 illusory.

[107] The Court of Appeal properly took the $100 monetary limit that had, in 1867, circumscribed the involvement of the inferior courts of the four founding provinces in the area of jurisdiction at issue as the starting point for its analysis. Comparing the current monetary ceiling to the monetary ceiling of the inferior courts at Confederation produces a quantitative benchmark that can be used to contrast the historical role of inferior courts with the role played by a court with provincially appointed judges today. The historical monetary ceiling needs to be expressed in present-day dollars and calculated using a reliable conversion method that allows for a useful comparison.

[108] If the current and historical monetary limits are close, it might be thought that the impact on the superior courts' role in exercising the jurisdiction in question will be lower. The fact that the two amounts are equivalent would suggest that the involvement of the court with provincially appointed judges corresponds to the inferior courts' historical involvement.

même de la distinction entre tribunal inférieur et cour supérieure signifiera invariablement que la compétence du premier était limitée d'une certaine manière » notamment de manière pécuniaire (p. 260). L'absence de plafond pécuniaire ou l'établissement d'un plafond pécuniaire très élevé peuvent brouiller la frontière entre une cour supérieure de juridiction générale et une cour de nomination provinciale et, partant, révéler que, dans les faits, celle-ci fonctionne comme une cour parallèle prohibée qui empêche celle-là de jouer son rôle constitutionnel.

[106] Cela étant, le seuil pécuniaire n'est qu'un facteur parmi d'autres à soupeser; il ne saurait revêtir un caractère déterminant en soi. Prise isolément, l'imposition d'une limite monétaire donnée apparaîtra toujours comme une décision discrétionnaire. C'est pourquoi cette limite doit être analysée dans son contexte et à la lumière des autres facteurs. Il convient de préconiser à cet égard une approche qui offre une marge de manœuvre aux provinces sans pour autant rendre illusoire la limite constitutionnelle imposée par l'art. 96.

[107] La Cour d'appel a eu raison de prendre comme point de départ de son analyse le seuil pécuniaire de 100 $ qui limitait, en 1867, l'engagement des tribunaux inférieurs des quatre provinces fondatrices dans l'exercice de la compétence en cause. La comparaison du plafond pécuniaire actuel et du plafond pécuniaire des tribunaux inférieurs à l'époque de la Confédération fournit un repère quantitatif permettant de mettre en opposition le rôle aujourd'hui joué par les cours de nomination provinciale et le rôle historique des tribunaux inférieurs. Le plafond pécuniaire historique doit être exprimé en dollars d'aujourd'hui et calculé selon une méthode d'actualisation fiable permettant de faire une comparaison utile.

[108] Si le plafond pécuniaire actuel s'approche du plafond pécuniaire historique, on peut considérer que l'impact sur le rôle des cours supérieures dans l'exercice de la compétence en question sera moindre. En effet, l'équivalence entre les deux montants tend à indiquer que l'engagement de la cour de nomination provinciale correspond à l'engagement historique des tribunaux inférieurs.

[109] However, the monetary factor must not transform the analysis into a mathematical operation; it is but one factor among several, and it is useful because it allows the analysis to be anchored in a quantitative range. The current monetary ceiling can exceed the historical ceiling without necessarily making the grant unconstitutional, just as the fact that a ceiling is under the historical ceiling could be insufficient to ensure that the grant is constitutional. In every case, the difference between the historical ceiling and the current ceiling must be analyzed having regard to the other factors in order to determine whether and, where appropriate, to what extent the superior courts' role is undermined.

[110] There should nevertheless be a reasonable connection between the current monetary ceiling and the historical one that reflects the general division of labour at the time of Confederation between the inferior courts and what are now the s. 96 courts. If the current ceiling is significantly higher than the historical ceiling of the inferior courts, that would suggest that the superior courts of general jurisdiction have been deprived of part of the role they have always played and that that part has been conferred on a court with provincially appointed judges. The constitutional basis for such a ceiling will be much more fragile if the ceiling applies to a vast area of jurisdiction at the heart of any of the fundamental branches of private law.

[111] It is to be expected that the monetary limit will increase over time because of inflation. The provinces should not have to frequently take action to adjust the limit. The courts should therefore be flexible when considering an amount that retains a reasonable connection to the historical monetary ceiling. Such an approach gives the provinces the latitude they need to ensure that legislation evolves in line with the rate of inflation (National Assembly, Standing Committee on Institutions, "Étude détaillée du projet de loi nº 54 — Loi portant sur la réforme du Code de procédure civile", *Journal des débats*, vol. 37, No. 71, 2nd Sess., 36th Leg., May 2, 2002, at pp. 6-7 and 9).

[109] Toutefois, le facteur pécuniaire ne doit pas transformer l'analyse en une opération mathématique; ce n'est qu'un facteur parmi d'autres dont l'utilité provient de ce qu'il permet d'ancrer l'analyse dans un ordre de grandeur de nature quantitative. Le plafond pécuniaire actuel peut excéder le plafond historique sans pour autant entraîner l'inconstitutionnalité de l'attribution, de même qu'un plafond inférieur au plafond historique peut être insuffisant à en assurer la constitutionnalité. Dans tous les cas, l'écart entre le plafond historique et le plafond actuel doit être analysé au regard des autres facteurs pour déterminer si, et le cas échéant dans quelle mesure, il y a atteinte au rôle des cours supérieures.

[110] Il devrait néanmoins exister, entre le plafond pécuniaire actuel et le plafond pécuniaire historique, un lien de rattachement raisonnable qui reflète la division générale du travail existant à l'époque confédérative entre les tribunaux inférieurs et les cours aujourd'hui visées à l'art. 96. Un plafond pécuniaire actuel qui excède significativement le plafond historique des tribunaux inférieurs tend à indiquer que les cours supérieures de juridiction générale se voient privées d'une partie du rôle qu'elles ont toujours joué au profit d'une cour de nomination provinciale. La fragilité constitutionnelle d'un tel plafond sera plus grande lorsque celui-ci porte sur un vaste domaine de compétence situé au cœur de l'une ou l'autre des branches fondamentales du droit privé.

[111] L'on peut s'attendre à ce que les limites pécuniaires augmenteront à travers le temps avec l'inflation. Les provinces ne devraient pas avoir à s'engager dans un exercice fréquent d'ajustement du seuil. Les cours devraient donc être flexibles lorsqu'elles considèrent un montant qui demeure raisonnablement rattaché au plafond pécuniaire historique. Pareille approche offre aux provinces la latitude nécessaire à l'évolution harmonieuse de la législation et du taux d'inflation (Assemblée nationale, Commission permanente des institutions, « Étude détaillée du projet de loi nº 54 — Loi portant sur la réforme du Code de procédure civile », *Journal des débats*, vol. 37, nº 71, 2e sess., 36e lég., 2 mai 2002, p. 6-7 et 9).

[112] This flexibility also facilitates access to justice (Blackstone, *Commentaries on the Laws of England* (1768), Book III, at p. 30, "[t]he policy of our ancient constitution . . . was to bring justice home to every man's door"). Although the current monetary limit should generally reflect the balance between the s. 96 courts and the inferior courts at the time of Confederation, there is room in the analysis for an expansion of provincial jurisdiction in response to changes in society and to pressing needs with regard to access to justice. This goal of facilitating access to justice should therefore always give a province a certain flexibility when it sets a monetary ceiling it considers appropriate in light of its own circumstances and specific provincial reality. Quebec is free to establish a court with provincially appointed judges that is unique to it, but that court's monetary jurisdiction must have a sufficient connection to the monetary limit that existed in 1867 in order to give effect to the compromise reached at Confederation.

[113] It is true that in this approach, significant weight is given to the monetary limit as a benchmark, whereas this Court has stated in discussing the *Residential Tenancies* test that geographical limitations must carry more weight than monetary limits (*Sobeys*, at p. 260). But that statement must be read in context. The Court was considering the practical involvement of the inferior courts in a specific area of jurisdiction at the time of Confederation. Significant geographical limitations could have had a considerable impact on the percentage of the population who had recourse to those courts. The relationship between the monetary ceilings and the role the inferior courts had actually played in that area of jurisdiction was less clear. In addition, attaching less importance to the monetary factor reflected considerations linked to inflation (*Sobeys*, at p. 260).

[114] The monetary factor we are proposing for this multi-factored analysis should not be subject to the same reservations as arose from *Sobeys*. First, it already takes inflation into account. Second, the factors of this analysis relate to the impact of legislation on the role the superior courts of general jurisdiction

[112] Cette flexibilité favorise également l'accès à la justice (Blackstone, *Commentaires sur les lois anglaises* (1823), t. IV, p. 48, « [l]e mode adopté par notre ancienne constitution [. . .] était de rendre la justice à chacun à sa porte »). En effet, bien que le seuil monétaire d'aujourd'hui devrait généralement refléter l'équilibre entre les cours visés à l'art. 96 et les tribunaux inférieurs de l'époque confédérative, il existe une place dans l'analyse pour la croissance de la compétence provinciale en réponse à l'évolution de la société et les besoins pressants en ce qui a trait à l'accès à la justice. Cet objectif de favoriser l'accès à la justice devrait, de ce fait, toujours reconnaître une certaine souplesse aux provinces lorsqu'elles fixent le seuil pécuniaire qu'elles considèrent adéquat en vertu de leur propre contexte et réalité provinciale particulière. Il est loisible au Québec de mettre sur pied une cour de nomination provinciale personnalisée, mais sa compétence pécuniaire doit rester suffisamment rattachée à la limite pécuniaire qui existait en 1867 afin de donner effet au compromis conclu à l'époque de la Confédération.

[113] Il est vrai que cette approche confère un poids significatif au seuil monétaire comme point de référence, alors que dans le cadre du test du *Renvoi sur la location résidentielle*, notre Cour avait noté que les limitations territoriales devaient avoir plus de poids que les limitations pécuniaires (*Sobeys*, p. 260). Encore faut-il replacer cette affirmation dans son contexte. La Cour s'intéressait à l'engagement pratique des tribunaux inférieurs de l'époque confédérative dans un domaine de compétence donné. Des limitations territoriales importantes pouvaient avoir un impact significatif sur le pourcentage de la population ayant recours à ces tribunaux. Les plafonds pécuniaires n'étaient pas aussi révélateurs du rôle qu'avaient réellement joué les tribunaux inférieurs dans ce domaine de compétence. La relativisation du facteur pécuniaire reflétait aussi des considérations liées à l'inflation (*Sobeys*, p. 260).

[114] Le facteur pécuniaire que nous proposons dans le cadre de la présente analyse multifactorielle ne doit pas être assujetti aux mêmes réserves que celles découlant de l'arrêt *Sobeys*. Premièrement, le facteur pécuniaire tient déjà compte de l'inflation. Deuxièmement, les présents facteurs s'intéressent à

play in Canada's constitutional architecture; they do not relate to the question whether there was a practical involvement of the inferior courts in a specific area of jurisdiction. Third, the purpose of this analysis is to remedy the problem of a wholesale grant of a vast area of jurisdiction. The monetary limits will clearly not have the same effect on the superior courts' role if the grant involves a specific, well-defined area of jurisdiction as they will if it involves a vast area of jurisdiction at the heart of private law. In the latter case, it will be much harder to limit the importance to be attached to them.

[115] In the case at bar, the Court of Appeal took $100 as the starting point. This amount, which served as a basis for the expert reports filed by various parties, "is the amount of the maximum monetary jurisdiction exercised in 1867 by some of the inferior courts charged with hearing certain civil matters" (para. 144). Four conversion methods were proposed, based on the consumer price index, interest rates, nominal wages and GDP per capita.

[116] We agree with the Court of Appeal's analysis as regards the consumer price index, interest rates and nominal wages (paras. 167-71). The best approach is to select the least imperfect method — the nominal GDP method in this case — and to remain mindful of its imperfections. In any event, the monetary limits are not a straitjacket, but a quantitative benchmark that is useful for anchoring the analysis in a monetary range. As we mentioned above, there must, in order to reflect the general division of labour that has always existed between the s. 96 courts and the other courts, be a certain proportionality between the current ceiling and the historical one.

[117] Although we concede that the nominal GDP per capita method has its weaknesses, it is nonetheless the one that should be used. This method has the advantage of incorporating [TRANSLATION] "all changes having occurred over time that have made

l'incidence d'une mesure législative sur le rôle que jouent les cours supérieures de juridiction générale dans l'architecture constitutionnelle canadienne; ils ne portent pas sur la recherche d'un engagement pratique des tribunaux inférieurs dans un domaine de compétence particulier. Troisièmement, la présente analyse vise à remédier au problème de l'attribution en bloc d'un vaste domaine de compétence. Or, les limites pécuniaires n'auront évidemment pas le même effet sur le rôle des cours supérieures selon que l'on attribue un domaine de compétence spécifique et bien circonscrit ou un vaste domaine de compétence situé au cœur du droit privé. Dans ce dernier cas, il s'avère beaucoup plus difficile de relativiser leur importance.

[115] En l'espèce, la Cour d'appel a pris pour point de départ le montant de 100 $. Ce montant, qui a servi de base aux expertises produites de part et d'autre, « correspond en effet à la compétence pécuniaire maximale qu'exerçaient, en 1867, quelques-unes des cours inférieures chargées d'entendre certaines matières civiles » (par. 144). Quatre méthodes d'actualisation ont été proposées : l'indice des prix à la consommation, les taux d'intérêt, les salaires nominaux et le PIB par habitant.

[116] Nous souscrivons à l'analyse qui en a été faite par la Cour d'appel en ce qui a trait à l'indice des prix à la consommation, des taux d'intérêt et des salaires nominaux (par. 167-171). L'approche appropriée consiste à sélectionner la méthode la moins imparfaite — ici, la méthode du PIB nominal — et à garder à l'esprit ses imperfections. De toute façon, les limites pécuniaires ne sont pas un carcan, mais plutôt un repère quantitatif utile pour ancrer l'analyse dans un ordre de grandeur pécuniaire. Comme nous l'avons dit, on devrait retrouver une certaine proportionnalité entre le plafond actuel et le plafond historique afin de respecter la division générale du travail qui a toujours existé entre les cours visées à l'art. 96 et les autres tribunaux.

[117] Bien que nous reconnaissions les faiblesses de la méthode du PIB nominal par habitant, cette dernière est néanmoins à privilégier. Cette méthode présente l'avantage d'incorporer « tous les changements qui sont survenus dans le temps qui ont permis

it possible to enhance the well-being of individual members of a society", and of being based on fairly reliable historical statistics (A.R., AGQ, vol. III, at pp. 68-70). It is not perfect, as it does not account for a number of factors that are not included in calculating GDP, such as domestic activities, second-hand transactions and environmental costs (*ibid.*). Using this method, the AGQ's expert before the Court of Appeal arrived at an updated amount of $66,008 for Canada and $60,790 for Quebec (pp. 71-72). The respondent's expert, using statistics he considered to be more reliable, arrived at updated amounts of $63,698 for Canada and $55,354 for Quebec (R.R., Chief Justice of the Superior Court et al., at pp. 39 and 42; see C.A. reasons, at para. 171 and fn. 281).

[118] Thus, a ceiling of $100 in 1867 is equivalent today, Canada-wide, to an amount somewhere between $63,698 and $66,008. The current ceiling of $85,000 is 29 percent more than the higher of these two amounts. This certainly suggests that the Court of Québec's role is greater than the historical role of the inferior courts, but this expanded role is not in itself entirely disproportionate given the gap between the current and historical ceilings and the methodological challenge of accurately converting historical monetary data. The monetary ceiling must be considered in its context in order to determine whether it undermines the role of the Quebec Superior Court by impermissibly infringing on its general private law jurisdiction. The figures must not obscure what is at issue here: the limits on the exclusive grant of a large block of jurisdiction that has an impact on the whole of Quebec civil law. When the transfer of a large block of jurisdiction affects one of the most fundamental branches of private law, the scope of the limits to which it is subject must be considerable.

(iv) Appeal Mechanisms

[119] Appeal mechanisms can shed helpful light on the question whether a grant of jurisdiction establishes a prohibited parallel court that undermines the role of the superior courts of general jurisdiction.

d'améliorer le bien-être des individus d'une société » et de reposer sur des statistiques historiques assez fiables (d.a., PGQ, vol. III, p. 68-70). Il ne s'agit pas d'une méthode parfaite, car elle laisse dans l'ombre un ensemble d'éléments exclus du calcul du PIB tels que les activités domestiques, les transactions d'occasion et les coûts environnementaux (*ibid.*). En appliquant cette méthode, l'expert de la PGQ devant la Cour d'appel parvient à un montant actualisé de 66 008 $ pour le Canada et de 60 790 $ pour le Québec (p. 71-72). En s'appuyant sur des statistiques qu'il estime plus fiables, l'expert des intimés, lui, arrive à des montants actualisés de 63 698 $ pour le Canada et de 55 354 $ pour le Québec (d.i., juge en chef de la Cour supérieure *et al.*, p. 39 et 42; voir les motifs de la C.A., par. 171 et note 281).

[118] Ainsi, un plafond de 100 $, en 1867, équivaut aujourd'hui à un montant situé quelque part entre 63 698 $ et 66 008 $ à l'échelle du Canada. Le plafond actuel de 85 000 $ est de 29 p. 100 supérieur au plus grand de ces deux montants. Cela indique, certes, un rôle accru joué par la Cour du Québec par rapport au rôle historique des tribunaux inférieurs, mais cet accroissement n'est, en soi, pas totalement disproportionné, vu l'écart avec les plafonds historiques et le défi méthodologique d'actualiser avec précision des données monétaires historiques. Il faut considérer ce plafond pécuniaire dans son contexte pour déterminer s'il affaiblit le rôle de la Cour supérieure du Québec en portant une atteinte inadmissible à sa compétence générale en droit privé. Les chiffres ne doivent pas faire oublier ce qui est en cause ici, à savoir les limites à l'attribution exclusive d'un bloc significatif de compétence qui a des répercussions sur l'ensemble du droit civil québécois. Lorsque le transfert d'un vaste bloc de compétence touche l'une ou l'autre des branches les plus fondamentales du droit privé, les limites auxquelles il est assujetti doivent revêtir une importance considérable.

(iv) Les mécanismes d'appel

[119] Les mécanismes d'appel peuvent apporter un éclairage utile pour répondre à la question de savoir si une attribution de compétence établit une cour parallèle prohibée qui affaiblit le rôle des cours supérieures de juridiction générale.

[120] From a constitutional point of view, a superior court of general jurisdiction and a provincial court of appeal are both "superior court[s]" within the meaning of s. 96 (*Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638, at p. 656, per Pigeon J., concurring; Pépin, at p. 136; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 834). However, the fact that a provincial court of appeal has oversight of decisions of the court with provincially appointed judges does not on its own justify a conclusion that the transfer of jurisdiction at issue satisfies constitutional requirements. First, it is above all the role of the superior court *of general jurisdiction* that is protected by s. 96 (*MacMillan Bloedel*, at paras. 22, 29 and 37; *Canadian Liberty Net*, at paras. 26-27). Second, the fact that a court with provincially appointed judges is subject to review or appeal does not authorize that court to absorb s. 96 court functions (*Re: B.C. Family Relations Act*, [1982] 1 S.C.R. 62, at p. 71, per Laskin C.J., dissenting, but not on this point).

[121] Nevertheless, how decisions rendered by the provincial court in exercising the jurisdiction at issue are to be appealed may help us answer the question whether the grant of that jurisdiction prevents the superior court of general jurisdiction from playing its role. If decisions of the court with provincially appointed judges can be appealed to a superior court of general jurisdiction at little cost, without leave and with no requirement of deference on questions of law, then there is a very clear hierarchical distinction between the two courts, and the superior court of general jurisdiction retains its ability to state the law. It will then be more difficult to conclude that the grant of jurisdiction undermines the superior court's role and impermissibly invades its general private law jurisdiction. If, on the other hand, there is a right to appeal directly to the provincial court of appeal, then there is no hierarchical distinction between the two courts and the superior court of general jurisdiction has no sway over decisions of the court with provincially appointed judges. In short, that would suggest that the court with provincially appointed judges functions as a parallel court.

[120] Au plan constitutionnel, une cour supérieure de juridiction générale et une cour d'appel provinciale sont toutes deux des « cour[s] supérieure[s] » au sens de l'art. 96 (*Procureur général du Québec c. Farrah*, [1978] 2 R.C.S. 638, p. 656, le juge Pigeon, concordant; Pépin, p. 136; H. Brun, G. Tremblay et E. Brouillet, *Droit constitutionnel* (6e éd. 2014), p. 834). Il ne suffit pas cependant qu'une cour d'appel provinciale conserve un droit de regard sur les décisions rendues par la cour de nomination provinciale pour conclure que le transfert de compétence à l'étude satisfait aux exigences constitutionnelles. D'une part, l'art. 96 protège avant tout le rôle de la cour supérieure *de juridiction générale* (*MacMillan Bloedel*, par. 22, 29 et 37; *Canadian Liberty Net*, par. 26-27). D'autre part, l'assujettissement d'une cour de nomination provinciale à une procédure de révision ou d'appel ne saurait lui permettre d'assumer des fonctions relevant d'une cour visée à l'art. 96 (*Renvoi : Family Relations Act (C.-B.)*, [1982] 1 R.C.S. 62, p. 71, le juge en chef Laskin, dissident, mais non sur ce point).

[121] Les modalités des droits d'appel à l'encontre des décisions rendues par la cour provinciale dans l'exercice de la compétence à l'étude peuvent toutefois nous aider à répondre à la question de savoir si l'attribution de cette compétence empêche la cour supérieure de juridiction générale de jouer son rôle. Si les décisions rendues par la cour de nomination provinciale sont appelables devant une cour supérieure de juridiction générale, à peu de frais, sans autorisation préalable et sans déférence aucune à l'égard des questions de droit, cela signifie qu'il y a une différenciation hiérarchique très nette entre les deux cours et que la cour supérieure de juridiction générale conserve sa faculté de dire le droit. Il sera dès lors plus difficile de conclure que l'attribution de compétence affaiblit son rôle et constitue une ingérence inadmissible dans sa compétence générale en droit privé. À l'inverse, si les droits d'appel s'exercent directement devant la cour d'appel provinciale, cela signifie qu'il n'y a aucune différenciation hiérarchique entre les deux cours et que les décisions rendues par la cour de nomination provinciale échappent à l'emprise de la cour supérieure de juridiction générale. En somme, cela tend à indiquer que la cour de nomination provinciale fonctionne comme une cour parallèle.

[122] In the instant case, decisions rendered in exercising the jurisdiction provided for in art. 35 para. 1 *C.C.P.* may be appealed to the Quebec Court of Appeal under art. 30 or 31 *C.C.P.* In most of the other provinces, decisions of a court with provincially appointed judges must be appealed to the superior court of general jurisdiction before they can be appealed to the provincial court of appeal. In such circumstances, a hierarchical distinction can be drawn between the court with provincially appointed judges and a prohibited parallel court. It can therefore be concluded that the superior court retains its role within the provincial judicial structure.

[123] Articles 30 and 31 *C.C.P.* confirm that the Court of Québec's decisions cannot be appealed to the Superior Court. To some extent, the Court of Québec's decisions are more shielded from appellate review than those of the Superior Court. Given that the threshold for an appeal as of right is fixed at $60,000 (leave is required for an appeal in any other case), appeals as of right against decisions of the Court of Québec will be much less common than those requiring leave. In most cases, litigants who wish to have decisions of the Court of Québec reviewed must go through a screening process in order to obtain leave to appeal. This factor therefore suggests that art. 35 para. 1 *C.C.P.* transforms the Court of Québec into a prohibited parallel court that undermines the role of the superior court of general jurisdiction.

(v) Impact on the Caseload of the Superior Court of General Jurisdiction

[124] A grant of jurisdiction to a court with provincially appointed judges does not necessarily deprive the superior court of all forms of involvement in that area of jurisdiction. If, for example, the grant in question is subject to a monetary ceiling, the superior court of general jurisdiction continues to have jurisdiction over claims that exceed the amount of that ceiling. But there may be circumstances in which the impact of the grant on the caseload retained by the superior court of general jurisdiction in the specific area of jurisdiction makes it possible to draw

[122] En l'espèce, les décisions rendues dans l'exercice de la compétence prévue à l'art. 35 al. 1 *C.p.c.* peuvent faire l'objet d'un appel à la Cour d'appel du Québec en vertu de l'art. 30 ou 31 *C.p.c.* Dans la plupart des autres provinces, les décisions de la cour de nomination provinciale font l'objet d'un appel à la cour supérieure de juridiction générale avant de pouvoir faire l'objet d'un appel devant la cour d'appel provinciale. Dans ces circonstances, il sera possible de différencier, au plan hiérarchique, la cour de nomination provinciale d'une cour parallèle prohibée, et donc de conclure que la cour supérieure conserve son rôle au sein de la structure judiciaire provinciale.

[123] Les articles 30 et 31 *C.p.c.* confirment qu'il n'existe pas d'appel à la Cour supérieure des décisions rendues par la Cour du Québec. Dans une certaine mesure, les décisions de la Cour du Québec sont plus à l'abri du contrôle en appel que celles de la Cour supérieure. En effet, considérant que le seuil d'appel de plein droit est fixé à 60 000 $ (l'appel est sur permission dans les autres cas), l'appel de plein droit à l'encontre de décisions de la Cour du Québec sera beaucoup moins fréquent que celui sur permission. Dans la majorité des cas, les justiciables souhaitant faire contrôler les décisions de la Cour du Québec doivent passer par un filtre préalable afin d'obtenir la permission d'en appeler. Par conséquent, ce facteur tend à indiquer que l'art. 35 al. 1 *C.p.c.* transforme la Cour du Québec en une cour parallèle prohibée qui entrave le rôle de la cour supérieure de juridiction générale.

(v) L'impact sur le volume de dossiers de la cour supérieure de juridiction générale

[124] L'attribution d'une compétence à une cour de nomination provinciale ne prive pas nécessairement la cour supérieure de toute forme d'engagement dans ce domaine de compétence. Si, par exemple, cette attribution est assujettie à un plafond pécuniaire, la cour supérieure de juridiction générale demeure compétente à l'égard des réclamations excédant le montant de ce plafond pécuniaire. Il peut arriver cependant, dans certaines circonstances, que l'impact de cette attribution sur le volume de dossiers que conserve la cour supérieure de juridiction générale

conclusions as to whether that court's role has been undermined and whether a parallel court has been created.

[125] In this case, the evidence in the record supports no conclusion as to the impact of art. 35 *C.C.P.* on the superior court's role. The parties submitted statistics that compared the caseload falling under art. 35 *C.C.P.* with the Quebec Superior Court's *general* civil law caseload, including in family matters and bankruptcy and insolvency cases. This means that it is impossible to determine, even approximately, what impact art. 35 *C.C.P.* has on the Superior Court's caseload in matters *falling specifically under the law of obligations*.

(vi) Pursuit of an Important Societal Objective

[126] Granting jurisdiction to a court with provincially appointed judges may be the means a legislature adopts to try to address a societal concern. The pursuit of an important societal objective may lend credence to the idea of a legitimate exercise of the provincial power in relation to the administration of justice, that is, of an exercise of that power for a purpose other than the creation of a prohibited parallel court. Access to justice, for example, is an important societal objective that could justify granting certain areas of jurisdiction to courts with provincially appointed judges (*Re: B.C. Family Relations Act*, at p. 107). The provinces must have considerable flexibility in what they do to address the needs of a changing society. The only limit on their initiative is that they may not create parallel courts that undermine the role of the superior courts of general jurisdiction. That being said, it is not enough to allege that there is an important societal objective; it is also necessary to show that the objective is real and that there is a connection between the grant of jurisdiction to a court with provincially appointed judges and the achievement of the objective. Given that the provinces are responsible for the administration of justice, for the adoption of rules of practice and for the financing of court operations, they cannot avail themselves of an access to justice argument on the

dans ce domaine de compétence permette de tirer des conclusions quant à l'affaiblissement du rôle de cette cour et à la création d'une cour parallèle.

[125] En l'espèce, la preuve au dossier ne permet de tirer aucune conclusion quant à l'impact de l'art. 35 *C.p.c.* sur le rôle joué par cette cour. Les parties ont soumis des statistiques qui comparent, d'un côté, le volume de dossiers relevant de l'art. 35 *C.p.c.* avec, d'un autre côté, le volume de dossiers civils de la Cour supérieure du Québec *en général*, incluant les matières familiales et les dossiers de faillite et d'insolvabilité. Il est donc impossible d'évaluer, même de façon approximative, l'impact de l'art. 35 *C.p.c.* sur le volume de dossiers de la Cour supérieure *relevant du droit des obligations en particulier*.

(vi) La poursuite d'un objectif social important

[126] L'attribution d'une compétence à une cour de nomination provinciale peut être le moyen par lequel le législateur tente de répondre à une préoccupation sociale. La poursuite d'un objectif social important peut accréditer l'idée d'un exercice légitime du pouvoir provincial en matière d'administration de la justice, c'est-à-dire d'un exercice de ce pouvoir à une fin autre que l'établissement d'une cour parallèle prohibée. L'accès à la justice, par exemple, constitue un objectif social important susceptible de justifier l'attribution de certaines compétences à des cours de nomination provinciale (*Renvoi : Family Relations Act (C.-B.)*, p. 107). Les provinces doivent bénéficier d'une grande marge de manœuvre dans la façon dont elles envisagent de répondre aux besoins d'une société en évolution. La seule limite à leur initiative est la création d'une cour parallèle qui mine le rôle des cours supérieures de juridiction générale. Cela étant, il ne suffit pas d'alléguer un objectif social important; encore faut-il l'établir et démontrer l'existence d'un lien entre l'attribution d'une compétence à une cour de nomination provinciale et l'atteinte de cet objectif. Puisque les provinces sont responsables de l'administration de la justice, de l'adoption de règles de procédure et du financement des opérations des tribunaux, elles ne sauraient plaider leur propre échec à octroyer des ressources suffisantes aux cours

basis of their own failure to give the superior courts sufficient resources.

[127] Access to justice can also be promoted through features like a simplified procedure and simplified rules on the production of evidence. A summary procedure, for example, or rules of evidence that are relaxed in comparison with those that apply in the superior courts, will make the court with provincially appointed judges distinctive. It will then be more difficult to conclude that the grant of jurisdiction establishes a prohibited parallel court that prevents the superior court of general jurisdiction from playing its role. Other features such as the types of remedies that may be ordered (*Tomko*, at pp. 123-25) or the absence of representation by lawyers can also be taken into consideration.

[128] The AGQ submitted that the increase in the monetary ceiling for the Court of Québec's civil jurisdiction was a response to a concern for access to justice in areas far from urban centres. However, we agree with the Court of Appeal that the AGQ has not established that this increase facilitates access to justice (C.A. reasons, at para. 185). In fact, the Court of Québec and the Superior Court both follow the same procedure and grant the same remedies, with a few exceptions, which means that it cannot readily be concluded, without further evidence, that the increase in the Court of Québec's monetary ceiling facilitates access to justice.

[129] The procedural framework in which the jurisdiction set out in art. 35 para. 1 *C.C.P.* is exercised is the same as in the Superior Court. Except in relation to questions of jurisdiction and the rules of practice, the *Code of Civil Procedure* makes no significant distinction between the two courts in this regard. The same is true of the rules of evidence provided for in the *Civil Code of Québec*. The Court of Québec's Small Claims Division has a simplified procedure in which parties are not represented by lawyers (arts. 536 to 570 *C.C.P.*); however, its monetary jurisdiction is quite limited compared to the one conferred on the Court of Québec by art. 35 para. 1 *C.C.P.* That limited jurisdiction cannot negate

supérieures pour se prévaloir d'un argument d'accès à la justice.

[127] La promotion de l'accès à la justice peut aussi se manifester à travers des caractéristiques telles qu'une procédure et des règles d'administration de la preuve simplifiées. Une procédure sommaire, par exemple, ou des règles de preuve assouplies par rapport à celles qui s'appliquent devant les cours supérieures confèreront à la cour de nomination provinciale un caractère distinctif. Il sera dès lors plus difficile de conclure que l'attribution de compétence établit une cour parallèle prohibée qui empêche la cour supérieure de juridiction générale de jouer son rôle. D'autres caractéristiques, comme les types de réparations susceptibles d'être accordées (*Tomko*, p. 123-125) ou l'absence de représentation par avocat, peuvent aussi être prises en compte.

[128] Le PGQ a prétendu que l'augmentation du plafond pécuniaire de la compétence civile de la Cour du Québec répondait à un souci d'accès à la justice en région éloignée des centres urbains. Toutefois, comme la Cour d'appel, nous sommes d'avis que le PGQ n'a pas démontré que cette augmentation favorise l'accès à la justice (motifs de la C.A., par. 185). De fait, la procédure applicable à la Cour du Québec et à la Cour supérieure et les réparations accordées par ces cours étant les mêmes, à quelques exceptions près, il est peu aisé de conclure, sans autre preuve, que l'augmentation du plafond pécuniaire de la Cour du Québec favorise l'accès à la justice.

[129] Le cadre procédural à l'intérieur duquel s'exerce la compétence prévue à l'art. 35 al. 1 *C.p.c.* est le même que celui qui s'applique en Cour supérieure. Hormis ce qui relève des questions de compétence et des règles de pratique, le *Code de procédure civile* ne formule à ce chapitre aucune distinction significative entre les deux cours. Cela est tout aussi vrai des règles de preuve prévues au *Code civil du Québec*. La Division des petites créances de la Cour du Québec prévoit une procédure simplifiée sans représentation par avocat (art. 536 à 570 *C.p.c.*); cependant, sa compétence pécuniaire reste assez limitée par rapport à celle que l'art. 35 al. 1 *C.p.c.* accorde à la Cour du Québec. Elle ne saurait écarter

the quite obvious similarity between the procedural schemes that apply to the Court of Québec and the Superior Court.

[130] Moreover, access to justice is an argument that cuts both ways in this case. Quebec is the only province that has conferred so broad a jurisdiction on its court with provincially appointed judges: elsewhere in Canada, the superior courts play the central role in civil matters. Yet it is not clear that this alone places the other provinces at a disadvantage compared with Quebec when it comes to resolving access to justice issues. Given their power in relation to the administration of justice, the provinces are free to reorganize their superior courts in order to deal with such challenges. If, for any reason, the situation is different in Quebec, no evidence on this subject was tendered. To the extent that a higher number of judges or courts is necessary, access to justice is perhaps better served by incorporating an *additional* court than by establishing an *alternative* court, that is, by adding a complementary court that is more accessible and has a simplified procedure rather than by establishing a parallel court which absorbs the superior court's functions.

(c) *Weighing the Factors*

[131] Although the multi-factored analysis is not a mathematical operation, it must nonetheless be capable of being transposed to a monetary scale. In our view, the historical monetary ceilings serve as a good starting point for the analysis and a useful anchor for a quantitative range. Up to the amounts of those historical ceilings, the jurisdiction-granting provision can generally be considered to be consistent with the Constitution. But as we will explain, a legislature cannot be found to be in compliance with its obligations under s. 96 solely because it complies with the historical monetary ceilings.

[132] To determine how much latitude a legislature has should it wish to exceed these historical ceilings, we must consider the various factors of the

la similitude assez évidente entre les régimes procéduraux applicables à la Cour du Québec et à la Cour supérieure.

[130] De plus, l'accès à la justice est un argument à double tranchant en l'espèce. Le Québec est la seule province qui ait doté sa cour de nomination provinciale d'une compétence aussi large : ailleurs au pays, ce sont les cours supérieures qui occupent le rôle central en matière civile. Or, il ne saute pas aux yeux que les autres provinces seraient, de ce seul fait, dans une position désavantageuse par rapport au Québec pour remédier aux problèmes d'accès à la justice. Étant donné leur pouvoir en matière d'administration de la justice, les provinces ont le loisir de réaménager leurs cours supérieures pour faire face à ce type de défis. Si, pour quelque raison que ce soit, la situation est différente au Québec, aucune preuve à ce sujet n'a été présentée en l'espèce. Dans la mesure où un nombre plus élevé de juges ou de tribunaux est nécessaire, l'accès à la justice est peut-être mieux servi par l'intégration d'une cour *additionnelle* que par l'établissement d'une cour *de substitution*, c'est-à-dire par l'ajout de tribunaux complémentaires plus accessibles avec une procédure simplifiée plutôt que par l'instauration d'une cour parallèle qui assume les fonctions de la cour supérieure.

c) *La mise en balance*

[131] L'analyse multifactorielle n'est pas une opération mathématique. Elle doit néanmoins pouvoir s'incarner dans une échelle pécuniaire. À notre avis, les plafonds pécuniaires historiques fournissent un bon point de départ pour l'analyse et un ancrage utile dans un ordre de grandeur quantitatif. Jusqu'à concurrence des montants que ces plafonds pécuniaires historiques expriment, on peut généralement considérer que la disposition attributive de compétence répond aux exigences constitutionnelles. Mais comme nous l'expliquerons, on ne peut pas considérer qu'une législature respecte les obligations que lui impose l'art. 96 du seul fait qu'elle respecte les plafonds pécuniaires historiques.

[132] Pour déterminer la latitude laissée à une législature désireuse d'aller au-delà de ces plafonds historiques, nous devons examiner les différents

multi-factored analysis: the scope of the jurisdiction being granted, whether the grant is exclusive or concurrent, the relationship between the proposed monetary limit and the historical monetary ceilings, appeal mechanisms, the impact of the jurisdiction-granting provision on the superior court's caseload, and whether there is an important societal objective. All these factors are weighed in order to strike an appropriate balance between recognition of the provinces' jurisdiction over the administration of justice and preservation of the nature, the constitutional role and the core jurisdiction of the superior courts of general jurisdiction.

[133] The more the analysis of the above factors suggests that the core jurisdiction of those courts has been infringed on, the less the province will be allowed to depart from the updated historical monetary ceilings. Conversely, the less the analysis of the factors in question suggests that the core jurisdiction of the superior courts has been infringed on, the more the province will be free to depart from those ceilings. This is essentially a continuum. At one end of the spectrum, the grant of a vast jurisdiction that is exclusive, is not accompanied by a mechanism for appealing a decision to a superior court of general jurisdiction, has a significant impact on that court's caseload and is not justified having regard to an important societal objective will limit the legislature's freedom and is not constitutional. The impact of such a grant on the superior court of general jurisdiction could be so great that merely complying with the historical monetary ceilings would not suffice under s. 96. At the other end of the spectrum, the concurrent grant of a more limited jurisdiction — one that is accompanied by a mechanism for appealing a decision to a superior court of general jurisdiction, has little impact on that court's workload and is justified having regard to an important societal objective — will give the legislature considerable flexibility. In *every case*, however, there must be a reasonable connection between the monetary ceiling contemplated by the legislature and the updated historical ceilings. The two ceilings must be in a similar range so as to be consistent with the general division of labour at the time of Confederation. In the same way, an *exclusive*

facteurs de l'analyse multifactorielle, à savoir l'étendue de la compétence attribuée, le caractère exclusif ou concurrent de l'attribution, le rapport entre le seuil pécuniaire proposé et les plafonds pécuniaires historiques, les mécanismes d'appel, l'impact de la disposition attributive de compétence sur le volume de dossiers de la cour supérieure et la poursuite d'un objectif social important. La pondération de tous ces facteurs cherche à atteindre un juste équilibre entre la reconnaissance de la compétence provinciale en matière d'administration de la justice et la préservation de la nature, du rôle constitutionnel et de la compétence fondamentale des cours supérieures de juridiction générale.

[133] Plus l'analyse de ces facteurs tend à indiquer une atteinte à la compétence fondamentale de ces cours, moins la province pourra s'écarter des plafonds pécuniaires historiques actualisés. Inversement, moins l'analyse de ces facteurs tend à indiquer un empiètement sur la compétence fondamentale des cours supérieures, plus la province sera libre de s'écarter des plafonds pécuniaires historiques actualisés. Il s'agit en quelque sorte d'un continuum. À une extrémité du spectre, l'attribution d'une vaste compétence, lorsqu'elle est exclusive, qu'elle n'est pas assortie d'un mécanisme d'appel à une cour supérieure de juridiction générale, qu'elle a un impact significatif sur le volume de dossiers de cette cour et qu'elle ne se justifie pas au regard d'un objectif social important, contraint la législature et n'est pas constitutionnelle. Pareille attribution pourrait entraîner des conséquences telles sur la cour supérieure de juridiction générale que le simple fait de respecter les plafonds pécuniaires historiques ne suffirait pas au regard de l'art. 96. À l'autre extrémité du spectre, l'attribution concurrente d'une compétence plus restreinte, lorsqu'elle s'accompagne d'un mécanisme d'appel à une cour supérieure de juridiction générale, qu'elle a peu d'impact sur l'achalandage de cette cour et qu'elle se justifie au regard d'un objectif social important, confère à la législature une marge de manœuvre appréciable. Dans *tous les cas* cependant, le plafond pécuniaire envisagé par la législature doit conserver un lien de rattachement raisonnable avec les plafonds historiques actualisés. Les deux plafonds doivent appartenir à un même ordre de

grant cannot "maim" the superior courts by impermissibly infringing on their core jurisdiction.

[134] In this case, the historical monetary ceiling of $100 is not in dispute. In today's dollars, this represents an amount of between $63,698 and $66,008. The amount need not be within a dollar of that range. The imperfection of the conversion methods and the flexibility that must be accorded to the provinces can justify slight differences. Nor is a province required to amend its legislation every year in order to index the monetary jurisdiction of its courts to the rate of inflation. Thus, an amount close to these ones can serve as a starting point for the analysis.

[135] The monetary ceiling of less than $85,000 fixed by art. 35 para. 1 *C.C.P.* represents an increase of approximately 29 percent over the historical ceiling. This increase is not clearly disproportionate; the adopted amount can reasonably be connected to the historical ceiling insofar as it falls into a similar range. What must now be done is to weigh the various qualitative factors in order to determine whether this grant of jurisdiction is consistent with the flexibility the Quebec legislature has. In our view, the answer must be no. The Quebec legislature has only minimal flexibility, because the result of the multifactored analysis clearly indicates that there is an impermissible infringement on the core jurisdiction of the superior courts of general jurisdiction.

[136] First, the scope of the jurisdiction granted to the Court of Québec is indicative of a significant encroachment on the general private law jurisdiction of the superior courts of general jurisdiction. This limits the Quebec legislature's latitude. Aside from exceptional situations such as the one considered in *McEvoy*, in which a transfer of the entirety of the jurisdiction over criminal matters to a court with provincially appointed judges was proposed, it is hard to imagine a broader transfer of jurisdiction than the

grandeur, de façon à respecter la division générale du travail qui existait à l'époque confédérative. De la même façon, l'attribution *exclusive* ne saurait avoir pour effet de « mutiler » les cours supérieures en portant une atteinte inadmissible à leur compétence fondamentale.

[134] En l'espèce, le plafond pécuniaire historique de 100 $ n'est pas contesté. En dollars d'aujourd'hui, il représente une somme se situant entre 63 698 $ et 66 008 $. Il n'est pas nécessaire de fixer un montant au dollar près. L'imperfection des méthodes d'actualisation et la marge de manœuvre qui doit être accordée aux provinces peuvent justifier de légers écarts. De plus, une province n'est pas tenue d'amender ses lois chaque année pour indexer la compétence pécuniaire de ses tribunaux sur le taux d'inflation. Ainsi, un montant avoisinant ces sommes peut servir de point de départ à l'analyse.

[135] Le plafond pécuniaire de moins de 85 000 $ fixé par l'art. 35 al. 1 *C.p.c.* représente une hausse d'environ 29 p. 100 par rapport au plafond pécuniaire historique. Cette augmentation n'est pas manifestement hors de proportion; le montant adopté peut raisonnablement s'y rattacher dans la mesure où il appartient à un même ordre de grandeur. Il s'agit maintenant de pondérer les différents facteurs qualitatifs afin de déterminer si cette attribution de compétence se situe à l'intérieur de la marge de manœuvre dont dispose la législature québécoise. Selon nous, une réponse négative s'impose. La législature québécoise ne dispose que d'une marge de manœuvre minimale, puisque le résultat de l'analyse multifactorielle indique clairement une atteinte inadmissible à la compétence fondamentale des cours supérieures de juridiction générale.

[136] Premièrement, l'étendue de la compétence attribuée à la Cour du Québec tend à démontrer un empiètement significatif sur la compétence générale en droit privé des cours supérieures de juridiction générale. Cela réduit la latitude dont bénéficie la législature québécoise. Hormis un cas de figure exceptionnel comme celui envisagé dans l'arrêt *McEvoy*, où l'on projetait de transférer la totalité de la juridiction criminelle à un tribunal de nomination provinciale, il est difficile d'imaginer un transfert

one effected in art. 35 para. 1 *C.C.P.*, which grants a substantial block of jurisdiction over private law matters. The law of obligations is nothing less than [TRANSLATION] "the general code for the relations man [*sic*] has with his peers" (G. Trudel, *Traité de droit civil du Québec* (1946), vol. 7, at p. 15).

[137] Second, the exclusivity of the transfer accentuates the encroachment on the core jurisdiction of the superior courts and reduces the flexibility the Quebec legislature has accordingly. The impact of the exclusivity of the grant is considerable: it means that the law of obligations will evolve in large part under the authority of a court with provincially appointed judges. The Superior Court's authority over obligations will be diminished accordingly. In light of s. 96, a grant of jurisdiction as broad as this over so fundamental a field of law must be subject to very significant limits, especially if it is exclusive. An exclusive grant of jurisdiction, even one that falls within acceptable historical limits, can have a significant impact on the core jurisdiction of the superior courts.

[138] Third, the fact that there is no accessible appeal mechanism that would enable the superior court of general jurisdiction to review decisions of the Court of Québec reinforces our conclusion that the two courts are parallel and that the interference is impermissible. The absence of such a mechanism contributes, once again, to reducing the province's flexibility in relation to the updated historical ceiling.

[139] Fourth, as we explained above, the statistical evidence produced in this case does not permit us to determine with certainty that art. 35 para. 1 *C.C.P.* has only a minimal impact on the Superior Court's caseload in the area of obligations.

[140] Fifth, the AGQ has not shown that a concrete public policy justified greater flexibility in relation to the historical limit. It follows that the Quebec

de compétence plus vaste que celui visé par l'art. 35 al. 1 *C.p.c.* Cette disposition attribue un bloc de compétence substantiel en droit privé. Le droit des obligations, ce n'est rien de moins que « le code général des relations de l'homme [*sic*] avec ses semblables » (G. Trudel, *Traité de droit civil du Québec* (1946), t. 7, p. 15).

[137] Deuxièmement, le caractère exclusif du transfert accentue l'empiètement sur la compétence fondamentale des cours supérieures et diminue d'autant la marge de manœuvre dont dispose la législature québécoise. L'impact du caractère exclusif de l'attribution est considérable : cela signifie que le droit des obligations se développera en grande partie sous l'égide d'une cour de nomination provinciale. L'autorité de la Cour supérieure en matière d'obligations s'en trouve diminuée d'autant. Au regard de l'art. 96, l'attribution d'une compétence aussi vaste, portant sur un domaine de droit aussi fondamental, doit être assujettie à des limites très importantes, à plus forte raison lorsqu'elle est exclusive. En effet, l'attribution exclusive d'une compétence, même lorsqu'elle se situe dans des bornes historiques acceptables, peut affecter de manière significative la compétence fondamentale des cours supérieures.

[138] Troisièmement, l'absence d'un mécanisme d'appel accessible qui permettrait à la cour supérieure de juridiction générale de contrôler les décisions rendues par la Cour du Québec renforce notre conclusion quant au parallélisme entre les deux cours et au caractère inacceptable de l'ingérence. L'absence d'un tel mécanisme contribue, encore une fois, à rétrécir la marge de manœuvre de la province à l'égard du plafond historique actualisé.

[139] Quatrièmement, comme nous l'avons expliqué, la preuve statistique produite en l'espèce ne nous permet pas de déterminer avec certitude que l'art. 35 al. 1 *C.p.c.* n'a qu'un impact minime sur le volume de dossiers de la Cour supérieure en matière d'obligations.

[140] Enfin, le PGQ n'a pas démontré qu'une politique publique concrète justifiait une plus grande flexibilité par rapport à ce seuil historique. Il s'ensuit

legislature could not depart from the updated historical ceilings other than minimally.

[141] In our opinion, art. 35 para. 1 *C.C.P.* in its current form infringes s. 96. Its constitutional infirmity does not arise from the high monetary limit alone, but from the combination with all the other factors. It would be possible to imagine a grant of jurisdiction that does not exclude the superior court from a field of law that is so vast and so fundamental. That is not, however, this legislation. Here, there is an exclusive grant of a vast area of jurisdiction at the core of Quebec's private law to a court with provincially appointed judges that operates like a superior court in every respect. The grant, if it is subject to no limits other than a monetary one, transforms the Court of Québec into a s. 96 court. In other words, art. 35 para. 1 *C.C.P.* encroaches impermissibly on the role the Constitution reserves to the superior court of general jurisdiction.

[142] If the Quebec legislature were to decide merely to lower the monetary ceiling for the Court of Québec's jurisdiction without altering its institutional context or the nature of the grant of jurisdiction provided for in art. 35 para. 1 *C.C.P.*, it would, to comply with its constitutional obligations, have to establish a monetary ceiling below the updated historical ceiling so as to leave the Superior Court with a caseload that is sufficient for it to continue to play a meaningful role in the development of the law of obligations. If, on the other hand, the legislature were to decide to revise the wording of art. 35 para. 1 *C.C.P.* and the institutional context in which that jurisdiction is exercised while minimizing the impact on the Superior Court's core jurisdiction, it would have some latitude to raise the monetary ceiling above the updated historical ceiling. The legislature should however ensure that a reasonable connection was maintained with the latter ceiling and the Superior Court was not deprived of too much of the caseload concerning the law of obligations. Whatever the legislature's choice may be, any change, including simplified procedures, that truly enhances access to justice will be an important factor in determining whether a grant of jurisdiction

que la législature québécoise ne saurait s'écarter des plafonds historiques actualisés, sinon de façon minimale.

[141] À notre avis, l'art. 35 al. 1 *C.p.c.*, sous sa forme actuelle, contrevient à l'art. 96. L'invalidité constitutionnelle de cette disposition ne provient pas uniquement du seuil pécuniaire élevé, mais de la combinaison de ce dernier avec tous les autres facteurs. Il serait possible d'envisager une attribution de la compétence n'ayant pas pour effet d'écarter la cour supérieure d'un domaine du droit aussi vaste et aussi fondamental. Mais la disposition législative en cause ici a cet effet. Un vaste domaine de compétence situé au cœur du droit privé québécois est attribué exclusivement à une cour de nomination provinciale qui fonctionne en tous points comme une cour supérieure. L'attribution, lorsqu'elle n'est assujettie à aucune autre limite qu'un seuil pécuniaire, transforme la Cour du Québec en une cour visée à l'art. 96. En d'autres termes, l'art. 35 al. 1 *C.p.c.* empiète de façon inacceptable sur le rôle que la Constitution réserve à la cour supérieure de juridiction générale.

[142] Dans l'éventualité où la législature québécoise voudrait se limiter à réduire le plafond pécuniaire de la compétence de la Cour du Québec sans modifier son contexte institutionnel ni la nature de l'attribution de compétence prévue à l'art. 35 al. 1 *C.p.c.*, elle devrait, pour se conformer à ses obligations constitutionnelles, établir un plafond pécuniaire situé en deçà du plafond historique actualisé et qui laisse à la Cour supérieure un volume de dossiers suffisant pour que celle-ci puisse continuer de jouer un rôle significatif dans l'évolution du droit des obligations. À l'inverse, dans l'éventualité où la législature souhaiterait revoir le libellé de l'art. 35 al. 1 *C.p.c.* et le contexte institutionnel dans le cadre duquel s'exerce cette compétence en minimisant l'impact sur la compétence fondamentale de la Cour supérieure, elle disposerait d'une certaine marge de manœuvre pour hausser le plafond pécuniaire au-delà du plafond historique actualisé. La législature devrait toutefois s'assurer de maintenir un lien de rattachement raisonnable avec ce dernier et de ne pas priver la Cour supérieure d'un achalandage trop important en matière de droit des obligations. Quel que soit le choix de la législature, tout changement

that affects the general private law jurisdiction of the superior courts is consistent with s. 96.

[143] This multi-factored approach gives full effect to the compromise reached at Confederation, reflected in the constitutional framework consisting of ss. 96 to 100. It is necessary in order to safeguard the unity and uniformity of the Canadian judicial system, which is the concern that motivated the framers of the Constitution. Even though the superior courts, with their guarantee of judicial independence, are no longer the sole guardians of the rule of law, the fact remains that their constitutional status must be protected. The transfer brought about by art. 35 para. 1 *C.C.P.* deprives the Quebec Superior Court of any capacity to resolve a broad range of disputes at the heart of private law, thereby creating a parallel court that infringes on the core jurisdiction of the superior courts.

[144] In closing, it would seem appropriate to clarify the scope of these reasons and their impact on the other tests developed with respect to s. 96. The multi-factored analysis we are adopting here *is not intended to replace the current law*. The analysis under s. 96 continues to involve two tests. The first — the *Residential Tenancies* test — continues to apply to any transfer of historical jurisdiction of the superior courts to an administrative tribunal or to another statutory court. The second — the core jurisdiction test — continues to apply in order to determine whether a statutory provision has the effect of removing or impermissibly infringing on any of the attributes that form part of the core jurisdiction of the superior courts. Where a transfer to a court with provincially appointed judges has an impact on the general private law jurisdiction of the superior courts, the question whether the infringement on the core jurisdiction is permissible or impermissible should be answered having regard to the factors discussed above. Those factors give the provincial legislature sufficiently clear guidance to determine what latitude it has under s. 96 when it wishes to

ayant pour effet de véritablement améliorer l'accès à la justice, incluant les procédures simplifiées, demeurera un facteur important dans l'évaluation de la conformité à l'art. 96 d'une attribution de compétence mettant en cause la compétence générale en droit privé des cours supérieures.

[143] Cette approche multifactorielle donne plein effet au compromis conclu à l'époque de la Confédération reflété dans le cadre constitutionnel formé par les art. 96 à 100. Elle est nécessaire à la protection du désir qui animait les rédacteurs de la Constitution d'assurer l'unité et l'uniformité du système judiciaire canadien. Même si les cours supérieures, avec leur garantie d'indépendance judiciaire, ne sont plus les uniques gardiennes de la primauté du droit, il n'en demeure pas moins que leur statut constitutionnel doit être protégé. Or, le transfert matérialisé par l'art. 35 al. 1 *C.p.c.* prive la Cour supérieure du Québec de toute capacité à trancher une vaste gamme de différends situés au cœur du droit privé, créant de ce fait une cour parallèle qui porte atteinte à la compétence fondamentale des cours supérieures.

[144] En terminant, il paraît opportun de préciser la portée des présents motifs et leur impact sur les autres tests développés sous l'art. 96. L'analyse multifactorielle que nous retenons ici *n'a pas pour vocation de remplacer le droit actuel*. L'analyse sous l'art. 96 se décline toujours en deux tests. Le premier — le test du *Renvoi sur la location résidentielle* — continue de s'appliquer à tout transfert d'une compétence historique des cours supérieures à un tribunal administratif ou une autre cour statutaire. Le deuxième — le test de la compétence fondamentale — demeure applicable afin de déterminer si une disposition législative a pour effet de retirer ou de porter une atteinte inadmissible à l'un ou l'autre des attributs qui font partie de la compétence fondamentale des cours supérieures. Lorsqu'un transfert effectué en faveur d'une cour de nomination provinciale met en cause la compétence générale en droit privé des cours supérieures, le caractère admissible ou inadmissible de l'atteinte à la compétence fondamentale devrait s'évaluer au regard des facteurs exposés ci-dessus. Ces facteurs fournissent à la législature provinciale des balises suffisamment claires pour

grant a court whose judges are appointed by the province jurisdiction over a significant portion of the common law without creating a parallel court.

[145] In *Residential Tenancies*, a rampart against the creation of prohibited parallel courts was erected on the basis of s. 96. That rampart has already proven its worth, as is attested by several decades of case law. As a general rule, that test will be sufficient for purposes of the analysis. But there may be cases in which it will prove to be inadequate for the role it must play where an attempt is made to assign a vast field of the general law to a court with provincially appointed judges. Such a transfer would tend to distort the historical analysis and to inappropriately favour a finding that there was a general shared involvement. Here, the grant under art. 35 para. 1 *C.C.P.* is one of those cases in which the gaps in the *Residential Tenancies* test are apparent. The core jurisdiction test, which we have adapted to better reflect the principles underlying s. 96, compensates for those gaps by providing an analytical framework on the basis of which it is possible to give an adequate response to problems of this nature for which no satisfactory solution can be found in the existing case law.

V. Analysis on the Second Question

[146] The second question concerns the application by the Court of Québec of the "obligation of judicial deference, which characterizes the application for judicial review," when hearing appeals of administrative decisions under one of the eight specified Acts. This question, understood correctly, is not about the constitutionality of the Court of Québec's appellate jurisdiction, but rather about the application by the Court of Québec of the standards of judicial review, that is, the standards of reasonableness and correctness that were established in *Dunsmuir* and reiterated in *Vavilov*. We are of the view, however, that the question has become moot because the Court of Québec is no longer required to apply these standards of review when hearing an administrative appeal. Moreover, there are no

déterminer quelle latitude lui est laissée par l'art. 96 lorsqu'elle souhaite attribuer à une cour dont les juges sont nommés par les provinces une compétence sur une partie significative du droit commun, tout en évitant la création d'une cour parallèle.

[145] Le *Renvoi sur la location résidentielle* a érigé sur le fondement de l'art. 96 un rempart contre la création des cours parallèles prohibées. Ce rempart a déjà fait ses preuves, comme en attestent plusieurs décennies de jurisprudence. En règle générale, ce test suffira aux besoins de l'analyse. Mais dans certains cas, il pourra s'avérer insuffisant pour remplir adéquatement son rôle face à une tentative d'attribuer à une cour de nomination provinciale un vaste domaine du droit commun. Ce type de transfert tend en effet à biaiser l'analyse historique et à favoriser indûment une conclusion d'engagement général partagé. En l'espèce, l'attribution effectuée par l'art. 35 al. 1 *C.p.c.* est l'un de ces cas où le test du *Renvoi sur la location résidentielle* démontre ses lacunes. Le test de la compétence fondamentale, que nous avons adapté pour mieux refléter les principes qui sous-tendent l'art. 96, y pallie en offrant un cadre analytique qui permet d'apporter une réponse adéquate à ce type de problème auquel la jurisprudence actuelle n'offre aucune solution satisfaisante.

V. Analyse de la seconde question

[146] La seconde question porte sur l'application par la Cour du Québec de « l'obligation de déférence judiciaire qui caractérise le pourvoi en contrôle judiciaire » lorsqu'elle entend un appel d'une décision administrative en vertu de l'une des huit lois mentionnées. Interprétée correctement, cette question ne concerne pas la constitutionnalité de la juridiction d'appel de la Cour du Québec, mais bien l'application par la Cour du Québec des normes de contrôle judiciaire, c'est-à-dire les normes de la décision raisonnable et de la décision correcte établies dans *Dunsmuir* et réitérées dans *Vavilov*. Nous sommes toutefois d'avis que cette question est devenue théorique, car la Cour du Québec n'a plus à appliquer ces normes de contrôle lorsqu'elle entend un appel administratif. De plus, il n'existe aucune circonstance

exceptional circumstances that would justify answering the question despite its mootness.

[147] In *Vavilov*, this Court reformed the analysis for determining the standard of review that applies to the judicial review of administrative actions. In essence, where a legislature has provided for a right of appeal to a court, the appellate standards of review developed in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 — correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law — will apply. Where the legislature has not provided for a right of appeal and has left the availability of judicial review intact, the administrative law standards of review will apply instead.

[148] Furthermore, the new s. 83.1 of the *Courts of Justice Act*, which came into force on June 5, 2020, provides that the Court of Québec must now apply the *Housen* standards in exercising its jurisdiction over appeals of administrative decisions.

[149] Thus, the combined effect of *Vavilov* and s. 83.1 is that the Court of Québec is no longer bound by the obligation of judicial deference and must now apply the appellate standards from *Housen* in any appeal it hears from an administrative decision. This is true of all the rights of appeal in question in this case.

[150] It is not unreasonable to argue that the intermediate step of appealing to a court with provincially appointed judges before applying for judicial review to the superior court might be unconstitutional because it is likely to deprive the superior courts of a considerable number of such applications. However, we wish to be clear that we are not ruling on whether the Court of Québec's appellate jurisdiction is constitutional, as that is not the question before us. That matter is therefore left for another day.

exceptionnelle qui justifierait de trancher néanmoins la question, malgré son caractère théorique.

[147] Dans *Vavilov*, notre Cour a réformé l'analyse visant à déterminer la norme de contrôle applicable en matière de contrôle judiciaire de l'action administrative. Essentiellement, lorsque le législateur a prévu un droit d'appel devant une cour de justice, les normes d'intervention en appel établies dans l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, sont applicables, c'est-à-dire la norme de la décision correcte quant aux questions de droit et la norme de l'erreur manifeste et déterminante quant aux questions de fait et aux questions mixtes. Lorsque le législateur n'a pas prévu de droit d'appel et laissé intact le recours en contrôle judiciaire, les normes de contrôle du droit administratif seront plutôt applicables.

[148] En outre, le nouvel art. 83.1 de la *Loi sur les tribunaux judiciaires*, entré en vigueur le 5 juin 2020, prévoit que la Cour du Québec doit maintenant appliquer les normes de *Housen* lorsqu'elle exerce sa compétence d'appel d'une décision de l'administration.

[149] Ainsi, l'effet combiné de l'arrêt *Vavilov* et de l'art. 83.1 est que la Cour du Québec n'est plus liée par l'obligation de retenue judiciaire et qu'elle doit maintenant appliquer les normes d'intervention en appel de *Housen*, et ce, à l'égard de tout appel qu'elle entend à l'encontre d'une décision administrative. Les droits d'appel concernés en l'espèce sont tous visés.

[150] Il n'est pas déraisonnable de prétendre que l'étape intermédiaire d'un appel à une cour de nomination provinciale avant l'exercice d'un contrôle judiciaire auprès de la cour supérieure puisse être inconstitutionnelle, puisqu'elle est susceptible de priver les cours supérieures d'un nombre substantiel de pourvois en contrôle judiciaire. Cependant, nous tenons à préciser que nous ne nous prononçons pas sur la question de la constitutionnalité de la juridiction d'appel de la Cour du Québec, puisqu'il ne s'agit pas de la question dont nous sommes saisis. Celle-ci est donc remise à un autre jour.

VI. Effect of the Decision

[151] In principle, a reference is merely an advisory procedure. The answer to a reference question may be viewed as a legal opinion for the executive that is analogous to an opinion provided by law officers of the Crown (*Reference re Secession of Quebec*, at para. 15). In a reference, the Court therefore does not have the power to *formally* declare a law to be unconstitutional. The only power it has is to answer the question before it (*Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571 (P.C.), at pp. 588-89; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at p. 863; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3 ("*Reference re Remuneration of Judges (1998)*"), at para. 9).

[152] Notwithstanding their advisory — and therefore, in principle, non-binding — nature, opinions given in references are in practice treated as judicial decisions and are followed by other courts (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 40; see also *Reference Re Certification in the Manitoba Health Sector*, 2019 MBCA 18, [2019] 5 W.W.R. 614, at para. 23; G. Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960), 6 *McGill L.J.* 168, at pp. 175-80). The day after this Court gives an opinion, any trial court considering the same question would in all likelihood apply that opinion because of its persuasive weight (*Reference re Remuneration of Judges (1998)*, at para. 10). It may therefore be appropriate, where the circumstances so require, for this Court to exercise its remedial discretion to suspend the effects of its decision in the context of a reference, as it may do on an appeal.

[153] This Court recently stated in *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 83, that a declaration of invalidity can be suspended "when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it

VI. Effet de la décision

[151] En principe, la procédure de renvoi n'a qu'un caractère consultatif. La réponse donnée à la question d'un renvoi s'apparente à un avis juridique fourni à l'exécutif dont la nature est similaire à un avis qui serait donné par les juristes de l'État (*Renvoi relatif à la sécession du Québec*, par. 15). Dans le cadre d'un renvoi, la Cour n'a donc pas le pouvoir de déclarer *formellement* une loi inconstitutionnelle. Elle n'a que le pouvoir de répondre à la question soumise (*Attorney-General for Ontario c. Attorney-General for Canada*, [1912] A.C. 571 (C.P.), p. 588-589; *Renvoi relatif à la Loi sur les écoles publiques (Man.), art. 79(3), (4) et (7)*, [1993] 1 R.C.S. 839, p. 863; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1998] 1 R.C.S. 3 (« *Renvoi relatif à la rémunération des juges (1998)* »), par. 9).

[152] Malgré leur caractère consultatif et donc, en principe, non contraignant, les avis donnés dans le cadre d'un renvoi sont traités, en pratique, comme des décisions judiciaires, et ils sont suivis par les autres tribunaux (*Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 40; voir aussi *Reference Re Certification in the Manitoba Health Sector*, 2019 MBCA 18, [2019] 5 W.W.R. 614, par. 23; G. Rubin, « The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law » (1960), 6 *R.D. McGill* 168, p. 175-180). Dès le lendemain du prononcé de l'avis, il est vraisemblable qu'un tribunal de première instance saisi de la même question appliquerait l'avis donné par la Cour en raison de sa force persuasive (*Renvoi relatif à la rémunération des juges (1998)*, par. 10). Lorsque la situation le requiert, il peut donc être opportun que la Cour exerce son pouvoir discrétionnaire de réparation afin d'en suspendre les effets éventuels dans le cadre d'un renvoi, comme elle le ferait dans le cas d'un pourvoi.

[153] Dans l'arrêt *Ontario (Procureur général) c. G*, 2020 CSC 38, [2020] 3 R.C.S. 629, par. 83, notre Cour a récemment affirmé qu'une déclaration d'invalidité pouvait être suspendue « lorsque le risque que représente une déclaration avec effet immédiat sur un intérêt public identifiable, fondé sur la Constitution,

outweighs the harmful impacts of delaying the declaration's effect". The analysis in this regard is guided by certain principles (para. 94). In the instant case, since suspending the declaration of invalidity would not perpetuate interference with any right guaranteed by the *Canadian Charter of Rights and Freedoms*, the most determinative principle is that of respect for the distinct institutional roles of the courts and the legislatures (paras. 97 and 126-31).

[154] The weighing of the various factors we have identified shows that the Quebec legislature has available to it a range of possible legislative measures that would be constitutional should it wish to depart from the updated historical monetary ceiling. It is not for this Court to choose which of those measures should be implemented to replace the current art. 35 para. 1 *C.C.P.* In accordance with the constitutional principles of parliamentary sovereignty and democracy, it would be preferable to leave it to the democratically elected Quebec legislature to choose which of those possibilities best reflects the interests and priorities of the people of Quebec (see *G*, at para. 97). This is all the more true where the harmful effects of a suspension would be minimal, as affected litigants would in the meantime continue to have access to the Court of Québec, an impartial and independent court that plays a part in maintaining the rule of law.

[155] An immediately effective declaration would significantly impair the Quebec legislature's ability to legislate in order to address the constitutional invalidity (*G*, at paras. 129-30). The day after the publication of this opinion, litigants with lawsuits for identical amounts could be subject to the jurisdiction of different courts (the Court of Québec or the Superior Court) depending on whether they decide to raise a preliminary exception concerning the jurisdiction of the Court of Québec. Such a situation would generate intolerable uncertainty in the administration of civil justice in Quebec. And it would then be difficult for the Quebec legislature, in enacting a new, constitutionally compliant art. 35 *C.C.P.*, to apply transitional measures that would restore the harmony of the system.

l'emporte sur les conséquences néfastes de la suspension de l'effet de cette déclaration ». Certains principes doivent guider cette analyse (par. 94). Dans le cas présent, puisque la suspension de la déclaration d'invalidité ne perpétue aucune entrave à un droit garanti par la *Charte canadienne des droits et libertés*, le principe le plus déterminant est celui du respect des rôles institutionnels distincts joués par les tribunaux et les législatures (par. 97 et 126-131).

[154] La pondération des différents facteurs que nous avons identifiés démontre que la législature québécoise dispose d'un éventail de mesures législatives possibles qui seraient constitutionnelles, si elle désire s'écarter du plafond pécuniaire historique actualisé. Il n'appartient pas à notre Cour de choisir laquelle de ces mesures devrait être mise en place afin de remplacer l'actuel art. 35 al. 1 *C.p.c.* Conformément aux principes constitutionnels de la souveraineté parlementaire et de la démocratie, il est préférable de laisser à la législature québécoise démocratiquement élue le soin de choisir laquelle de ces possibilités reflète le mieux les intérêts et les priorités de la population québécoise (voir *G*, par. 97). Ceci est d'autant plus vrai lorsque les effets néfastes d'une suspension seraient minimes, les justiciables touchés continuant entre-temps à avoir accès à la Cour du Québec, un tribunal impartial et indépendant participant au maintien de la primauté du droit.

[155] Une déclaration avec effet immédiat nuirait considérablement à la capacité du législateur québécois de légiférer afin de remédier à l'inconstitutionnalité (*G*, par. 129-130). Au lendemain de la publication du présent avis, des justiciables ayant des litiges d'une valeur identique pourraient être sujets à la compétence de cours différentes (soit la Cour du Québec, soit la Cour supérieure) suivant leurs décisions de soulever ou pas un moyen préliminaire à l'encontre de la compétence de la Cour du Québec. Une telle situation engendrerait une incertitude intolérable au sein de l'administration de la justice civile au Québec. Au moment de l'adoption d'un nouvel art. 35 *C.p.c.* conforme à la Constitution, il deviendrait alors difficile pour le législateur québécois d'appliquer des mesures transitoires rétablissant l'harmonie du système.

[156] For these reasons, like the Court of Appeal, we agree that our opinion that art. 35 para. 1 *C.C.P.* is unconstitutional should not be implemented for a period of 12 months from the date of its release. It is normally up to the government to demonstrate how long the suspension should be. Despite the absence of submissions on this point in this Court, we find the length of time determined by the Court of Appeal to be adequate (*G*, at para. 135). Article 35 para. 1 *C.C.P.* should therefore be considered valid in the interim. The Quebec legislature will also turn its mind to transitional provisions once it has selected between the available constitutionally compliant options. Three comments must be made regarding the effects of this opinion, however.

[157] First, any originating proceedings filed in the Court of Québec before or during the suspension period can be pursued to the conclusion of the proceedings even if the proceedings conclude after the 12-month period has expired. Any judgment that terminates a proceeding at that time will be final and will not be affected by this Court's opinion. The absence of such a transitional measure would deprive Quebec of a harmonious judicial system, result in great disorder and affect the implementation and enforcement of litigants' rights. If this Court did not address this situation, the rule of law would suffer (*Reference re Manitoba Language Rights*, at pp. 750-51).

[158] Second, *res judicata* precludes the reopening of cases that were within the jurisdiction of the Court of Québec pursuant to art. 35 para. 1 *C.P.C.* and that have already been decided by that court (see *Reference re Manitoba Language Rights*, at p. 756). Any decisions rendered by the Court of Québec in such cases before this decision will thus continue to be fully effective.

[159] Third, the *de facto* doctrine, which recognizes and gives effect "to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence and efficacy of public and private bodies corporate, though

[156] Pour ces raisons, nous sommes d'opinion, à l'instar de la Cour d'appel, qu'il ne devrait pas être donné effet à notre avis concluant à l'inconstitutionnalité de l'art. 35 al. 1 *C.p.c.* pendant une période de 12 mois suivant le dépôt de la présente décision. Il incombe normalement au gouvernement d'établir la durée que doit avoir la suspension. Malgré l'absence d'arguments sur cette question devant notre Cour, nous estimons la période déterminée par la Cour d'appel adéquate (*G*, par. 135). L'article 35 al. 1 *C.p.c.* devrait donc être considérée valide entre-temps. Le législateur québécois devra aussi se pencher sur les dispositions transitoires lorsqu'il aura choisi l'une des solutions constitutionnellement valides qui s'offrent à lui. Trois mentions relatives aux effets de cet avis s'imposent toutefois.

[157] Premièrement, les demandes introductives d'instance déposées à la Cour du Québec avant ou durant la période de suspension de la déclaration d'invalidité pourront suivre leur cours jusqu'à la fin de l'instance, et ce, même si l'instance prend fin après l'expiration de la période de 12 mois. Tout jugement final alors rendu passera en force de chose jugée et ne sera pas affecté par l'avis de notre Cour. L'absence d'une telle mesure transitoire priverait le Québec d'un ordre judiciaire harmonieux, pourrait entraîner un désordre important et aurait des répercussions sur la mise en œuvre et la sanction des droits des justiciables. Si notre Cour omettait de remédier à cette situation, la primauté du droit en souffrirait (*Renvoi relatif aux droits linguistiques au Manitoba*, p. 750-751).

[158] Deuxièmement, le principe de la chose jugée empêche de rouvrir les dossiers qui relevaient de la compétence de la Cour du Québec en vertu de l'art. 35 al. 1 *C.p.c.* et que cette dernière a déjà tranchés (voir *Renvoi relatif aux droits linguistiques au Manitoba*, p. 756). Ainsi, toutes les décisions de la Cour du Québec rendues dans ces dossiers avant la présente décision continueront d'avoir pleine autorité.

[159] Troisièmement, le principe de la validité *de facto*, qui reconnaît et donne effet « aux attentes justifiées de gens qui se sont fiés aux actes de ceux qui ont appliqué les lois invalides, ainsi qu'à l'existence et au fonctionnement des corps publics ou privés

irregularly or illegally organized" (*ibid.*, at p. 757), will also save rights, obligations and other effects which have arisen out of actions performed pursuant to art. 35 *C.C.P.* by courts, judges, persons exercising statutory powers and public officials. "Such rights, obligations and other effects are, and will always be, enforceable and unassailable" (*ibid.*).

VII. Disposition

[160] Our answers to the stated questions are as follows:

[TRANSLATION]

1. Are the provisions of the first paragraph of article 35 of the *Code of Civil Procedure* (chapter C-25.01), setting at less than $85,000 the limit to the exclusive monetary jurisdiction of the Court of Québec, valid with regard to section 96 of the *Constitution Act, 1867*, given the jurisdiction of Quebec over the administration of justice under paragraph 14 of section 92 of the *Constitution Act, 1867*?

No, the provisions of the first paragraph of art. 35 of the *Code of Civil Procedure* (chapter C-25.01) setting at less than $85,000 the limit to the exclusive monetary jurisdiction of the Court of Québec are not valid with regard to s. 96 of the *Constitution Act, 1867*.

[TRANSLATION]

2. Is it compatible with section 96 of the *Constitution Act, 1867* to apply the obligation of judicial deference, which characterizes the application for judicial review, to the appeals to the Court of Québec provided for in sections 147 of the *Act respecting access to documents held by public bodies and the protection of personal information* (chapter A-2.1), 115.16 of the *Act respecting the Autorité des marchés financiers* (chapter A-33.2), 100 of the *Real Estate Brokerage Act* (chapter C-73.2), 379 of the *Act respecting the distribution of financial products and services* (chapter D-9.2), 159 of the *Act respecting administrative justice* (chapter J-3), 240 and 241 of the *Police Act* (chapter P-13.1), 91 of the *Act respecting the Régie du logement* (chapter R-8.1) and 61 of the *Act respecting the protection of personal information in the private sector* (chapter P-39.1)?

mêmes irrégulièrement ou illégalement constitués » (*ibid.*, p. 757), permettra également de préserver les droits, obligations et autres effets ayant découlé des actes accomplis, conformément à l'art. 35 *C.p.c.*, par des tribunaux, des juges, des personnes exerçant des pouvoirs légaux et des officiers publics. « Ces droits, obligations et autres effets sont et seront toujours exécutoires et incontestables » (*ibid.*).

VII. Dispositif

[160] Nous répondons aux questions posées comme suit :

1. Les dispositions du premier alinéa de l'article 35 du *Code de procédure civile* (chapitre C-25.01) fixant, à moins de 85 000 $, le seuil de la compétence pécuniaire exclusive de la Cour du Québec, sont-elles valides au regard de l'article 96 de la *Loi constitutionnelle de 1867*, étant donné la compétence du Québec sur l'administration de la justice aux termes du paragraphe 92 (14) de la *Loi constitutionnelle de 1867*?

Non, les dispositions du premier alinéa de l'art. 35 du *Code de procédure civile* (chapitre C-25.01) fixant, à moins de 85 000 $, le seuil de la compétence pécuniaire exclusive de la Cour du Québec ne sont pas valides au regard de l'art. 96 de la *Loi constitutionnelle de 1867*.

2. Est-il compatible avec l'article 96 de la *Loi constitutionnelle de 1867* d'appliquer l'obligation de déférence judiciaire, qui caractérise le pourvoi en contrôle judiciaire, aux appels à la Cour du Québec prévus aux articles 147 de la *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels* (chapitre A-2.1), 115.16 de la *Loi sur l'Autorité des marchés financiers* (chapitre A-33.2), 100 de la *Loi sur le courtage immobilier* (chapitre C-73.2), 379 de la *Loi sur la distribution des produits et services financiers* (chapitre D-9.2), 159 de la *Loi sur la justice administrative* (chapitre J-3), 240 et 241 de la *Loi sur la police* (chapitre P-13.1), 91 de la *Loi sur la Régie du logement* (chapitre R-8.1) et 61 de la *Loi sur la protection des renseignements personnels dans le secteur privé* (chapitre P-39.1)?

We do not answer this question, because it is now moot.

[161] For the foregoing reasons, we would dismiss the appeals without costs. This opinion should not be implemented for a period of 12 months from the date of its release. Any originating proceedings filed in the Court of Québec before or during this suspension period can be pursued to the conclusion of the proceedings even if the proceedings conclude after the 12-month period has expired.

English version of the reasons of Wagner C.J. and Rowe J. delivered by

THE CHIEF JUSTICE (dissenting in part) —

TABLE OF CONTENTS

Nous ne répondons pas à cette question, car elle est devenue théorique.

[161] Pour les raisons qui précèdent, nous sommes d'avis que les pourvois devraient être rejetés sans dépens. Il ne devrait pas être donné effet au présent avis pendant une période de 12 mois suivant son dépôt. Les demandes introductives d'instance déposées à la Cour du Québec avant ou durant cette période de suspension pourront suivre leur cours jusqu'à la fin de l'instance, et ce, même si l'instance prend fin après l'expiration de la période de 12 mois.

Les motifs du juge en chef Wagner et du juge Rowe ont été rendus par

LE JUGE EN CHEF (dissident en partie) —

TABLE DES MATIÈRES

I. Introduction

[162] I have read the reasons of my colleagues Côté and Martin JJ., but with respect, I cannot agree with their conclusion. Like Abella J., although for different reasons, I am of the view that art. 35 para. 1 of the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), does not remove from the Quebec Superior Court part of its core jurisdiction. I explain this below.

[163] The first question raised in the reference to the Quebec Court of Appeal requires an answer that strikes a balance between, on the one hand, the ability of the provinces and territories to experiment with new forms of access to civil justice through provincially or territorially constituted courts and, on the other, the need to preserve the core jurisdiction of the superior courts that allows them to state and develop the civil law or the common law.

[164] Specifically, what must be determined in this case is whether art. 35 para. 1 *C.C.P.*, which raises the monetary ceiling of the Court of Québec's civil jurisdiction from less than $70,000 to less than $85,000, is contrary to s. 96 of the *Constitution Act, 1867*. The enactment of this provision of the *C.C.P.* was part of a series of increases in the ceiling that were all related to the genesis and history of the Court of Québec, a provincially constituted court that, over the course of the reforms made to it from the time of Confederation until today, has played a key beneficial role in Quebec's justice system by facilitating the judicial resolution of conflicts in all districts in the province.

[165] Although the Quebec legislature has always regarded such increases as a way of promoting access

I. Introduction

[162] J'ai pris connaissance des motifs exposés par mes collègues les juges Côté et Martin, mais avec égards je ne puis me rallier à leur conclusion. Tout comme la juge Abella, mais pour des raisons différentes, je suis d'avis que l'art. 35 al. 1 du *Code de procédure civile*, RLRQ, c. C-25.01 (« *C.p.c.* »), ne retire pas à la Cour supérieure du Québec une partie de sa compétence fondamentale. Voici pourquoi.

[163] La première question soulevée dans le renvoi à la Cour d'appel du Québec exige une réponse équilibrée entre, d'une part, la possibilité pour les provinces et les territoires d'expérimenter de nouvelles formes d'accès à la justice civile par l'entremise de tribunaux de création provinciale ou territoriale, et, d'autre part, la nécessité de préserver la compétence fondamentale des cours supérieures qui leur permet de dire et de faire évoluer le droit civil ou la common law.

[164] En l'espèce, il s'agit plus précisément de déterminer si l'art. 35 al. 1 *C.p.c.*, qui fait passer de moins de 70 000 $ à moins de 85 000 $ le plafond pécuniaire de la compétence de la Cour du Québec en matière civile, contrevient à l'art. 96 de la *Loi constitutionnelle de 1867*. L'adoption de cette disposition du *C.p.c.* s'inscrit dans la foulée d'une série d'augmentations de ce plafond, toutes liées à la genèse et à l'histoire de la Cour du Québec, une cour de création provinciale qui, au fil des réformes dont elle a été l'objet depuis les débuts de la Confédération jusqu'à aujourd'hui, a joué un rôle déterminant et bénéfique au sein du système de justice québécois, en facilitant la résolution par voie judiciaire des conflits dans tous les districts de la province.

[165] Bien que le législateur québécois ait toujours envisagé de telles hausses comme une façon

to justice, the respondents the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec see in them instead a gradual erosion of the superior courts' core jurisdiction in civil matters that cannot be authorized by s. 96.

[166] The Court of Appeal held that, in order to be consistent with s. 96, the monetary ceiling of the Court of Québec's civil jurisdiction must fall between $55,000 and $70,000, subject to future updates, and that setting the ceiling for claims at less than $85,000 is therefore unconstitutional (2019 QCCA 1492, at para. 188 (CanLII)). The Court of Appeal stated that s. 96 gives the Quebec Superior Court core jurisdiction over "substantial" civil law disputes, which it defined as those involving an amount of $70,000 or more, an amount corresponding to the updated maximum value of the monetary ceiling of the inferior courts' jurisdiction at the time of Confederation. The Court of Appeal shared the concerns raised by the respondents about the gradual erosion of the Quebec Superior Court's civil jurisdiction and noted that the Quebec legislature has given the Court of Québec a more significant role in civil matters than any other Canadian province (paras. 147, 150 and 187).

[167] The appellants the Conférence des juges de la Cour du Québec, the Attorney General of Quebec, the Conseil de la magistrature du Québec and the Canadian Association of Provincial Court Judges are appealing the answer given by the Quebec Court of Appeal to the first reference question.

[168] It should be noted that both the Attorney General of Quebec and the Attorney General of Canada, who is intervening for the federal government, fully support the position that art. 35 para. 1 *C.C.P.* is constitutional. In particular, the Attorney General of Canada takes the view that the Court of Appeal's analytical approach overlooks the *actual impact* of this article [TRANSLATION] "on the Superior Court's ability to hear civil disputes" (I.F. (AGC), at para. 5). He adds that, in the final analysis, given [TRANSLATION] "its insignificant effect" on the core jurisdiction exercised by the Superior Court in

de favoriser l'accès à la justice, les intimés le juge en chef, la juge en chef associée et la juge en chef adjointe de la Cour supérieure du Québec y voient pour leur part une érosion progressive de la compétence fondamentale des cours supérieures en matière civile que l'art. 96 ne saurait autoriser.

[166] La Cour d'appel a conclu que, pour respecter l'art. 96, le plafond pécuniaire de la compétence de la Cour du Québec en matière civile doit se situer entre 55 000 $ et 70 000 $, sous réserve d'actualisations futures, et que le fait de fixer le plafond des réclamations à moins de 85 000 $ est en conséquence inconstitutionnel (2019 QCCA 1492, par. 188 (CanLII)). La Cour d'appel affirme que cet article confère à la Cour supérieure du Québec une compétence fondamentale sur les litiges de droit civil « substantiels », qu'elle définit comme ceux de 70 000 $ et plus, une somme correspondant à la valeur actualisée et maximale du plafond pécuniaire de la compétence des tribunaux inférieurs de l'époque confédérative. La Cour d'appel fait siennes les inquiétudes soulevées par les intimés au sujet de l'érosion progressive de la compétence de la Cour supérieure du Québec en matière civile, et souligne que le législateur québécois a conféré à la Cour du Québec un rôle plus important en cette matière que toute autre province canadienne (par. 147, 150 et 187).

[167] Les appelants la Conférence des juges de la Cour du Québec, le procureur général du Québec, le Conseil de la magistrature du Québec et l'Association canadienne des juges des cours provinciales font appel de la réponse donnée par la Cour d'appel du Québec à la première question du renvoi.

[168] Il convient de souligner que tant le procureur général du Québec que le procureur général du Canada, qui intervient pour le fédéral, appuient sans réserve la thèse de la constitutionnalité de l'art. 35 al. 1 *C.p.c.* De façon plus particulière, le procureur général du Canada estime que la méthode d'analyse de la Cour d'appel omet de tenir compte de *l'impact réel* qu'a cet article « sur la capacité de la Cour supérieure d'entendre des litiges en matière civile » (m. interv. (PGC), par. 5). Il ajoute, en dernière analyse, qu'en raison de « son effet peu important » sur la compétence fondamentale exercée par la Cour

this regard, art. 35 para. 1 *C.C.P.* in no way infringes s. 96 of the *Constitution Act, 1867* (para. 8).

[169] In my view, the appeals relating to the first question should be allowed. In the opinion it provided on the questions referred to it ("Opinion"), the Court of Appeal interpreted the limits of the Superior Court's core jurisdiction too broadly and froze in time the civil jurisdiction of the Court of Québec, as a provincially constituted court, rather than adopting an analytical framework attuned to the actual constitutional objectives of s. 96. These objectives include fostering a unified judicial system throughout Canada. In my opinion, the preservation of the superior courts' ability to state and develop private law allows this objective to be achieved in accordance with s. 96.

[170] For this purpose, it is not necessary to maintain the monetary ceiling of the inferior courts' civil jurisdiction in effect at the time of Confederation. There is another approach — not only desirable but also truer to the spirit of s. 96 — that gives the provinces and territories real autonomy in the administration of civil justice and permits them to make the choices best suited to their own emerging and complex challenges. As I will explain, such an analytical framework makes it possible both to protect the essential space the provinces and territories have for experimentation in matters of access to justice, which may include expanding their courts' civil jurisdiction, and to ensure in the process that the superior courts can continue to state and develop the civil law and the common law.

[171] The analysis that follows is based on the two stages of the s. 96 analytical framework, which are concerned with the historical jurisdiction and the core jurisdiction of the superior courts.

[172] With regard to the first stage of the analytical framework, I am of the view that art. 35 *C.C.P.* satisfies the three tests developed in *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714. When

supérieure à cet égard, l'art. 35 al. 1 *C.p.c.* n'enfreint d'aucune manière l'art. 96 de la *Loi constitutionnelle de 1867* (par. 8).

[169] J'estime que les appels portant sur la première question doivent être accueillis. Dans l'avis qu'elle a formulé au terme du renvoi qui lui était soumis (« Avis »), la Cour d'appel a interprété trop largement les limites de la compétence fondamentale de la Cour supérieure et a figé dans le temps la compétence de la Cour du Québec en matière civile, en tant que tribunal de création provinciale, plutôt que d'adopter un cadre d'analyse sensible aux objectifs constitutionnels concrets visés par l'art. 96. Parmi ces objectifs, mentionnons celui qui consiste à favoriser la présence d'un système judiciaire unifié à travers le Canada. Le fait de préserver la capacité des cours supérieures de dire et de faire évoluer le droit privé permet, à mon avis, de satisfaire à cet objectif conformément à l'art. 96.

[170] Pour ce faire, point n'est besoin de perpétuer le plafond pécuniaire de la compétence des tribunaux inférieurs en matière civile en vigueur au moment de la Confédération. Il existe une autre approche non seulement souhaitable, mais de surcroît plus fidèle à l'esprit de l'art. 96, qui confère aux provinces et aux territoires une réelle autonomie dans l'administration de la justice civile, et leur permet de faire les choix les mieux adaptés aux défis émergents et complexes qui leur sont propres. Comme je vais l'exposer, un tel cadre d'analyse permet à la fois de protéger l'espace essentiel d'expérimentation des provinces et territoires en matière d'accès à la justice, notamment par l'élargissement de la compétence de leurs tribunaux en matière civile, et de faire en sorte, ce faisant, que les cours supérieures puissent continuer de dire et de faire évoluer le droit civil et la common law.

[171] L'analyse qui suit est fondée sur les deux étapes du cadre d'analyse de l'art. 96, soit celles liées à la compétence historique et à la compétence fondamentale des cours supérieures.

[172] Pour ce qui est de la première étape du cadre d'analyse, j'estime que l'art. 35 *C.p.c.* satisfait aux trois critères élaborés dans le *Renvoi sur la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S.

properly characterized in terms of its subject matter, the jurisdiction conferred by this article on the Court of Québec is civil jurisdiction over contractual and extracontractual obligations. At the time of Confederation, the inferior courts of three of the four founding provinces, with the exception of Lower Canada (the province of Quebec), exercised a general shared jurisdiction in this regard.

[173] As for the second stage of the analysis, I am of the view that art. 35 *C.C.P.* does not remove from the Quebec Superior Court any power that is within its core jurisdiction. This jurisdiction must be defined narrowly and, with due respect for those who disagree, I see no need to confer on the superior courts any more power over private law disputes than is necessary.

[174] Of all the possible interpretations of the Confederation compromise embodied in s. 96, the only one that seems reasonable to me is the one that ultimately allows the superior courts to state and develop private law. As long as this ability is not jeopardized, the superior courts' core jurisdiction in this area will remain intact and the unified nature of Canada's judicial system will be protected.

[175] The provinces and territories are therefore free to increase the civil jurisdiction of their respective courts insofar as they comply with this important restriction. The following factors, which are both quantitative and qualitative, provide some helpful guidance: (a) the impact on the number of cases that the superior court continues to deal with; (b) the impact on the proportion of cases within the superior court's jurisdiction compared with those within the jurisdiction of a provincially or territorially constituted court; (c) the impact on the nature and importance of the cases within the superior court's jurisdiction.

[176] Once these factors are applied in this case, as I will do below, the necessary conclusion is that art. 35 *C.C.P.* does not have the effect of removing the power to state and develop private law from the Quebec Superior Court. The evidence shows that the

714. Adéquatement qualifiée en fonction de son objet, la compétence que confère cet article à la Cour du Québec est une compétence en matière civile sur des obligations contractuelles et extracontractuelles. Au moment de la Confédération, hormis dans le Bas-Canada (la province de Québec), les tribunaux inférieurs de trois des quatre provinces fondatrices exerçaient alors une compétence générale partagée à cet égard.

[173] Pour ce qui est de la seconde étape de l'analyse, je suis d'avis que l'art. 35 *C.p.c.* ne retire à la Cour supérieure du Québec aucun pouvoir relevant de sa compétence fondamentale. Cette compétence doit être définie étroitement, et, avec égards pour l'opinion contraire, il n'est selon moi pas nécessaire de conférer aux cours supérieures plus de pouvoirs qu'il n'en faut à l'égard des différends de droit privé.

[174] De toutes les interprétations possibles du compromis confédératif consacré à l'art. 96, la seule qui me semble raisonnable est celle qui, en dernière analyse, permet aux cours supérieures de dire et de faire évoluer le droit privé. Tant que cette faculté ne sera pas menacée, la compétence fondamentale des cours supérieures en semblable matière demeurera intacte et le caractère unifié du système judiciaire canadien sera protégé.

[175] Les provinces et territoires sont donc libres d'accroître la compétence civile de leurs tribunaux respectifs, tant et aussi longtemps que cette limite importante est respectée. Les facteurs suivants, qui sont de nature quantitative et de nature qualitative, apportent un éclairage pertinent : a) l'impact sur le nombre de dossiers que la cour supérieure continue de traiter; b) l'impact sur la proportion des dossiers relevant de la cour supérieure par rapport à ceux relevant d'un tribunal de création provinciale ou territoriale; c) l'impact sur la nature et l'importance des dossiers relevant de la compétence de la cour supérieure.

[176] Une fois ces facteurs appliqués à la présente affaire, comme je le fais plus loin, la conclusion qui s'impose est que l'art. 35 *C.p.c.* n'a pas pour effet de retirer à la Cour supérieure du Québec son pouvoir de dire et de faire évoluer le droit privé. Il ressort

Superior Court continues to hear a sufficient number and substantial proportion of civil cases, in which it is called upon to adjudicate significant disputes that are highly varied in nature.

[177] Like Quebec, other provinces are continuing, by means of innovative initiatives, to promote access to justice everywhere within their boundaries. The interpretation I adopt of s. 96, informed by the compromise of the founders of Confederation, has the advantage of giving the provinces the degree of autonomy they need in the years ahead to address the complex challenge of access to justice, an undertaking whose success does not depend on a single solution.

[178] Before I embark on the analysis mentioned above, it is important to begin by providing a broad outline of the Court of Québec's genesis and history, viewed from the standpoint of the exercise by that court of its civil jurisdiction.

II. Background

[179] The history of the Court of Québec and its predecessors before and since Confederation can be divided into four phases, which go back to the pre-Confederation period and the Commissioners' Court, until the time the Commissioners' Court was replaced following Confederation by the Magistrate's Court, which was later renamed Provincial Court and, finally, Court of Québec: (1) replacement of the Commissioners' Court by the Magistrate's Court (1869 to 1953); (2) abolition of the Circuit Court and increase in the Magistrate Court's civil jurisdiction (1953 to 1965); (3) replacement of the Magistrate's Court by the Provincial Court and increase in its civil jurisdiction (1965 to 1988); (4) replacement of the Provincial Court by the Court of Québec and increase in its civil jurisdiction (1988 to today).

[180] The first phase began with the creation of the Magistrate's Court, which was established by the Quebec legislature in 1869 and given the civil jurisdiction formerly exercised by the Commissioners'

de la preuve que cette dernière continue d'entendre un nombre suffisant et une proportion substantielle d'affaires civiles, dans lesquelles elle est appelée à trancher des différends importants et de nature très variée.

[177] À l'instar du Québec, d'autres provinces continuent, au moyen d'initiatives novatrices, de favoriser l'accès à la justice sur l'ensemble de leur territoire. L'interprétation de l'art. 96 que je retiens, inspirée du compromis des Pères fondateurs de la Confédération, a l'avantage d'accorder aux provinces le degré d'autonomie dont elles ont besoin au cours des prochaines années pour relever le défi complexe que représente l'accès à la justice, un chantier dont le succès n'est pas tributaire d'une seule et unique solution.

[178] Avant d'amorcer l'analyse mentionnée précédemment, il importe au préalable de décrire à grands traits la genèse et l'histoire de la Cour du Québec, considérées du point de vue de l'exercice par celle-ci de sa compétence en matière civile.

II. Le contexte

[179] L'histoire de la Cour du Québec et des tribunaux qui l'ont précédée avant et depuis la Confédération peut être divisée en quatre temps, qui remontent à l'époque préconfédérative et à la Cour des commissaires, jusqu'au moment où celle-ci fut remplacée après la Confédération par la Cour de magistrat, laquelle fut renommée subséquemment Cour provinciale puis, enfin, Cour du Québec : (1) remplacement de la Cour des commissaires par la Cour de magistrat (1869-1953); (2) abolition de la Cour de circuit et augmentation de la compétence civile de la Cour de magistrat (1953-1965); (3) remplacement de la Cour de magistrat par la Cour provinciale et augmentation de sa compétence civile (1965-1988); (4) remplacement de la Cour provinciale par la Cour du Québec et augmentation de sa compétence civile (1988-jusqu'à aujourd'hui).

[180] La première phase s'est amorcée par la création de la Cour de magistrat, qui a été instituée par le législateur québécois en 1869 et s'est vu confier la compétence civile qu'exerçait auparavant la Cour des

Court, also a provincially constituted court (*An Act respecting District Magistrates in this Province*, S.Q. 1869, c. 23, ss. 13, 16 and 17). Like the Commissioners' Court, the Magistrate's Court exercised that jurisdiction concurrently with the Circuit Court, a s. 96 court (see *Renvoi concernant la constitutionnalité de la Loi concernant la juridiction de la Cour de magistrat, 11-12 Elizabeth II, chapitre 62*, [1965] B.R. 1, at pp. 7-8, 11-12 and 18-19; *Séminaire de Chicoutimi v. La Cité de Chicoutimi*, [1973] S.C.R. 681, at pp. 689-90). The jurisdiction of the Magistrate's Court increased from $25 to $50 in 1871, to $99.99 in 1921 and then to less than $200 in 1946 (*An Act further to amend the law respecting District Magistrates in this Province*, S.Q. 1871, c. 9, s. 1; *An Act to amend the Code of Civil Procedure respecting the district magistrate's court*, S.Q. 1921, c. 100, s. 1; *An Act respecting the jurisdiction of the District Magistrate's Court*, S.Q. 1946, c. 53, s. 1). In 1922, the Circuit Court's civil jurisdiction was transferred to the Magistrate's Court in districts where the latter was present (*An Act to amend the Code of Civil Procedure respecting the jurisdiction of the Circuit and Magistrates' Courts*, S.Q. 1922, c. 94).

[181] The Circuit Court was abolished by the Quebec legislature in 1953, during the second phase. The jurisdiction of the Magistrate's Court over civil suits for less than $200 then became exclusive rather than concurrent (*An Act to amend the Courts of Justice Act*, S.Q. 1952-53, c. 29, s. 17; *An Act to amend the Code of Civil Procedure*, S.Q. 1952-53, c. 18, s. 12). In 1963, that jurisdiction was increased to less than $500 (*An Act respecting the jurisdiction of the Magistrate's Court*, S.Q. 1963, c. 62, s. 1).

[182] In 1964, the Quebec government referred the question of whether that increase was constitutionally valid to the Court of Appeal, clearly seeking to put an end to the uncertainty surrounding its constitutionality. The Court of Appeal unanimously held that the increase was invalid on the ground that, taken together, the successive increases in the civil jurisdiction of the Magistrate's Court had the effect of usurping the Superior Court's role (*Renvoi*

commissaires, elle aussi un tribunal de création provinciale (*Acte concernant les Magistrats de District en cette Province*, S.Q. 1869, c. 23, art. 13, 16 et 17). À l'instar de cette dernière, la Cour de magistrat exerçait cette compétence de manière concurrente avec la Cour de circuit, une cour visée par l'art. 96 (voir *Renvoi concernant la constitutionnalité de la Loi concernant la juridiction de la Cour de magistrat, 11-12 Elizabeth II, chapitre 62*, [1965] B.R. 1, p. 7-8, 11-12 et 18-19; *Séminaire de Chicoutimi c. La Cité de Chicoutimi*, [1973] R.C.S. 681, p. 689-690). Cette compétence de la Cour de magistrat est passée de 25 $ à 50 $ en 1871, à 99.99 $ en 1921, puis à moins de 200 $ en 1946 (*Acte pour amender de nouveau la loi concernant les Magistrats de District en cette Province*, S.Q. 1871, c. 9, art. 1; *Loi amendant le Code de procédure civile relativement à la Cour de magistrat de district*, S.Q. 1921, c. 100, art. 1; *Loi concernant la juridiction de la Cour de magistrat de district*, S.Q. 1946, c. 53, art. 1). En 1922, la compétence de la Cour de circuit en matière civile a été transférée à la Cour de magistrat dans les districts où celle-ci était présente (*Loi amendant le Code de procédure civile, relativement à la juridiction de la Cour de circuit et de la Cour de magistrat*, S.Q. 1922, c. 94).

[181] La Cour de circuit a été abolie par la législature du Québec en 1953, lors de la deuxième phase. La compétence de la Cour de magistrat à l'égard des litiges civils de moins de 200 $ est alors passée de concurrente à exclusive (*Loi modifiant la Loi des tribunaux judiciaires*, S.Q. 1952-53, c. 29, art. 17; *Loi modifiant le Code de procédure civile*, S.Q. 1952-53, c. 18, art. 12). En 1963, cette compétence a été haussée à moins de 500 $ (*Loi concernant la juridiction de la Cour de magistrat*, S.Q. 1963, c. 62, art. 1).

[182] En 1964, dans le cadre d'un renvoi, le gouvernement du Québec a soumis à la Cour d'appel la question de la validité constitutionnelle de cette augmentation, manifestement afin de lever l'incertitude entourant sa constitutionalité. La Cour d'appel a, à l'unanimité, jugé la hausse invalide, au motif que le cumul des augmentations successives de la compétence de la Cour de magistrat en matière civile avait eu pour effet d'usurper le rôle de la Cour supérieure

concernant la constitutionnalité de la Loi concernant la juridiction de la Cour de magistrat).

[183] That decision was appealed to this Court. Fauteux J., writing for his colleagues, found that the Court of Appeal had gone beyond the question referred to it by ruling on the constitutionality of the series of increases since 1869, when it should instead have confined itself to the specific question of the increase in the monetary ceiling that was the subject of the reference (*Re Cour de Magistrat de Québec*, [1965] S.C.R. 772, at p. 780). On that point, Fauteux J. held for a unanimous Court that the increase in question, which had raised the ceiling from less than $200 to less than $500, was not contrary to s. 96 (p. 783).

[184] In 1965, at the start of the third phase of its history, the Magistrate's Court was renamed Provincial Court (*An Act to amend the Courts of Justice Act*, S.Q. 1965, c. 17, s. 1). Over the years, the monetary ceiling of the Provincial Court's civil jurisdiction was raised several times, to less than $1,000 in 1966, less than $3,000 in 1969, less than $6,000 in 1979, less than $10,000 in 1982 and less than $15,000 in 1984 (*Code of Civil Procedure*, S.Q. 1965, c. 80, art. 34; *An Act to again amend the Code of Civil Procedure*, S.Q. 1969, c. 81, s. 2; *An Act to amend the Code of Civil Procedure and other legislation*, S.Q. 1979, c. 37, s. 8; *An Act to amend various legislation*, S.Q. 1982, c. 58, s. 19; *An Act to amend the Code of Civil Procedure and other legislation*, S.Q. 1984, c. 26, s. 3).

[185] Finally, in the fourth phase, which began in 1988, the National Assembly of Quebec created the Court of Québec by merging the Provincial Court, the Court of Sessions of the Peace and the Youth Court (*An Act to amend the Courts of Justice Act and other legislation to establish the Court of Québec*, S.Q. 1988, c. 21, ss. 1 to 5). Because the Court of Québec inherited the Provincial Court's civil jurisdiction, its civil jurisdiction at that time was less than $15,000; that jurisdiction increased to less than $30,000 a few years later, in 1995, then to less than $70,000 in 2002 and, finally, to less than $85,000 in 2016 (*An*

(*Renvoi concernant la constitutionnalité de la Loi concernant la juridiction de la Cour de magistrat*).

[183] Cette décision a été portée en appel devant notre Cour. Le juge Fauteux, s'exprimant au nom de ses collègues, a estimé que la Cour d'appel avait débordé le cadre de la question soulevée par le renvoi en se prononçant sur la constitutionnalité de la série d'augmentations depuis 1869, alors qu'elle aurait dû plutôt s'en tenir à la question précise de l'augmentation du plafond pécuniaire visée par le renvoi (*Re Cour de Magistrat de Québec*, [1965] R.C.S. 772, p. 780). Sur ce point, le juge Fauteux a conclu, dans un arrêt unanime, que l'augmentation en cause, qui avait fait passer le plafond de moins de 200 $ à moins de 500 $, ne contrevenait pas à l'art. 96 (p. 783).

[184] En 1965, à l'aube de la troisième phase de son histoire, la Cour de magistrat a été renommée Cour provinciale (*Loi modifiant la Loi des tribunaux judiciaires*, S.Q. 1965, c. 17, art. 1). Au fil des années, le plafond pécuniaire de la compétence de la Cour provinciale en matière civile a fait l'objet de plusieurs augmentations, qui l'ont fait passer à moins de 1 000 $ en 1966, à moins de 3 000 $ en 1969, à moins de 6 000 $ en 1979, à moins de 10 000 $ en 1982 et à moins de 15 000 $ en 1984 (*Code de procédure civile*, S.Q. 1965, c. 80, art. 34; *Loi modifiant de nouveau le Code de procédure civile*, L.Q. 1969, c. 81, art. 2; *Loi modifiant le Code de procédure civile et d'autres dispositions législatives*, L.Q. 1979, c. 37, art. 8; *Loi modifiant diverses dispositions législatives*, L.Q. 1982, c. 58, art. 19; *Loi modifiant le Code de procédure civile et d'autres dispositions législatives*, L.Q. 1984, c. 26, art. 3).

[185] Enfin, durant la quatrième phase, amorcée en 1988, l'Assemblée nationale du Québec a créé la Cour du Québec en fusionnant la Cour provinciale, la Cour des sessions de la paix ainsi que le Tribunal de la jeunesse (*Loi modifiant la Loi sur les tribunaux judiciaires et d'autres dispositions législatives en vue d'instituer la Cour du Québec*, L.Q. 1988, c. 21, art. 1 à 5). Parce que la Cour du Québec avait hérité de la compétence de la Cour provinciale en matière civile, sa compétence à cet égard se limitait alors à moins de 15 000 $; cette compétence augmenta quelques années plus tard à moins de 30 000 $ en

Act to amend the Code of Civil Procedure and the Act respecting municipal courts, S.Q. 1995, c. 2, s. 2; *An Act to reform the Code of Civil Procedure*, S.Q. 2002, c. 7, s. 5; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 35).

[186] The following table, which is based largely on the one set out in the Opinion (see para. 173), shows how the monetary ceiling of the civil jurisdiction of provincially constituted courts in Quebec has increased since 1965 and also indicates, for each increase, the corresponding value determined by updating the $100 ceiling in effect in 1867:

Year of legislative amendment (date of assent)	**Ceiling of the jurisdiction of the Court of Québec (formerly the Magistrate's Court and the Provincial Court)**	**Updated value of the 1867 ceiling of $100 (where available)**
1965	$1,000	$2,884.41
1969	$3,000	$3,904.83
1979	$6,000	$11,130.55
1982	$10,000	$14,732.18
1984	$15,000	$17,222.62
1995	$30,000	$27,901.34
2002	$70,000	$37,175.75
2014	$85,000	$52,843.97 (2016) $55,354.47 (2017)

As can be seen, before 2002, almost all of the increases were below the updated value of the $100 ceiling that existed in 1867; the situation then changed, as the ceiling of the Court of Québec's jurisdiction greatly exceeded that value.

A. *Objectives Pursued by the Quebec Legislature*

[187] In making reforms to the Quebec justice system, the province has been guided by two

1995, à moins de 70 000 $ en 2002, puis, enfin, à moins de 85 000 $ en 2016 (*Loi modifiant le Code de procédure civile et la Loi sur les cours municipales*, L.Q. 1995, c. 2, art. 2; *Loi portant réforme du Code de procédure civile*, L.Q. 2002, c. 7, art. 5; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 35).

[186] Basé en grande partie sur celui que l'on trouve dans l'Avis (voir par. 173), le tableau suivant illustre l'augmentation du plafond pécuniaire de la compétence civile des tribunaux de création provinciale dans la province de Québec depuis 1965, en plus d'indiquer, pour les différentes hausses, leur valeur correspondante établie par actualisation du plafond de 100 $ en vigueur en 1867 :

Année de la modification législative (date de la sanction)	**Plafond de compétence de la Cour du Québec (anciennement la Cour de magistrat et la Cour provinciale)**	**Actualisation du plafond de 100 $ de 1867 (lorsque disponible)**
1965	1 000 $	2 884,41 $
1969	3 000 $	3 904,83 $
1979	6 000 $	11 130,55 $
1982	10 000 $	14 732,18 $
1984	15 000 $	17 222,62 $
1995	30 000 $	27 901,34 $
2002	70 000 $	37 175,75 $
2014	85 000 $	52 843,97 $ (2016) 55 354,47 $ (2017)

Comme on peut le constater, avant 2002, la vaste majorité des augmentations se situait en deçà de la valeur actualisée du plafond de 100 $ existant en 1867; la situation a changé par la suite, le plafond de la compétence de la Cour du Québec le dépassant largement.

A. *Les objectifs poursuivis par le législateur québécois*

[187] Deux objectifs indissociables ont guidé la province dans le cadre des réformes du système de

inseparable objectives: (1) promoting access to justice; (2) strengthening the position of the court known today as the Court of Québec as a distinct provincial judicial institution. In fact, enhancing access to justice has been a central concern underlying each increase in the monetary ceiling of the Court of Québec's civil jurisdiction (Legislative Assembly, "Projet de loi: Code de procédure civile", *Débats de l'Assemblée législative*, vol. 1, 1st Sess., 24th Leg., December 12 and 16, 1952, at pp. 273 and 284 (Hon. M. Duplessis); Legislative Assembly, "Bill 20 — Code de procédure civile", *Débats de l'Assemblée législative*, vol. 2, No. 85, 4th Sess., 27th Leg., July 14, 1965, at p. 4294 (Hon. C. Wagner); National Assembly, "Bill 74 — Loi modifiant de nouveau le code de procédure civile", *Débats de l'Assemblée nationale*, vol. 8, No. 100, 4th Sess., 28th Leg., December 9, 1969, at p. 4748 (R. Paul); National Assembly, "Projet de loi nº 40 — Loi modifiant le Code de procédure civile et d'autres dispositions législatives", *Journal des débats*, vol. 21, No. 36, 4th Sess., 31st Leg., June 5, 1979, at p. 1686 (M.-A. Bédard); National Assembly, "Projet de loi nº 101 — Loi modifiant diverses dispositions législatives", *Journal des débats*, vol. 26, No. 100, 3rd Sess., 32nd Leg., December 13, 1982, at p. 7105 (M.-A. Bédard); National Assembly, "Projet de loi 83 — Loi modifiant le Code de procédure civile et d'autres dispositions législatives", *Journal des débats*, vol. 27, No. 91, 4th Sess., 32nd Leg., May 15, 1984, at p. 6033 (P.-M. Johnson); National Assembly, "Projet de loi 41 — Loi modifiant le Code de procédure civile et la Loi sur les cours municipales", *Journal des débats*, vol. 34, No. 8, 1st Sess., 35th Leg., December 8, 1994, at pp. 359-60 (P. Bégin); National Assembly, "Projet de loi nº 54 — Loi portant réforme du Code de procédure civile", *Journal des débats*, vol. 37, No. 58, 2nd Sess., 36th Leg., November 20, 2001, at pp. 3769-71 (P. Bégin); National Assembly, "Projet de loi nº 28 — Loi instituant le nouveau Code de procédure civile", *Journal des débats*, vol. 43, No. 72, 1st Sess., 40th Leg., September 24, 2013, at pp. 4502-9 (B. St-Arnaud)). The proposal to streamline Quebec's judicial system in order to make it more accessible and more capable of delivering justice effectively gained significant momentum during the Quiet Revolution and truly became the driving force behind the reform of the Quebec courts (see H.

justice québécois : (1) favoriser l'accès à la justice; (2) renforcer la position du tribunal — connu aujourd'hui sous le nom de Cour du Québec — en tant qu'institution judiciaire provinciale distincte. En effet, accroître l'accès à la justice a été une préoccupation centrale derrière chacune des augmentations du plafond pécuniaire de la compétence de la Cour du Québec en matière civile (Assemblée législative, « Projet de loi : Code de procédure civile », Débats de l'Assemblée législative, vol. 1, 1re sess., 24e lég., 12 et 16 décembre 1952, p. 273 et 284 (l'hon. M. Duplessis); Assemblée législative, « Bill 20 — Code de procédure civile », *Débats de l'Assemblée législative*, vol. 2, nº 85, 4e sess., 27e lég., 14 juillet 1965, p. 4294 (l'hon. C. Wagner); Assemblée nationale, « Bill 74 — Loi modifiant de nouveau le code de procédure civile », *Débats de l'Assemblée nationale*, vol. 8, nº 100, 4e sess., 28e lég., 9 décembre 1969, p. 4748 (R. Paul); Assemblée nationale, « Projet de loi nº 40 — Loi modifiant le Code de procédure civile et d'autres dispositions législatives », *Journal des débats*, vol. 21, nº 36, 4e sess., 31e lég., 5 juin 1979, p. 1686 (M.-A. Bédard); Assemblée nationale, « Projet de loi nº 101 — Loi modifiant diverses dispositions législatives », *Journal des débats*, vol. 26, nº 100, 3e sess., 32e lég., 13 décembre 1982, p. 7105 (M.-A. Bédard); Assemblée nationale, « Projet de loi 83 — Loi modifiant le Code de procédure civile et d'autres dispositions législatives », *Journal des débats*, vol. 27, nº 91, 4e sess., 32e lég., 15 mai 1984, p. 6033 (P.-M. Johnson); Assemblée nationale, « Projet de loi 41 — Loi modifiant le Code de procédure civile et la Loi sur les cours municipales », *Journal des débats*, vol. 34, nº 8, 1re sess., 35e lég., 8 décembre 1994, p. 359-360 (P. Bégin); Assemblée nationale, « Projet de loi nº 54 — Loi portant réforme du Code de procédure civile », *Journal des débats*, vol. 37, nº 58, 2e sess., 36e lég., 20 novembre 2001, p. 3769-3771 (P. Bégin); Assemblée nationale, « Projet de loi nº 28 — Loi instituant le nouveau Code de procédure civile », *Journal des débats*, vol. 43, nº 72, 1re sess., 40e lég., 24 septembre 2013, p. 4502-4509 (B. St-Arnaud)). Le projet de rationalisation du système judiciaire québécois afin d'accroître son accessibilité et sa capacité à rendre justice de manière efficace a nettement pris de l'ampleur au cours de la Révolution tranquille et est véritablement devenu le moteur de la réforme des

St-Louis, "Reform of the Trial Courts in Quebec", in P. H. Russell, ed., *Canada's Trial Courts: Two Tiers or One?* (2007), 123, at pp. 124-25). This explains why the Court of Québec [TRANSLATION] "became the court with the widest presence throughout the territory [of Quebec]" (S. Normand, *La Cour du Québec: Genèse et développement* (2013), at p. 90).

[188] The commitment to making thorough reforms to Quebec's justice system also required modernizing and improving the structural organization of the Court of Québec as a provincial judicial institution (see P. H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987), at p. 126). As Patrice Garant observes, those judicial reforms reflect the fact that, during and after the Quiet Revolution, [TRANSLATION] "the government and legislature of Quebec became aware of the significance of the . . . Court [of Québec] as an institution that was important to Quebec's identity" ("La Cour du Québec et la justice administrative" (2012), 53 *C. de D.* 229, at p. 242).

[189] When the replacement of the Magistrate's Court by the Provincial Court was proposed in the Legislative Assembly of Quebec in 1965, that sweeping reform proposal was driven by three main ideas: increasing the civil jurisdiction of the court in question, making it more accessible to litigants, and making it more professional; all of these objectives thus contributed jointly to the renewal of Quebec's justice system (Legislative Assembly, "Bill No 75 — Loi modifiant la loi des tribunaux judiciaires", *Débats de l'Assemblée legislative*, vol. 2, No. 84, 4th Sess., 27th Leg., July 13, 1965, at pp. 4232-35 (Hon. C. Wagner)).

[190] However, the spirit of reform in the Quebec legislature came up against a few obstacles, all related to s. 96, which served as a constitutional limit and check. Initial attempts to abolish the Circuit Court in the district of Montréal and to replace it with a Magistrate's Court were rejected by the federal government (*An Act to amend the law respecting District Magistrates*, S.Q. 1888, c. 20, s. 1; *An Act to amend the law respecting district*

tribunaux québécois (voir H. St-Louis, « Reform of the Trial Courts in Quebec », dans P. H. Russell, dir., *Canada's Trial Courts : Two Tiers or One?* (2007), 123, p. 124-125). C'est ce qui explique pourquoi la Cour du Québec « est devenue le tribunal le plus présent sur l'ensemble du territoire [du Québec] » (S. Normand, *La Cour du Québec : Genèse et développement* (2013), p. 90).

[188] Par ailleurs, cette volonté de réformer en profondeur le système de justice québécois requérait également la modernisation et l'amélioration de l'organisation structurelle de la Cour du Québec en tant qu'institution judiciaire provinciale (voir P. H. Russell, *The Judiciary in Canada : The Third Branch of Government* (1987), p. 126). Comme le fait remarquer l'auteur Patrice Garant, ces réformes judiciaires témoignent du fait que pendant et après la Révolution tranquille « le gouvernement québécois et son législateur ont pris conscience de l'importance de la Cour [du Québec] comme institution importante pour l'identité québécoise » (« La Cour du Québec et la justice administrative » (2012), 53 *C. de D.* 229, p. 242).

[189] Lorsqu'il fut proposé à l'Assemblée législative du Québec, en 1965, de remplacer la Cour de magistrat par la Cour provinciale, trois idées maîtresses animaient ce vaste projet de réforme : accroître la compétence du tribunal en question en matière civile, le rendre plus accessible aux justiciables et le professionnaliser davantage, de telle sorte que tous ces objectifs contribuent mutuellement au renouvellement du système de justice québécois (Assemblée législative, « Bill No 75 — Loi modifiant la loi des tribunaux judiciaires », *Débats de l'Assemblée législative*, vol. 2, nº 84, 4e sess., 27e lég., 13 juillet 1965, p. 4232-4235 (l'hon. C. Wagner)).

[190] Cet esprit réformateur manifesté par le législateur québécois a cependant rencontré quelques obstacles, tous liés à l'art. 96, celui-ci agissant comme frein et limite d'ordre constitutionnel. Les premières tentatives en vue d'abolir la Cour de circuit du district de Montréal et de la remplacer par une Cour de magistrat ont été rejetées par le gouvernement fédéral (*Acte amendant la loi relative aux magistrats de districts*, S.Q. 1888, c. 20, art. 1; *Acte amendant la loi relative*

magistrates, S.Q. 1889, c. 30, s. 1; Department of Justice, *Correspondence, Reports of the Ministers of Justice and Orders in Council Upon the Subject of Dominion and Provincial Legislation 1867-1895* (1896), at pp. 345 and 431-32).

[191] In addition, despite this Court's favourable decision in *Re Cour de Magistrat de Québec*, doubts remained about the constitutionality of the increase in the monetary jurisdiction of the court we now know as the Court of Québec in civil matters (see, e.g., *Débats de l'Assemblée nationale*, December 9, 1969, at pp. 4746-48 and 4750 (R. Paul and A. Maltais); National Assembly, Commission permanente de la justice, "Projet de loi nº 101 — Loi modifiant diverses dispositions législatives", *Journal des débats*, No. 226, 3rd Sess., 32nd Leg., December 16, 1982, at pp. B-11320 and B-11321 (M.-A. Bédard); National Assembly, "Projet de loi 83 — Loi modifiant le Code de procédure civile et d'autres dispositions législatives", *Journal des débats*, vol. 27, No. 103, 4th Sess., 32nd Leg., June 7, 1984, at pp. 6826-31 (P.-M. Johnson)). The Court of Appeal's decision in that case nonetheless continued to have some persuasive force based on the perception that this Court had allowed the appeal for [TRANSLATION] "technical" reasons (see J. Deslauriers, "La Cour provinciale et l'art. 96 de l'A.A.N.B." (1977), 18 *C. de D.* 881, at p. 914). That situation led the Chief Judge of the Court of Québec to state in 2007 that it was only a matter of time before there was a constitutional challenge to that court's civil jurisdiction (see St-Louis, at p. 132). Clearly, history has proved her right.

B. *Emergence of the Role of Provincially Constituted Courts in Canada*

[192] A connection can be made between, on the one hand, the almost complete absence of decisions on the interpretation and application of s. 96 involving an exclusive transfer of jurisdiction to a provincially constituted court (and not an administrative tribunal) and, on the other, the establishment and strong expansion of this type of court in Canada.

aux magistrats de district, S.Q. 1889, c. 30, art. 1; Ministère de la Justice, *Correspondence, Reports of the Ministers of Justice and Orders in Council Upon the Subject of Dominion and Provincial Legislation 1867-1895* (1896), p. 345 et 431-432).

[191] De plus, malgré l'arrêt favorable de notre Cour dans *Re Cour de Magistrat de Québec*, les doutes ont persisté relativement à la constitutionnalité de l'augmentation de la compétence pécuniaire en matière civile du tribunal que nous connaissons aujourd'hui sous le nom de Cour du Québec (voir, p. ex., *Débats de l'Assemblée nationale*, 9 décembre 1969, p. 4746-4748 et 4750 (R. Paul et A. Maltais); Assemblée nationale, Commission permanente de la justice, « Projet de loi nº 101 — Loi modifiant diverses dispositions législatives », *Journal des débats*, nº 226, 3e sess., 32e lég., 16 décembre 1982, p. B-11320 à B-11321 (M.-A. Bédard); Assemblée nationale, « Projet de loi 83 — Loi modifiant le Code de procédure civile et d'autres dispositions législatives », *Journal des débats*, vol. 27, nº 103, 4e sess., 32e lég., 7 juin 1984, p. 6826-6831 (P.-M. Johnson)). En effet, la décision de la Cour d'appel dans cette affaire a malgré tout conservé une certaine force de persuasion, basée sur la perception voulant que notre Cour ait accueilli l'appel pour des raisons dites « techniques » (voir J. Deslauriers, « La Cour provinciale et l'art. 96 de l'A.A.N.B. » (1977), 18 *C. de D.* 881, p. 914). Cette situation a amené la juge en chef de la Cour du Québec à déclarer, en 2007, que ce n'était qu'une question de temps avant que soit lancée une contestation constitutionnelle de la compétence de la Cour du Québec en matière civile (voir St-Louis, p. 132). Force est de constater que l'histoire lui a donné raison.

B. *L'émergence du rôle des cours de création provinciale au Canada*

[192] Il est possible de faire un rapprochement entre, d'une part, la quasi-absence de décisions portant sur l'interprétation et l'application de l'art. 96 en cas de transfert exclusif d'une compétence à un tribunal judiciaire de création provinciale (et non à un tribunal administratif), et, d'autre part, l'établissement de ce type de tribunaux au Canada ainsi que la forte expansion de ceux-ci.

[193] In 1867, magistrate's courts exercised quite limited jurisdiction in criminal matters and were composed largely of magistrates who were not legal professionals (G. T. G. Seniuk and N. Lyon, "The Supreme Court of Canada and The Provincial Court in Canada" (2000), 79 *Can. Bar Rev.* 77, at pp. 91-93). Starting in the 1960s, the provincial and territorial governments replaced magistrate's courts with new "provincial" courts presided over by qualified judges who had previously practised as lawyers, which had the effect of making these courts more professional (Russell, at pp. 126-27).

[194] In parallel with the establishment of modern provincially constituted courts, the Parliament of Canada passed legislation to confer much more extensive criminal jurisdiction on them. This played a part in making these courts the backbone of the criminal justice system, even though at another time, as we know, inferior courts generally had jurisdiction only over minor criminal cases. The practical result of that significant change was to give provincial courts concurrent jurisdiction with superior courts over all offences under the *Criminal Code*, R.S.C. 1985, c. C-46, with a few exceptions (Seniuk and Lyon, at pp. 95-96). In 2014-15, for example, over 99 percent of the 328,028 criminal cases dealt with by the courts involving offences committed by adults were tried by provincially constituted courts (K. Roach, *Criminal Law* (7th ed. 2018), at pp. 2-3).

[195] It should also be noted that, in recent years, a number of provinces have increased their courts' monetary jurisdiction in civil matters. In 2014, Alberta raised its Provincial Court's monetary ceiling from $25,000 to $50,000 (*Provincial Court Civil Division Amendment Regulation*, Alta. Reg. 139/2014), and since 2015, the Lieutenant Governor in Council has had the power to increase that ceiling to $100,000 (see *Statutes Amendment Act, 2015*, S.A. 2015, c. 12, s. 6(4)(a)(v)). In 2017, British Columbia raised its Provincial Court's monetary ceiling from $25,000 to $35,000 as well (*Small Claims Act*,

[193] En 1867, les cours de magistrat exerçaient une compétence plutôt limitée en matière pénale et étaient composées en grande partie de magistrats qui n'étaient pas des professionnels du droit (G. T. G. Seniuk et N. Lyon, « The Supreme Court of Canada and The Provincial Court in Canada » (2000), 79 *R. du B. can.* 77, p. 91-93). À partir des années 1960, les gouvernements provinciaux et territoriaux ont remplacé les cours de magistrat par de nouveaux tribunaux dits « provinciaux » présidés par des juges qualifiés, qui avaient exercé auparavant la profession d'avocat, ce qui a eu pour conséquence de professionnaliser ces tribunaux (Russell, p. 126-127).

[194] Parallèlement à l'établissement des tribunaux modernes de création provinciale, le Parlement du Canada a légiféré pour confier à ces tribunaux une compétence nettement plus étendue en matière pénale, ce qui a contribué à faire de ceux-ci l'épine dorsale du système de justice pénale, alors qu'à une autre époque, comme on le sait, les tribunaux inférieurs n'avaient généralement compétence qu'à l'égard des affaires pénales mineures. Cet important changement a eu pour résultat concret de conférer aux tribunaux provinciaux une compétence concurrente à celle des cours supérieures sur l'ensemble des infractions prévues au *Code criminel*, L.R.C. 1985, c. C-46, sous réserve de quelques exceptions (Seniuk et Lyon, p. 95-96). Ainsi, à titre d'exemple, pour les années 2014-2015, plus de 99 p. 100 des 328 028 affaires pénales traitées par les tribunaux concernant les infractions commises par des personnes majeures ont été jugées par des tribunaux de création provinciale (K. Roach, *Criminal Law* (7e éd. 2018), p. 2-3).

[195] Il convient également de souligner que plusieurs provinces ont, au cours des dernières années, augmenté la compétence pécuniaire de leurs tribunaux en matière civile. En 2014, l'Alberta a haussé le plafond pécuniaire de la Cour provinciale de l'Alberta de 25 000 $ à 50 000 $ (*Provincial Court Civil Division Amendment Regulation*, Alta. Reg. 139/2014), plafond que le lieutenant-gouverneur en conseil a, depuis 2015, le pouvoir d'augmenter jusqu'à 100 000 $ (voir *Statutes Amendment Act, 2015*, S.A. 2015, c. 12, sous-al. 6(4)(a)(v)). En 2017, la Colombie-Britannique a elle aussi haussé

R.S.B.C. 1996, c. 430, s. 3; *Small Claims Court Monetary Limit Regulation*, B.C. Reg. 179/2005, s. 1, as amended by B.C. Reg. 120/2017, Sch. 1). A few years earlier, in 2012, British Columbia also created a new Civil Resolution Tribunal to deal with most claims in which the amount sought does not exceed $5,000 (*Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25, ss. 2, 118 and 133; *Tribunal Small Claims Regulation*, B.C. Reg. 232/2018, s. 3). Finally, Saskatchewan did the same in 2016 by increasing the claims ceiling from $20,000 to $30,000 (*The Small Claims Amendment Regulations, 2016*, Sask. Reg. 4/2016, s. 3; *The Small Claims Act, 2016*, S.S. 2016, c. S-50.12, s. 4; *The Small Claims Regulations, 2017*, R.R.S., c. S-50.12, Reg. 1, s. 3).

[196] Given the fact that provincially constituted courts typically sit in more locations than superior courts, it must be recognized that the initiatives taken by the provincial legislatures have promoted access to justice in civil matters in the provinces in question (I.F. (Canadian Council of Chief Judges), at para. 11).

[197] In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, this Court was asked to consider the impact of the expansion in the provincial courts' civil jurisdiction, a measure that, according to Lamer C.J., required a "constitutional response" (para. 129). In light of the legislative policy of granting greater jurisdiction to provincially constituted courts, this Court held that those courts therefore needed the same guarantees of judicial independence as the superior courts (para. 129).

[198] These appeals represent an opportunity for this Court to provide a *constitutional response* that recognizes the efforts made by the provinces and territories to ensure modern, accessible justice that is attuned to 21st century issues, without draining

le plafond pécuniaire de la Cour provinciale de la Colombie-Britannique, qui est passé de 25 000 $ à 35 000 $ (*Small Claims Act*, R.S.B.C. 1996, c. 430, art. 3; *Small Claims Court Monetary Limit Regulation*, B.C. Reg. 179/2005, art. 1, modifié par B.C. Reg. 120/2017, ann. 1). De plus, quelques années auparavant, en 2012, elle avait créé un tout nouveau tribunal de résolution des litiges civils chargé de traiter la majorité des recours dont le montant réclamé ne dépasse pas 5 000 $ (*Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25, art. 2, 118 et 133; *Tribunal Small Claims Regulation*, B.C. Reg. 232/2018, art. 3). Enfin, la Saskatchewan a fait de même en 2016, faisant passer de 20 000 $ à 30 000 $ le plafond des réclamations (*Règlement modificatif de 2016 sur les petites créances*, Règl. de la Sask. 4/2016, art. 3; *Loi de 2016 sur les petites créances*, L.S. 2016, c. S-50.12, art. 4; *Règlement de 2017 sur les petites créances*, R.R.S., c. S-50.12, règl. 1, art. 3).

[196] Or, comme les tribunaux de création provinciale siègent généralement à plus d'endroits que les cours supérieures, il faut reconnaître que les initiatives des législateurs provinciaux ont favorisé l'accès à la justice en matière civile sur leur territoire (m. interv. (Canadian Council of Chief Judges), par. 11).

[197] Dans le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, notre Cour a été appelée à examiner l'impact de l'élargissement de la compétence des tribunaux provinciaux en matière civile, mesure qui requérait, selon le juge en chef Lamer, l'application d'une « solution constitutionnelle » (par. 129). En présence de cette politique législative qui confiait une compétence élargie aux tribunaux de création provinciale, la Cour a jugé que ces tribunaux devaient en conséquence bénéficier des mêmes garanties d'indépendance judiciaire que les cours supérieures (par. 129).

[198] Les présents pourvois représentent l'occasion pour la Cour d'apporter une *solution constitutionnelle* permettant de reconnaître les efforts déployés par les provinces et les territoires pour assurer une justice moderne, accessible et adaptée aux

all substance from the central unifying role played by the superior courts in Canada's justice system.

III. Role of Sections 92(14) and 96 in Canada's Constitutional Order

[199] Constitutional provisions must be "placed in [their] proper linguistic, philosophic and historical contexts" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344) and interpreted in a manner that is sensitive to evolving circumstances, as they "must continually adapt to cover new realities" (*Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 30). In addition, the underlying principles of constitutional provisions, such as federalism, may be relevant to their interpretation (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25).

[200] Here, ss. 96 and 92(14) of the *Constitution Act, 1867*, taken together, reflect one of the important compromises reached by the Fathers of Confederation with respect to the administration of justice in Canada.

[201] On the one hand, s. 92(14) gives each province the power and responsibility to legislate in relation to the administration of justice, including for the purpose of creating, transforming or abolishing judicial offices. Section 129 of the *Constitution Act, 1867* in fact expressly provides for the continuance of the inferior courts that had civil jurisdiction at the time of Confederation, whose powers are within the exclusive authority of the provinces under s. 92(14). The provinces' power is a wide one that gives them a great deal of flexibility, allowing them, among other things, to organize their courts in a manner that favours access to justice and strengthens public confidence in the judiciary while at the same time taking their specific needs and challenges into account (*Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 39; see also *Reference re Adoption Act*, [1938] S.C.R. 398, at pp. 413-14).

enjeux du XXIe siècle, sans vider de sa substance le rôle unificateur de premier plan que jouent les cours supérieures au sein du système de justice canadien.

III. Le rôle du par. 92(14) et de l'art. 96 dans l'ordre constitutionnel canadien

[199] Les textes constitutionnels doivent être « situé[s] dans [leurs] contextes linguistique, philosophique et historique appropriés » (*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344), en plus d'être interprétés d'une manière qui tienne compte de l'évolution des circonstances, puisqu'ils « doi[vent] être continuellement adapté[s] à de nouvelles réalités » (*Renvoi relatif au mariage entre personnes du même sexe*, 2004 CSC 79, [2004] 3 R.C.S. 698, par. 30). De plus, les principes sous-jacents des textes constitutionnels, par exemple le fédéralisme, peuvent être utiles pour interpréter ces textes (*Renvoi relatif à la réforme du Sénat*, 2014 CSC 32, [2014] 1 R.C.S. 704, par. 25).

[200] En l'espèce, l'art. 96 et le par. 92(14) de la *Loi constitutionnelle de 1867* reflètent ensemble un des compromis importants dont ont convenu les Pères de la Confédération en ce qui concerne l'administration de la justice au Canada.

[201] D'une part, suivant le par. 92(14), chaque province a le pouvoir et la responsabilité de légiférer à l'égard de l'administration de la justice, notamment pour créer, transformer et abolir des charges judiciaires. En effet, l'art. 129 de la *Loi constitutionnelle de 1867* prévoit expressément le maintien des cours inférieures ayant juridiction en matière civile au moment de la Confédération et dont les pouvoirs relèvent exclusivement des provinces aux termes du par. 92(14). Il s'agit d'un pouvoir étendu, lequel accorde aux provinces une grande marge de manœuvre, qui leur permet notamment d'organiser leurs tribunaux d'une manière propre à favoriser l'accès à la justice et à renforcer la confiance du public envers le pouvoir judiciaire, tout en tenant compte de leurs besoins et défis spécifiques (*Conférence des juges de paix magistrats du Québec c. Québec (Procureure générale)*, 2016 CSC 39, [2016] 2 R.C.S. 116, par. 39; voir aussi *Reference re Adoption Act*, [1938] R.C.S. 398, p. 413-414).

[202] On the other hand, this provincial power is subject to what s. 96 subtracts in favour of Parliament, including the power to appoint the judges of the superior courts in each province as well as the requirements that "flow by necessary implication from [the] terms [of that provision]" (*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 66, per Major J.). Parliament's power of appointment therefore "implicitly limit[s] provincial competence to endow a provincial tribunal with [the] powers [of s. 96 courts]" (*Re Residential Tenancies Act, 1979*, at p. 728). By giving such protection to the superior courts' core inherent jurisdiction, which is integral to their operations, s. 96 helps to establish a strong constitutional base for national unity through a network of related Canadian courts that ensures the rule of law, interprovincial uniformity and minimum standards of decision making throughout the country (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 29). In this sense, s. 96 confers "a special and inalienable status" on the superior courts (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 52).

[203] It does not follow, in my view, that s. 96 freezes the civil jurisdiction of the inferior courts at what it was at the time of Confederation. The section does, of course, constitute an important constitutional protection, but its scope remains limited to what is necessary to ensure that the underlying objectives of the Confederation compromise are achieved, and primarily the objective of ensuring a unified judicial presence throughout Canada. Under the doctrine of mutual modification, the scope of s. 96 must be understood together with the scope of s. 92(14) so that "the Constitution operates as an internally consistent harmonious whole" (*Trial Lawyers*, at para. 25; see *Reference re Adoption Act*, at p. 415; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.), at p. 109). In other words, the interpretation of s. 96 must take into account "the structure of government that [the Constitution] seeks to implement" and "the manner

[202] D'autre part, ce pouvoir provincial est assujetti aux soustractions opérées par l'art. 96 en faveur du législateur fédéral, notamment le pouvoir de nommer les juges des cours supérieures dans chaque province, ainsi que les exigences qui « découlent [des] termes [de cette disposition] par déduction nécessaire » (*Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473, par. 66, le juge Major). En conséquence, le pouvoir de nomination reconnu au législateur fédéral « restreint implicitement la compétence des provinces de conférer [l]es pouvoirs [des cours visées à l'art. 96] à un tribunal provincial » (*Renvoi sur la Loi de 1979 sur la location résidentielle*, p. 728). En protégeant ainsi la compétence fondamentale et inhérente des cours supérieures, compétence essentielle à leurs activités, l'art. 96 contribue à établir un fondement constitutionnel solide de l'unité nationale, au moyen d'un réseau de tribunaux canadiens connexes qui garantit la primauté du droit, l'uniformité entre les provinces et l'existence de normes minimales en matière décisionnelle partout au pays (*Trial Lawyers Association of British Columbia c. Colombie-Britannique (Procureur général)*, 2014 CSC 59, [2014] 3 R.C.S. 31, par. 29). En ce sens, l'art. 96 confère aux cours supérieures « un statut spécial et inaliénable » (*MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725, par. 52).

[203] Il ne s'ensuit pas pour autant, selon moi, que l'art. 96 fige la compétence civile des tribunaux inférieurs à celle qu'ils possédaient au moment de la Confédération. Certes, il s'agit d'une protection constitutionnelle importante, mais sa portée demeure restreinte à ce qui est nécessaire pour garantir la réalisation des objectifs sous-jacents du compromis confédératif, dont principalement celui d'assurer une présence judiciaire unifiée dans l'ensemble du Canada. En vertu de la théorie de la modification mutuelle, la portée de l'art. 96 doit être interprétée en corrélation avec le champ d'application du par. 92(14), afin que « la Constitution s'applique comme un tout harmonieux et intrinsèquement cohérent » (*Trial Lawyers*, par. 25; voir *Reference re Adoption Act*, p. 415; *Citizens Insurance Co. of Canada c. Parsons* (1881), 7 App. Cas. 96 (C.P.), p. 109). En d'autres termes, l'interprétation de l'art. 96 doit tenir compte de « la structure de

in which the constitutional provisions are intended to interact with one another" (*Reference re Senate Reform*, at para. 26).

[204] In light of the foregoing, s. 96 cannot have the effect of depriving the provinces of the autonomy and flexibility they need to administer civil justice in a manner that responds to evolving social realities and the changing needs of litigants, nor can it stand "in the way of new institutional approaches to social or political problems" (*Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238, at p. 253; see P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at pp. 155-56; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 775). This means that s. 96 should not be given an overly broad scope that would unduly limit the provinces' ability to address complex and emerging legislative challenges related to the administration of justice. Moreover, the case law on s. 96 has long recognized the central role that the inferior courts play in ensuring access to justice because, as Duff C.J. put it, their decisions touch "the great mass of the people more intimately and more extensively than do the judgments of the Superior Courts" (*Reference re Adoption Act*, at p. 415; see also *Re: B.C. Family Relations Act*, [1982] 1 S.C.R. 62, at pp. 106-7 and 112-13; P. Girard, J. Phillips and R. B. Brown, *A History of Law in Canada* (2018), vol. 1, *Beginnings to 1866*, at pp. 390-92 and 397-404).

[205] In my view, to prevent s. 92(14) from being drained of all substance, the provinces must have real freedom to make the choices best suited to their own needs and to balance a number of important values by experimenting with new forms of access to civil justice through their courts. As Beetz J. wrote in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, unlike in a case involving the *Canadian Charter of Rights and Freedoms*,

gouvernement qu[e] [la Constitution] vise à mettre en œuvre » ainsi que de « la façon dont les dispositions constitutionnelles sont censées interagir les unes avec les autres » (*Renvoi relatif à la réforme du Sénat*, par. 26).

[204] À la lumière de ce qui précède, l'art. 96 ne saurait avoir pour effet de priver les provinces de l'autonomie et la souplesse dont elles ont besoin pour administrer la justice civile de manière à répondre à l'évolution des réalités sociales et des besoins des justiciables, ni de s'ériger en « obstacle aux nouvelles façons institutionnelles d'aborder les problèmes sociaux ou politiques » (*Sobeys Stores Ltd. c. Yeomans et Labour Standards Tribunal (N.-É.)*, [1989] 1 R.C.S. 238, p. 254; voir P. J. Monahan, B. Shaw et P. Ryan, *Constitutional Law* (5e éd. 2017), p. 155-156; H. Brun, G. Tremblay et E. Brouillet, *Droit constitutionnel* (6e éd. 2014), p. 775). Il faut en conséquence éviter d'attribuer à l'art. 96 une portée démesurée, qui limiterait indûment la capacité des provinces de relever des défis législatifs complexes et émergents en matière d'administration de la justice. Qui plus est, la jurisprudence relative à l'art. 96 reconnaît depuis longtemps le rôle central que jouent les tribunaux inférieurs dans l'accès à la justice, en ce que, pour reprendre les mots du juge en chef Duff, leurs décisions touchent [TRADUCTION] « plus largement et plus intimement la vaste majorité des gens que les jugements des cours supérieures » (*Reference re Adoption Act*, p. 415; voir aussi *Renvoi : Family Relations Act (C.-B.)*, [1982] 1 R.C.S. 62, p. 106-107 et 112-113; P. Girard, J. Phillips et R. B. Brown, *A History of Law in Canada*, vol. 1, *Beginnings to 1866* (2018), p. 390-392 et 397-404).

[205] À mon sens, afin d'éviter que le par. 92(14) ne soit vidé de sa substance, les provinces doivent disposer d'une véritable latitude leur permettant de faire les choix les mieux adaptés aux besoins qui leur sont propres et de mettre en équilibre un certain nombre de valeurs importantes en expérimentant de nouvelles formes d'accès à la justice par l'entremise de leurs tribunaux. Comme l'écrivait le juge Beetz dans *SEFPO c. Ontario (Procureur général)*, [1987] 2 R.C.S. 2, contrairement à ce qui est le cas dans une affaire portant sur la *Charte canadienne des droits et libertés*,

in a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation. [p. 56]

[206] Therefore, subject to the limits imposed by the historical and core jurisdiction of the s. 96 superior courts, the provincial legislatures have full power to expand their courts' civil jurisdiction in order to facilitate access to justice. In accordance with *Re Residential Tenancies Act, 1979* and *Sobeys Stores*, the first stage of the analysis is to determine whether the grant of jurisdiction in question is permissible. The second stage is to decide whether the Superior Court's jurisdiction can be ousted, that is, whether an exclusive grant of jurisdiction is permissible.

IV. Analytical Framework for the Historical Jurisdiction of the Superior Courts

[207] The three-step analysis for determining the constitutionality of a provincial grant of jurisdiction was established by Dickson J. (as he then was) in *Re Residential Tenancies Act, 1979* and was later refined by the Court in *Sobeys Stores*, *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252 ("*Reference re Young Offenders*"), and *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 ("*Reference re Residential Tenancies Act (N.S.)*"). The first step, the historical test, involves answering the following question: Does the impugned power or jurisdiction broadly conform to an exclusive power or jurisdiction exercised by the superior, district or county courts at the time of Confederation?

[208] If the impugned jurisdiction was exercised concurrently by the superior and inferior courts at the time of Confederation, it must be determined whether the inferior courts had a "general shared involvement" (*Sobeys Stores*, at p. 260 (emphasis

dans une affaire de partage des pouvoirs, lorsqu'on a démontré que le législateur a agi dans les limites de sa compétence, l'établissement de l'équilibre entre des valeurs contradictoires repose sur le jugement politique de ce législateur et ne peut pas être révisé par les tribunaux sans qu'ils examinent la sagesse de la mesure législative. [p. 56]

[206] En conséquence, sous réserve des limites qu'impose la compétence historique et fondamentale des cours supérieures visées par l'art. 96, les législatures provinciales ont plein pouvoir pour élargir la compétence de leurs tribunaux en matière civile en vue de faciliter l'accès à la justice. Conformément au *Renvoi sur la Loi de 1979 sur la location résidentielle* et à l'arrêt *Sobeys Stores*, la première étape de l'analyse consiste à déterminer si l'attribution de compétence en cause est permise. La deuxième étape consiste à décider si la compétence de la Cour supérieure peut être écartée, c'est-à-dire se demander si une attribution exclusive de compétence est permise.

IV. Le cadre d'analyse de la compétence historique des cours supérieures

[207] L'analyse à trois volets applicable pour statuer sur la constitutionnalité d'une attribution de compétence par une province a été établie par le juge Dickson (plus tard juge en chef) dans le *Renvoi sur la Loi de 1979 sur la location résidentielle*, puis précisée par la Cour dans les affaires *Sobeys Stores*, *Renvoi relatif à la Loi sur les jeunes contrevenants (Î.-P.-É.)*, [1991] 1 R.C.S. 252 (« *Renvoi sur les jeunes contrevenants* »), et *Renvoi relatif à certaines modifications à la Residential Tenancies Act (N.-É.)*, [1996] 1 R.C.S. 186 (« *Renvoi relatif à la Residential Tenancies Act (N.-É.)* »). Le premier volet, soit le critère historique, consiste à répondre à la question suivante : Est-ce que le pouvoir ou la compétence qu'on attaque correspond de façon générale à un pouvoir ou à une compétence de nature exclusive qu'exerçaient les cours supérieures, de district ou de comté au moment de la Confédération?

[208] Si, à l'époque de la Confédération, la compétence contestée était exercée de manière concurrente par les cours supérieures et inférieures, il faut déterminer s'il existait un « engagement général partagé » (*Sobeys Stores*, p. 260 (soulignement omis)) ou une

deleted)) or a "meaningful concurrency of power" (*Reference re Residential Tenancies Act (N.S.)*, at para. 77) in this regard. If so, the grant will be considered valid under the historical test. The historical analysis therefore strikes a balance between the preservation of the superior courts' historical role and the need to adapt to the realities of modern society, while giving the provinces flexibility to experiment with measures to facilitate access to justice (*Sobeys Stores*, at pp. 263 and 278-82).

[209] On the other hand, if the jurisdiction was exclusive to the superior courts, then it is necessary to proceed to the second and third steps of the analytical framework.

A. *Characterization of the Jurisdiction Conferred by Article 35 C.C.P.*

[210] The application of the historical test must begin with a proper characterization of the jurisdiction in issue. The characterization of the impugned jurisdiction must go beyond "a technical analysis of remedies" (*Sobeys Stores*, at p. 255). It is not focused on the "particular remedy sought" (*Reference re Young Offenders*, at p. 266), but is concerned rather with the "type of dispute" (*Reference re Residential Tenancies Act (N.S.)*, at para. 76; *MacMillan Bloedel*, at para. 14), the "jurisdiction" (*Sobeys Stores*, at p. 260) or the "subject-matter" of the decision (*Dupont v. Inglis*, [1958] S.C.R. 535, at p. 543) — in short, with the matter in issue. Moreover, the effect of the characterization must not be to "freeze the jurisdiction of inferior courts at what it was in 1867" (*Reference re Young Offenders*, at p. 266). For example, in *Sobeys Stores*, the Court characterized the power in issue as jurisdiction over unjust dismissal, not over the remedy of reinstatement. Similarly, in *Attorney General of Quebec v. Grondin*, [1983] 2 S.C.R. 364, the Court characterized the exclusive jurisdiction given to the Régie du logement as jurisdiction over disputes between landlords and tenants, without considering the $10,000 monetary ceiling at the characterization stage.

« compétence concurrente appréciable » (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 77) des tribunaux inférieurs à ce sujet, auquel cas, l'attribution sera jugée valide selon le critère historique. Ainsi, l'analyse historique établit un équilibre entre la préservation du rôle historique des cours supérieures et le besoin d'adaptation aux réalités de la société moderne, tout en laissant aux provinces la marge de manœuvre leur permettant d'expérimenter des mesures en vue de faciliter l'accès à la justice (*Sobeys Stores*, p. 263 et 278-282).

[209] Par contre, s'il s'agit d'une compétence exclusive des cours supérieures, il faut alors procéder aux deuxième et troisième volets du cadre d'analyse.

A. *Qualification de la compétence attribuée par l'art. 35 C.p.c.*

[210] Dans l'examen du critère historique, il faut d'abord qualifier adéquatement la compétence en cause. La qualification de la compétence contestée ne doit pas se limiter à « une analyse formaliste des recours » (*Sobeys Stores*, p. 255). La qualification n'est pas axée sur la « réparation demandée » (*Renvoi sur les jeunes contrevenants*, p. 266), mais s'intéresse plutôt au « type de différend » (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 76), au « domaine de compétenc[e] » (*Sobeys Stores*, p. 260), à [TRADUCTION] « l'objet » de la décision (*Dupont c. Inglis*, [1958] R.C.S. 535, p. 543), à la « nature du litige » (*MacMillan Bloedel*, par. 14); bref, à la matière en cause. De plus, cette qualification ne doit pas avoir pour effet de « figer la compétence des tribunaux inférieurs à ce qu'elle était en 1867 » (*Renvoi sur les jeunes contrevenants*, p. 266). À titre d'exemple, dans *Sobeys Stores*, la Cour a qualifié le pouvoir en cause de compétence en matière de congédiement abusif, et non de compétence sur le redressement lié à la réintégration. De même, dans l'affaire *Procureur général du Québec c. Grondin*, [1983] 2 R.C.S. 364, la Cour a qualifié la compétence exclusive attribuée à la Régie du logement de compétence sur les litiges entre locateurs et locataires, sans considérer le plafond pécuniaire de 10 000 $ à l'étape de la qualification.

[211] This is a crucial question, as the manner in which the jurisdiction in issue is characterized can be determinative in the application of the historical test. As Wilson J. recognized in *Sobeys Stores*, "those challenging legislation will probably favour the narrower view as more likely to bring success through the historical test", whereas "[t]hose supporting the legislation will no doubt advocate a more expansive view on the assumption that the broader the characterization the more likely it will be that at least some aspects of the jurisdiction will have been within the purview of inferior courts at Confederation" (p. 253).

[212] Two characterizations have been proposed in this case. The respondents and the intervener the Trial Lawyers Association of British Columbia characterize the jurisdiction in issue as general civil jurisdiction that is exclusive throughout Quebec over claims for less than $85,000 (in 2016 dollars). The appellants and the intervener the Attorney General of Canada characterize it as jurisdiction over civil disputes based on contractual and extracontractual obligations.

[213] In my view, the characterization proposed by the respondents — and implicitly adopted by the Court of Appeal in its analysis of core jurisdiction — presents four problems. First, it gives too much weight to the monetary ceiling established by art. 35 *C.C.P.* and therefore departs from this Court's consistent line of cases establishing that the characterization should not be focused on the remedy sought. The value of a claim is not in itself a "type of dispute", as the same questions of fact and law may arise regardless of the amount in issue.

[214] Second, the characterization proposed by the respondents has the effect of bypassing the application of the historical test, under which, as I explain below, monetary limits are only one factor in the overall assessment among several others, including the geographic reach of the jurisdiction and the range of disputes the court could decide (*Reference re Residential Tenancies Act (N.S.)*, at para. 77). At

[211] Il s'agit d'une question cruciale, puisque la manière dont la compétence en cause est qualifiée peut s'avérer déterminante dans l'examen du critère historique. Comme l'a reconnu la juge Wilson dans *Sobeys Stores*, « ceux qui contestent une loi favoriseront probablement la conception la plus étroite, plus susceptible de leur donner gain de cause par le biais du critère historique », alors que « [l]es défenseurs de la loi favoriseront sans aucun doute une vue plus globale, présumant que plus la qualification est large, plus il est probable qu'au moins certains aspects de la compétence puissent être retrouvés parmi les attributions des tribunaux inférieurs à l'époque de la Confédération » (p. 253).

[212] En l'espèce, deux qualifications ont été proposées. Les intimés et l'intervenante Trial Lawyers Association of British Columbia qualifient la compétence en cause de compétence générale en matière civile, exclusive sur l'ensemble du territoire québécois, sur les réclamations inférieures à 85 000 $ (valeur pécuniaire en 2016). Les appelants et l'intervenant le procureur général du Canada la qualifient de compétence sur les litiges de nature civile fondés sur des obligations contractuelles et extracontractuelles.

[213] Je suis d'avis que la qualification que proposent les intimés — et qu'a implicitement adoptée la Cour d'appel dans son analyse de la compétence fondamentale — soulève quatre problèmes. Premièrement, elle accorde une trop grande importance au plafond pécuniaire établi par l'art. 35 *C.p.c.* et, de ce fait, s'écarte de la jurisprudence constante de notre Cour selon laquelle la qualification ne doit pas être axée sur le redressement recherché. En effet, la valeur d'une réclamation ne constitue pas en soi un « type de litige », les mêmes questions de fait et de droit étant susceptibles de se poser indépendamment de la somme en jeu.

[214] Deuxièmement, la qualification proposée par les intimés a pour effet de court-circuiter l'examen du critère historique, dans lequel, comme je l'expliquerai ci-après, les limites pécuniaires ne constituent qu'un facteur parmi d'autres dans l'évaluation globale, notamment les limites géographiques de la compétence et l'éventail des différends que le tribunal peut trancher (*Renvoi relatif à la Residential*

the preliminary stage of characterization, no one factor, be it monetary or geographic, can be made so decisive.

[215] In the same vein, the allegedly exclusive nature of the jurisdiction cannot be included in its characterization. If a grant of jurisdiction satisfies both stages of the s. 96 analytical framework, then it can be exclusive (*MacMillan Bloedel*, at para. 18). The exclusivity of the grant therefore *results* from the fact that both stages are met. It cannot be allowed to influence the analysis by being included in the characterization prematurely.

[216] Finally, a monetary characterization could freeze the jurisdiction of the provincial courts at what it was at the time of Confederation as a result of a technical analysis of remedies, contrary to this Court's consistent case law on this point. That approach is therefore liable to deprive the provinces of the flexibility they require to structure their courts' jurisdiction in a manner that takes account of evolving social realities and the changing needs of litigants.

B. *Application of the Historical Test*

[217] The historical analysis is concerned with the jurisdiction vested exclusively in the superior courts at the time of Confederation. If the inferior courts had either a meaningful concurrency of power or a "shared involvement" in the field in question, then s. 96 does not come into play. An "overly technical" analysis must be avoided (*Reference re Residential Tenancies Act (N.S.)*, at para. 77), because what is required is analogous jurisdiction and it is not necessary "that jurisdiction . . . have been entirely or even generally concurrent, for the nature of the inferior-superior court distinction will invariably mean that the former's jurisdiction was limited in some way" (*Sobeys Stores*, at p. 260).

Tenancies Act (N.-É.), par. 77). À l'étape préliminaire de la qualification, on ne peut accorder un caractère aussi décisif à l'un des facteurs, qu'il soit pécuniaire ou géographique.

[215] Dans le même ordre d'idées, le prétendu caractère exclusif de la compétence ne peut être inclus dans la qualification de celle-ci. Si l'attribution d'une compétence satisfait aux deux étapes du cadre d'analyse de l'art. 96, elle pourra alors être exclusive (*MacMillan Bloedel*, par. 18). Partant, l'exclusivité de l'attribution *résulte* du fait que celle-ci satisfait aux deux étapes, et on ne peut permettre qu'elle influe sur l'analyse en l'incluant prématurément dans la qualification.

[216] Finalement, une qualification pécuniaire risque de figer la compétence des cours provinciales à celles qu'elles possédaient au moment de la Confédération par application d'une analyse formaliste des recours, et ce, à l'encontre d'une jurisprudence constante de la Cour à ce sujet. Cette approche est, en conséquence, susceptible de priver les provinces de la souplesse dont elles ont besoin pour organiser la compétence de leurs tribunaux d'une manière qui permette de tenir compte de l'évolution des réalités sociales et des besoins de leurs justiciables.

B. *Application du critère historique*

[217] L'analyse historique s'attache aux compétences conférées exclusivement aux cours supérieures à l'époque de la Confédération. Si les tribunaux inférieurs exerçaient soit une compétence concurrente appréciable sur le domaine en question, soit un « engagement partagé » dans celui-ci, l'art. 96 n'entre alors pas en jeu. Il faut éviter une analyse « exagérément formaliste » (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 77), car ce qui est requis c'est l'existence d'une compétence analogue et non « que leur compétence [ait] été parfaitement ni même en général concurrente, car la nature même de la distinction entre tribunal inférieur et cour supérieure signifiera invariablement que la compétence du premier était limitée d'une certaine manière » (*Sobeys Stores*, p. 260).

[218] In *Sobeys Stores*, the Court set out three questions for assessing the extent of the courts' shared involvement in exercising the jurisdiction in question:

> (a) was the inferior court jurisdiction geographically restricted? Was it confined to certain municipal or district courts or was it being exercised province-wide?
>
> (b) was the inferior court jurisdiction limited to a few specific situations? . . .
>
> (c) was the inferior court jurisdiction restricted by pecuniary limits so as to reduce its scope even after allowing for inflation? [p. 261]

In addition to these questions, two other factors were recognized by the Court in *Reference re Residential Tenancies Act (N.S.)*: the percentage of the population that would have used the inferior courts, and the frequency with which disputes amenable to their process arose (para. 77).

[219] It is clear that, depending on the context, certain factors will have more weight than others. For example, "[a] significant geographical limitation would tell against the legislative scheme much more than a purely pecuniary limit" (*Sobeys Stores*, at p. 260). It is also clear that the purpose of these factors is essentially to ascertain whether a substantial percentage of the population had access to an inferior court in the field in question. This was the question that Wilson J. was considering in *Sobeys Stores* when she explained the relevance of the monetary and geographical factors in terms of "recourse to the inferior courts for the majority of colonial residents" (p. 260). As I mentioned above, the Court in *Reference re Residential Tenancies Act (N.S.)* also recognized two new analytical factors to provide a clearer picture of public access to the inferior courts, noting that the "practical involvement" of those courts in exercising the jurisdiction at issue is what matters (para. 77 (emphasis in original)).

[218] Dans l'arrêt *Sobeys Stores*, la Cour a énoncé trois questions pour apprécier l'étendue de l'engagement partagé des tribunaux dans l'exercice de la compétence en question :

> a) la compétence du tribunal inférieur était-elle géographiquement limitée? Était-elle confinée à certaines cours municipales ou de district ou était-elle exercée dans toute la province?
>
> b) la compétence du tribunal inférieur était-elle limitée à un petit nombre d'espèces? . . .
>
> c) la compétence du tribunal inférieur était-elle restreinte par des plafonds pécuniaires qui en réduisaient l'ampleur même compte tenu de l'inflation? [p. 261]

À ces questions s'ajoutent deux autres facteurs reconnus par la Cour dans l'arrêt *Renvoi relatif à la Residential Tenancies Act (N.-É.)* : le pourcentage de la population qui avait recours aux tribunaux inférieurs et la fréquence des différends relevant de la compétence de ces tribunaux (par. 77).

[219] Il est évident que, selon le contexte, certains facteurs seront plus importants que d'autres. À titre d'exemple, « [u]ne limitation territoriale importante serait beaucoup plus défavorable au régime législatif qu'un plafond purement pécuniaire » (*Sobeys Stores*, p. 260). Il est également évident que ces facteurs visent essentiellement à déterminer si un pourcentage considérable de la population avait accès à un tribunal inférieur dans le domaine en question. C'est relativement à cette question que la juge Wilson, dans *Sobeys Stores*, a expliqué la pertinence des facteurs pécuniaires et géographiques en termes de « recours aux tribunaux inférieurs pour la majorité des résidents de la colonie » (p. 260). De même, comme je l'ai mentionné précédemment, la Cour a reconnu dans *Renvoi relatif à la Residential Tenancies Act (N.-É.)* deux nouveaux facteurs analytiques afin de dégager une image plus précise de l'accès du public aux tribunaux inférieurs, indiquant ainsi que c'est l'« engagement pratique » de ces tribunaux dans l'exercice de la compétence en question qui importe (par. 77 (souligné dans l'original)).

[220] In the application of the historical test, all courts that existed in pre-Confederation Canada must be considered, and not only those of the province (then a colony) in question. As Wilson J. also recognized in *Sobeys Stores*, "consistency at the level of the historical analysis would seem to be desirable and . . . it is best achieved by measuring each s. 96 challenge against the same historical yardstick. The test at this stage should be national, not provincial" (p. 266). In other words, if the objective is to ensure the integrity of a unified judicial system, the analysis of court involvement must not be confined "within artificially circumscribed boundaries" (*Reference re Residential Tenancies Act (N.S.)*, at para. 78). Because they give priority to and focus exclusively on the historical situation in Quebec, the respondents' arguments and the Court of Appeal's analysis depart from this Court's case law on this point. That methodology is contrary both to the federalism principle (*R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 78) and to the objective underlying s. 96 of ensuring a unified judicial system.

[221] When the jurisdiction in issue is properly characterized, the analysis of the historical test leads to the conclusion that the jurisdiction was not vested exclusively in the s. 96 courts. I agree with my colleagues that, on the whole, the inferior courts at the time of Confederation had a general shared involvement or a meaningful concurrency of power in contractual and extracontractual matters. This is confirmed by a historical overview.

[222] In Upper Canada (the province of Ontario), division courts had jurisdiction over any personal action up to $40 and any contractual claim up to $100 (D. Fyson, *Civil Justice in Mid-Nineteenth-Century British North America: Court Structure, Judges and Recourse to the Courts in Lower Canada, Upper Canada, New Brunswick and Nova Scotia*, April 10, 2018, reproduced in A.R. (AGQ), vol. III, at p. 126 ("Fyson Report")). This represented about 83 percent of civil cases (p. 183).

[220] Aux fins d'application du critère historique, il faut tenir compte de tous les tribunaux qui existaient jadis dans le Canada préconfédératif, et non seulement ceux de la province (alors une colonie) concernée. Comme l'a également reconnu la juge Wilson dans *Sobeys Stores*, « la cohérence au niveau de l'analyse historique semble désirable et [. . .] le meilleur moyen d'y arriver est de mesurer chaque contestation fondée sur l'art. 96 au même étalon historique. Le critère à ce stade devrait être national, non pas provincial » (p. 266). Autrement dit, si l'objectif consiste à garantir l'intégrité d'un système judiciaire unifié, l'analyse de l'engagement des tribunaux ne doit pas être concentrée « à l'intérieur de limites artificiellement circonscrites » (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 78). Du fait qu'elles s'attachent prioritairement et exclusivement à la situation historique au Québec, les prétentions des intimés de même que l'analyse de la Cour d'appel s'écartent de la jurisprudence de la Cour à ce sujet. Cette méthodologie va à l'encontre tant du principe du fédéralisme (*R. c. Comeau*, 2018 CSC 15, [2018] 1 R.C.S. 342, par. 78) que de l'objectif sous-jacent de l'art. 96, soit la garantie d'un système judiciaire unifié.

[221] Lorsque la compétence en cause est qualifiée correctement, l'analyse du critère historique mène à la conclusion que cette compétence n'appartenait pas exclusivement aux cours visées par l'art. 96. À l'instar de mes collègues, je suis d'avis que, dans l'ensemble, les tribunaux inférieurs à l'époque de la Confédération avaient un engagement général partagé ou une compétence concurrente appréciable en matière contractuelle et extracontractuelle. Un survol historique le confirme.

[222] Dans le Haut-Canada (la province de l'Ontario), les cours de divisions avaient compétence sur toute action personnelle jusqu'à 40 $ et sur toute réclamation en matière contractuelle jusqu'à concurrence de 100 $ (D. Fyson, *Civil Justice in Mid-Nineteenth-Century British North America : Court Structure, Judges and Recourse to the Courts in Lower Canada, Upper Canada, New Brunswick and Nova Scotia*, 10 avril 2018, reproduit dans d.a. (PGQ), vol. III, p. 126 (« Rapport Fyson »)), ce qui représentait environ 83 p. 100 des dossiers civils (p. 183).

[223] In New Brunswick, the City Court of Saint John could hear civil disputes up to $80 (p. 137) and, until 1867, the Court of Common Pleas exercised jurisdiction concurrently with the New Brunswick Supreme Court in civil matters, without any monetary limits except in cases involving title to land (pp. 131-33).

[224] In Nova Scotia, justices of the peace, who were spread throughout the province, had jurisdiction over small claims up to $20 (or $80 when two justices sat) (p. 141), while the Halifax City Court had jurisdiction over actions in contract not exceeding $80 and other civil actions up to $40 (p. 144). Those actions represented the majority of civil cases in that province (p. 198).

[225] In Lower Canada, commissioners' courts had jurisdiction in contractual matters up to $25 in 228 localities (pp. 110-13), or most of the territory, and heard approximately 26 percent of cases in 1866 (p. 170). The Montréal Recorder's Court had jurisdiction over disputes between landlords and tenants up to $100 (p. 118), which, as this Court has stated, would correspond to "quite a substantial" monetary jurisdiction today (*Sobeys Stores*, at p. 270). The Québec Recorder's Court heard disputes between masters and servants without any monetary limit (Fyson Report, at p. 118). The so-called "inferior" courts therefore heard about 40 percent of civil actions in 1866 (p. 170).

[226] All told, the vast majority — at least 80 percent — of civil disputes in pre-Confederation Canada, with the exception of Lower Canada, came before the inferior courts. Although that jurisdiction was subject to monetary limits in several matters, it nevertheless indicates that there was significant coextensive involvement by the inferior courts in contractual and extracontractual matters. Those courts were truly a powerful force in the civil justice system, they had significant private law jurisdiction at the time within their respective territory, and they heard the

[223] Au Nouveau-Brunswick, la Cour municipale de Saint John pouvait entendre les différends civils jusqu'à concurrence de 80 $ (p. 137) et, jusqu'en 1867, la Cour des plaids communs exerçait une compétence concurrente à la Cour suprême du Nouveau-Brunswick en matière civile sans limites pécuniaires, sauf à l'égard des titres fonciers (p. 131-133).

[224] En Nouvelle-Écosse, les juges de paix, qui étaient présents dans l'ensemble de la province, avaient compétence en matière de petites créances jusqu'à concurrence de 20 $ (et de 80 $ lorsque deux juges siégeaient) (p. 141), alors que la Cour municipale de Halifax avait compétence sur les actions contractuelles d'au plus 80 $ et sur les autres recours civils jusqu'à concurrence de 40 $ (p. 144). Ces recours représentaient la majorité des dossiers civils dans cette province (p. 198).

[225] Dans le Bas-Canada, les cours des commissaires avaient compétence jusqu'à concurrence de 25 $ en matière contractuelle dans 228 localités (p. 110-113), soit sur la majorité du territoire, et ils entendaient approximativement 26 p. 100 des affaires en 1866 (p. 170). De son côté, la Cour du recorder de Montréal avait compétence sur les différends entre locateurs et locataires jusqu'à concurrence de 100 $ (p. 118), somme qui correspondrait à une compétence pécuniaire « fort substantielle » de nos jours comme l'a affirmé notre Cour (*Sobeys Stores*, p. 270). Pour sa part, la Cour du recorder de Québec entendait les différends entre maîtres et serviteurs sans aucune limite pécuniaire (Rapport Fyson, p. 118). En conséquence, en 1866, les tribunaux dits « inférieurs » entendaient environ 40 p. 100 des recours de nature civile (p. 170).

[226] Tout compte fait, à l'exception du Bas-Canada, les tribunaux inférieurs étaient saisis de la grande majorité, soit au moins 80 p. 100, des litiges civils dans le Canada préconfédératif. Bien qu'en plusieurs matières cette compétence ait été limitée sur le plan pécuniaire, elle révèle néanmoins un engagement parallèle important des tribunaux inférieurs en matière contractuelle et extracontractuelle. Ces tribunaux représentaient véritablement un puissant moteur du système de justice civile, jouissaient alors d'une importante compétence en droit privé

great majority of cases. If the Court of Appeal had properly characterized the jurisdiction in question as being over "civil disputes based on contractual and extracontractual obligations", it could not have reached any other conclusion.

[227] It clearly follows that s. 96 cannot have the effect of freezing Quebec's civil justice system at a time prior to Confederation. Section 96 unquestionably allows increases in the Court of Québec's civil jurisdiction in light of the general historical conditions in most of the founding provinces before 1867. Quebec could therefore take this path despite the fact that the other provinces made different choices after Confederation.

[228] Accordingly, it must be concluded that art. 35 *C.C.P.* satisfies the historical step of the analysis set out in *Re Residential Tenancies Act, 1979*. What remains to be determined is whether this article has the effect of removing from the Superior Court part of its core jurisdiction.

V. Analytical Framework for the Core Jurisdiction of the Superior Courts

[229] I agree with the Court of Appeal's view that, in light of *Trial Lawyers*, s. 96 of the *Constitution Act, 1867* gives the superior courts a core jurisdiction that allows them "to resolve disputes between individuals and decide questions of private and public law" (para. 48 (emphasis deleted), citing *Trial Lawyers*, at para. 32).

[230] That being said, I nonetheless find that the monetary ceiling provided for in art. 35 *C.C.P.* does not have the effect of removing the power to resolve disputes between individuals and decide questions of private and public law from the Quebec Superior Court.

A. *Description of the Analytical Framework*

[231] The framework that has been established to protect the superior courts' core jurisdiction does

au sein de leur territoire respectif et entendaient la grande majorité des affaires. Si la Cour d'appel avait qualifié correctement la compétence en question de « litiges de nature civile fondés sur des obligations contractuelles et extracontractuelles », elle n'aurait pu arriver à une autre conclusion.

[227] Dès lors, on constate que l'art. 96 ne peut avoir pour effet de figer le système de justice civile du Québec à un moment antérieur à la Confédération. L'article 96 autorise incontestablement l'accroissement de la compétence civile de la Cour du Québec, compte tenu des conditions historiques générales qui régnaient au sein de la majorité des provinces fondatrices avant 1867. Le Québec pouvait en conséquence emprunter cette voie, en dépit du fait que les autres provinces ont effectué des choix différents après la création de la Confédération.

[228] Il faut donc conclure que l'art. 35 *C.p.c.* respecte le volet historique de l'analyse énoncée dans le *Renvoi sur la Loi de 1979 sur la location résidentielle*. Il reste maintenant à décider si l'art. 35 *C.p.c.* a pour effet de retirer à la Cour supérieure une partie de sa compétence fondamentale.

V. Le cadre d'analyse de la compétence fondamentale des cours supérieures

[229] Je souscris à l'opinion de la Cour d'appel selon laquelle, à la lumière de l'arrêt *Trial Lawyers*, l'art. 96 de la *Loi constitutionnelle de 1867* confère aux cours supérieures une compétence fondamentale leur permettant « de résoudre des différends opposant des particuliers et de trancher des questions de droit privé et de droit public » (par. 48 (soulignement omis), citant *Trial Lawyers*, par. 32).

[230] Cela dit, j'estime néanmoins que le plafond pécuniaire prévu à l'art. 35 *C.p.c.* n'a pas pour effet de retirer à la Cour supérieure du Québec son pouvoir de résoudre des différends opposant des particuliers et de trancher des questions de droit privé et de droit public.

A. *Présentation du cadre d'analyse*

[231] Le cadre établi pour protéger la compétence fondamentale des cours supérieures ne

not allow this jurisdiction to be removed from them (*MacMillan Bloedel*, at para. 30). The framework involves two questions: (1) Is the power in question within the core jurisdiction of the superior courts? (2) Does the law have the effect of removing the power from their core jurisdiction?

[232] The analysis required to answer the first question referred to the Court of Appeal entails identifying a power that is within the core jurisdiction of the superior courts. In *MacMillan Bloedel*, Lamer C.J. described this jurisdiction in the following manner: "The core jurisdiction . . . comprises those powers which are essential to the administration of justice and the maintenance of the rule of law" (para. 38). Removing such powers from a superior court would make it "something other than a superior court" and deprive it of its "essential character" (para. 30).

[233] This Court has repeatedly emphasized that the superior courts' core jurisdiction is "a very narrow one which includes only critically important jurisdictions" (*Reference re Residential Tenancies Act (N.S.)*, at para. 56; see also *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 59; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at paras. 59 and 61). If they were deprived of these critically important powers, the superior courts could not continue to play their central and unifying role in our constitutional and judicial system and to uphold the rule of law (*Re Residential Tenancies Act, 1979*, at p. 728; *MacMillan Bloedel*, at paras. 15 and 35-37; *Trial Lawyers*, at para. 32; see also *Reference re Residential Tenancies Act (N.S.)*, at para. 72; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 88; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 17; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 32). As noted by Professor Daly, identifying the powers that are within the superior courts' core jurisdiction is always a very delicate exercise, as it must not lead to the jurisdiction being expanded so far as to imperil Canadian

permet pas que cette compétence leur soit retirée (*MacMillan Bloedel*, par. 30). Ce cadre comporte deux questions : (1) Le pouvoir examiné fait-il partie de la compétence fondamentale des cours supérieures? (2) La loi a-t-elle pour effet de retirer ce pouvoir de la compétence fondamentale des cours supérieures?

[232] L'analyse requise pour répondre à la première question du renvoi soumis à la Cour d'appel consiste à identifier un pouvoir faisant partie de la compétence fondamentale des cours supérieures. Dans *MacMillan Bloedel*, cette compétence a été décrite ainsi par le juge en chef Lamer : « La compétence fondamentale [. . .] comprend les pouvoirs qui sont essentiels à l'administration de la justice et au maintien de la primauté du droit » (par. 38). Le fait de retirer ces pouvoirs à une cour supérieure ferait de ce tribunal « quelque chose d'autre qu'une cour supérieure », elle en perdrait son « caractère essentiel » (par. 30).

[233] Notre Cour a maintes fois souligné que la compétence fondamentale des cours supérieures est « très limitée et ne comprend que les pouvoirs qui ont une importance cruciale » (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 56; voir aussi *Babcock c. Canada (Procureur général)*, 2002 CSC 57, [2002] 3 R.C.S. 3, par. 59; *R. c. Ahmad*, 2011 CSC 6, [2011] 1 R.C.S. 110, par. 59 et 61). Si elles étaient privées de tels pouvoirs, les cours supérieures ne sauraient alors continuer à jouer leur rôle central et unificateur au sein de notre système constitutionnel et judiciaire et à assurer la primauté du droit (*Renvoi sur la Loi de 1979 sur la location résidentielle*, p. 728; *MacMillan Bloedel*, par. 15 et 35-37; *Trial Lawyers*, par. 32; voir aussi *Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 72; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, par. 88; *Ontario c. Criminal Lawyers' Association of Ontario*, 2013 CSC 43, [2013] 3 R.C.S. 3, par. 17; *Windsor (City) c. Canadian Transit Co.*, 2016 CSC 54, [2016] 2 R.C.S. 617, par. 32). Comme le fait observer le professeur Daly, l'identification des pouvoirs qui font partie de la compétence fondamentale des cours supérieures est toujours une opération fort délicate, puisqu'elle

courts' well-established respect for institutional pluralism (P. Daly, "Section 96: Striking a Balance between Legal Centralism and Legal Pluralism", in R. Albert, P. Daly and V. MacDonnell, eds., *The Canadian Constitution in Transition* (2019), 84, at p. 101).

[234] Some of these powers are procedural and arise from the exercise by the superior courts of their inherent jurisdiction. The power to punish for all forms of contempt is one example (*MacMillan Bloedel*, at paras. 38-41); the power to remedy abuses of process is another (*Babcock*, at para. 60; *Ahmad*, at para. 61).

[235] Other powers are part of the superior courts' subject-matter jurisdiction. They include the power to judicially review the decisions of administrative tribunals that was recognized in *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, and the power to pronounce upon the validity of federal laws that was affirmed in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307.

[236] This Court has struck down various laws whose effect was to remove from the superior courts a power arising from their core jurisdiction. I am referring here to the removal of the power to review the decisions of administrative tribunals (*Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638; *Crevier*) or the removal of the power to try young persons for contempt of court *ex facie* (*MacMillan Bloedel*).

[237] In *Trial Lawyers*, the Court used the expressions "infringe" and "impinge" to describe the pernicious effect of a law on the superior courts' core jurisdiction (paras. 31-32, 36 and 45). The use of these expressions does not change the nature of the test formulated in *MacMillan Bloedel*: the question remains whether the law in question has the effect of removing a power that is within the core jurisdiction.

ne doit pas conduire à un élargissement tel de cette compétence qu'elle mettrait en péril le respect bien établi des tribunaux canadiens pour le pluralisme institutionnel (P. Daly, « Section 96 : Striking a Balance between Legal Centralism and Legal Pluralism », dans R. Albert, P. Daly et V. MacDonnell, dir., *The Canadian Constitution in Transition* (2019), 84, p. 101).

[234] Certains de ces pouvoirs sont procéduraux et découlent de l'exercice par les cours supérieures de leur compétence inhérente. Le pouvoir de punir toutes les formes d'outrage en est un exemple (*MacMillan Bloedel*, par. 38-41); le pouvoir de remédier aux abus de procédure en est un autre (*Babcock*, par. 60; *Ahmad*, par. 61).

[235] D'autres pouvoirs relèvent de la compétence matérielle des cours supérieures. Il s'agit notamment du pouvoir de contrôler judiciairement les décisions des tribunaux administratifs qui a été reconnu dans l'affaire *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, ainsi que du pouvoir de se prononcer sur la validité des lois fédérales qui a été confirmé dans l'affaire *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307.

[236] Notre Cour a invalidé diverses lois qui avaient pour effet de retirer aux cours supérieures un pouvoir découlant de leur compétence fondamentale. Je vise ici le retrait du pouvoir de contrôler les décisions des tribunaux administratifs (*Procureur général du Québec c. Farrah*, [1978] 2 R.C.S. 638; *Crevier*), ou encore le retrait du pouvoir de juger des adolescents en cas d'outrages au tribunal commis en dehors des audiences (*MacMillan Bloedel*).

[237] Dans l'affaire *Trial Lawyers*, la Cour a employé l'expression « porte atteinte » pour décrire l'effet pernicieux d'une loi sur la compétence fondamentale des cours supérieures (par. 31-32, 36 et 45). L'emploi de cette expression ne change pas la nature du critère formulé dans *MacMillan Bloedel* : il s'agit toujours de décider si la loi examinée a pour effet de retirer un pouvoir faisant partie de la compétence fondamentale.

B. *Power to Resolve Private Law Disputes*

[238] In *Trial Lawyers*, McLachlin C.J. defined the superior courts' core jurisdiction in civil matters as follows:

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. . . . The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. . . . To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. [para. 32]

In its analysis, the Court of Appeal relied on this passage to identify the superior courts' core jurisdiction (paras. 115 and 140). Based on the definition quoted above, the superior courts may, at first glance, seem to have a very broad jurisdiction. I reiterate, however, that this core jurisdiction "is a very narrow one which includes only critically important jurisdictions" (*Reference re Residential Tenancies Act (N.S.)*, at para. 56).

[239] The superior courts' jurisdiction in matters of private law is limited to what is necessary for them to play their central role in maintaining the rule of law and the unity of our constitutional and judicial system. Insofar as this jurisdiction stays within these limits and contributes to protecting this crucial role played by the superior courts, it should be concluded that the definition and above all the scope given to the jurisdiction are in keeping with the principles established by the Court in this regard.

[240] In order for this role to be preserved, the superior courts must, of course, have substantial jurisdiction in matters of private law, but their jurisdiction need not be exclusive. Certain powers in this area can therefore be removed from them (*Labour Relations Board of Saskatchewan v. John East Iron*

B. *Le pouvoir de résoudre des différends de droit privé*

[238] Dans l'arrêt *Trial Lawyers*, la juge en chef McLachlin a défini ainsi la compétence fondamentale des cours supérieures en matière civile :

> Les cours supérieures ont toujours eu pour tâche de résoudre des différends opposant des particuliers et de trancher des questions de droit privé et de droit public. [. . .] Considérées dans le contexte institutionnel du système de justice canadien, la résolution de ces différends et les décisions qui en résultent en matière de droit privé et de droit public sont des aspects centraux des activités des cours supérieures. [. . .] Empêcher l'exercice de ces activités attaque le cœur même de la compétence des cours supérieures que protège l'art. 96 de la *Loi constitutionnelle de 1867*. [par. 32]

Dans son analyse, la Cour d'appel s'est appuyée sur ce passage pour identifier la compétence fondamentale des cours supérieures (par. 115 et 140). Suivant la définition citée plus haut, les cours supérieures peuvent sembler à première vue posséder une compétence très étendue. Je rappelle cependant que cette compétence fondamentale « est très limitée et ne comprend que les pouvoirs qui ont une importance cruciale » (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 56).

[239] La compétence des cours supérieures en matière de droit privé se limite à ce qui est nécessaire pour assurer le rôle central que jouent ces tribunaux dans le maintien de la primauté du droit et de l'unité de notre système constitutionnel et judiciaire. Dans la mesure où cette compétence respecte ces limites et contribue à la protection de ce rôle crucial des cours supérieures, il y a lieu de conclure que la définition qu'on en donne, mais surtout la portée qu'on lui confère sont conformes aux enseignements de la Cour à cet égard.

[240] Pour préserver ce rôle, il est certes nécessaire que les cours supérieures détiennent une compétence substantielle en matière de droit privé, sans toutefois que cette compétence soit exclusive. En conséquence, certains pouvoirs en cette matière peuvent leur être retirés (*Labour Relations Board of Saskatchewan c.*

Works, Ltd., [1949] A.C. 134 (P.C.); *Reference re Residential Tenancies Act (N.S.)*).

[241] In my view, the power to resolve disputes between individuals and decide questions of private law is meaningful only if the superior courts, as courts of original general jurisdiction, have substantial jurisdiction that allows them to state and develop the civil law in Quebec and the common law in the other provinces. Otherwise, the role they have played in unifying Canada's judicial system and maintaining the rule of law from Confederation until today would be jeopardized.

C. *Factors to Be Considered*

[242] To decide whether art. 35 *C.C.P.* removes from the Quebec Superior Court its substantial jurisdiction in civil matters, the Court of Appeal focused its analysis on two monetary factors: the updated value of the $100 ceiling that applied in 1867, and the monetary threshold for appeals as of right.

[243] With regard to the first factor, the Court of Appeal updated the 1867 ceiling of $100 on the inferior courts' monetary jurisdiction over certain civil matters in order to determine the maximum limit of the Court of Québec's monetary jurisdiction in civil matters. Primarily on the basis of this factor, the Court of Appeal found that art. 35 *C.C.P.* has the effect of infringing on [TRANSLATION] "the core jurisdiction of the Quebec Superior Court to adjudicate certain substantial civil disputes" (para. 188).

[244] With respect, I do not think that an amount like this can be of such decisive importance in assessing the impact of this article on the exercise of the Quebec Superior Court's core jurisdiction in the civil law. In my opinion, the Court of Appeal's approach was not sufficiently holistic given that, as indicated above, the Superior Court's power to resolve disputes between individuals and decide questions of private law must be significant enough to enable it to state and develop the law in this area. The question is therefore not whether the Superior

John East Iron Works, Ltd., [1949] A.C. 134 (C.P.); *Renvoi relatif à la Residential Tenancies Act (N.-É.)*).

[241] Le pouvoir de résoudre des différends opposant des particuliers et de trancher des questions de droit privé n'a de sens à mon avis que si les cours supérieures, en tant que tribunaux de droit commun, détiennent une compétence substantielle leur permettant de dire et de faire évoluer le droit civil au Québec et la common law dans les autres provinces. Autrement, le rôle qu'elles jouent dans l'unification du système judiciaire canadien et dans le maintien de la primauté du droit depuis la Confédération jusqu'à aujourd'hui serait compromis.

C. *Les facteurs à considérer*

[242] Pour décider si l'art. 35 *C.p.c.* retire à la Cour supérieure du Québec sa compétence substantielle en matière civile, la Cour d'appel a consacré l'essentiel de son analyse à deux facteurs d'ordre pécuniaire : la valeur actualisée du plafond de 100 $ applicable en 1867 et le seuil monétaire des appels de plein droit.

[243] En ce qui concerne le premier facteur, la Cour d'appel a actualisé la somme de 100 $ afin de déterminer la limite maximale de la compétence pécuniaire de la Cour du Québec en matière civile, une somme qui, en 1867, correspondait à la compétence pécuniaire maximale que les cours inférieures pouvaient exercer à l'égard de certaines matières civiles. Principalement sur la base de ce facteur, elle a conclu que l'art. 35 *C.p.c.* avait pour effet d'entraver « la compétence fondamentale de la Cour supérieure du Québec de trancher certains différends substantiels en matière civile » (par. 188).

[244] Avec égards, une telle somme ne peut à mon sens être aussi déterminante lorsque vient le temps d'évaluer l'effet de cet article sur l'exercice de la compétence fondamentale de la Cour supérieure du Québec en droit civil. À mon avis, cette approche de la Cour d'appel n'est pas suffisamment holistique, car, comme je l'ai mentionné plus tôt, le pouvoir de la Cour supérieure de résoudre des différends opposant des particuliers et de trancher des questions de droit privé doit être suffisamment important pour qu'elle puisse dire le droit en la matière et le

Court can still adjudicate substantial civil disputes, but rather whether its jurisdiction in this regard is substantial enough that it is capable of ensuring this development.

[245] I believe that three quantitative and qualitative factors are relevant in determining whether art. 35 *C.C.P.* (or any other statutory provision) removes from the Superior Court part of its core jurisdiction in matters of private law: (a) the impact on the number of cases that the Superior Court continues to deal with; (b) the impact on the proportion of cases within the Superior Court's jurisdiction compared with those within the jurisdiction of a provincially constituted court; (c) the impact on the nature and importance of the cases within the Superior Court's jurisdiction.

[246] As long as the superior courts continue to hear a volume of cases that is sufficient in number and proportion and varied enough in nature and importance that they are able to state and develop the civil law in Quebec and the common law in the other provinces, they will, as a result, continue to play their unifying role in Canada's constitutional and judicial system. Under such conditions, the legislatures can, without infringing on the superior courts' core jurisdiction in matters of private law, confer subject-matter jurisdiction on provincially constituted courts to empower them to hear a certain number of civil claims.

[247] In this regard, Professor Daly writes that "[t]he question . . . is how to preserve the s. 96 courts as central pillars of the Canadian legal order, their 'prime importance in the constitutional pattern,' while also preserving space for institutional and interpretive pluralism by maintaining a favourable constitutional climate for legislative experimentation" (p. 98, citing *Law Society of British Columbia*, at p. 327). In my view, the three factors set out above ensure an appropriate balance in seeking, on the one hand, to have a plurality of provincial or territorial justice system models that can increase access to

faire évoluer. Il ne s'agit donc pas de décider si la Cour supérieure peut toujours trancher des différends substantiels en matière civile, mais plutôt de se demander si la compétence qu'elle détient à cet égard est à ce point substantielle qu'elle lui permet d'assurer cette évolution.

[245] Pour décider si l'art. 35 *C.p.c.* (ou toute autre disposition législative) retire à la Cour supérieure une partie de sa compétence fondamentale en matière de droit privé, trois facteurs de nature quantitative et qualitative me semblent pertinents : a) l'impact sur le nombre de dossiers que la Cour supérieure continue de traiter; b) l'impact sur la proportion des dossiers relevant de la Cour supérieure par rapport à ceux relevant d'un tribunal de création provinciale; c) l'impact sur la nature et l'importance des dossiers relevant de la compétence de la Cour supérieure.

[246] Tant et aussi longtemps que les cours supérieures continueront d'entendre un volume suffisant — en nombre et en proportion — d'affaires suffisamment variées en nature et en importance pour être en mesure de dire et de faire évoluer le droit civil au Québec et la common law dans les autres provinces, elles continueront par le fait même à jouer leur rôle unificateur au sein du système constitutionnel et judiciaire canadien. Dans de telles conditions, les législatures peuvent, sans porter atteinte à la compétence fondamentale des cours supérieures en matière de droit privé, accorder aux tribunaux de création provinciale une compétence matérielle leur permettant d'entendre un certain nombre de réclamations civiles.

[247] À ce propos, le professeur Daly écrit : [TRADUCTION] « La question [. . .] consiste à déterminer comment protéger le rôle des cours visées à l'art. 96 en tant que piliers centraux de l'ordre juridique canadien, leur "position de premier plan à l'intérieur du régime constitutionnel," tout en préservant également la marge de manœuvre rendant possible le pluralisme institutionnel et interprétatif par le maintien d'un climat constitutionnel favorable à l'expérimentation législative » (p. 98, citant *Law Society of British Columbia*, p. 327). Les trois facteurs susmentionnés assurent à mon avis un juste équilibre entre la

justice by means of various initiatives and, on the other, to have the superior courts play their unifying role in the Canadian legal order.

[248] A number of appellants and interveners pointed out the various initiatives introduced by provincial legislatures that have recognized the need to reform some aspects of the operations of their private law courts in order to enhance access to justice in their province. Protection of the superior courts' core jurisdiction in this field should certainly not have the effect of deterring the provinces and territories from making essential efforts to this end. As Brandeis J. stated in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), at p. 311, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." In this sense, for the reasons set out above, the approach I am suggesting here does not interfere with the ability of the provinces and territories to experiment with new forms of access to civil justice.

[249] Moreover, it goes without saying that the application of the three factors is highly factual in nature, which does not mean that it calls for a cyclical re-examination of the impact of a statutory provision on the specific exercise of this jurisdiction. In the words of Laskin C.J. in *R. v. Zelensky*, [1978] 2 S.C.R. 940, at p. 951, it is true that "[n]ew appreciations thrown up by new social conditions . . . make it appropriate for this Court to re-examine courses of decision on the scope of legislative power . . . always remembering, of course, that it is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by the *British North America Act*" (see also *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, at p. 703; *Big M Drug Mart*, at p. 335).

recherche, d'une part, d'une pluralité de modèles de système de justice provinciale ou territoriale susceptible d'accroître l'accès à la justice par diverses initiatives, et d'autre part, du rôle unificateur que jouent les cours supérieures au sein de l'ordre judiciaire canadien.

[248] Plusieurs appelants et intervenants ont fait état des différentes initiatives mises en place par des législateurs provinciaux qui ont constaté le besoin de réformer certains aspects du fonctionnement de leurs tribunaux de droit privé dans le but de favoriser davantage l'accès à la justice sur leur territoire. La protection de la compétence fondamentale des cours supérieures en cette matière ne devrait surtout pas avoir pour effet de décourager les provinces et territoires de déployer des efforts essentiels en ce sens. Comme l'a affirmé le juge Brandeis dans l'arrêt *New State Ice Co. c. Liebmann*, 285 U.S. 262 (1932), p. 311, [TRADUCTION] « [l']une des heureuses conséquences du système fédéral est le fait qu'un seul État courageux peut, si ses citoyens en font le choix, servir de laboratoire et se livrer à des expériences sociales et économiques inédites sans risque pour le reste du pays. » En ce sens, pour les raisons mentionnées précédemment, l'approche que je suggère ici ne fait pas obstacle à la possibilité qui s'offre aux provinces et territoires d'expérimenter de nouvelles formes d'accès à la justice civile.

[249] Par ailleurs, il va de soi que l'application des trois facteurs s'avère éminemment factuelle, ce qui ne signifie pas qu'elle invite pour autant à un réexamen cyclique de l'effet d'une disposition législative sur l'exercice spécifique de cette compétence. Pour reprendre les termes employés par le juge en chef Laskin dans l'arrêt *R. c. Zelensky*, [1978] 2 R.C.S. 940, p. 951, il est vrai que « [l]'évolution due à de nouvelles situations sociales [. . .] autoris[e] cette Cour à réexaminer l'orientation des décisions relatives à l'étendue du pouvoir législatif [. . .], sans oublier, bien sûr, qu'on lui a confié le rôle très délicat de maintenir l'intégrité des limites constitutionnelles imposées par l'*Acte de l'Amérique du Nord britannique* » (voir aussi *Clark c. Compagnie des chemins de fer nationaux du Canada*, [1988] 2 R.C.S. 680, p. 703; *Big M Drug Mart*, p. 335).

[250] The burden of proving on a balance of probabilities that a statutory provision impairs a superior court's ability to state and develop private law strikes me as a particularly onerous one. This is the case, it seems to me, because of the extensive evidence required for this purpose, which must be quantitative, qualitative and comprehensive.

D. *Article 35 C.C.P. Does Not Infringe on the Superior Court's Core Jurisdiction in Civil Matters*

[251] In this case, I conclude from the application of the three factors set out above that art. 35 *C.C.P.* does not have the effect of removing from the Superior Court part of its core jurisdiction.

[252] First, with regard to the impact of the grant of jurisdiction on the number of cases heard by the Superior Court, that court continues to deal with a large number of civil cases. Specifically, the data for 2017-18, after art. 35 *C.C.P.* came into force, show that about 45 percent of civil cases were opened at the Superior Court (63,807 cases in the Civil, Commercial and Family Chambers, compared with 77,021 cases in the Court of Québec's Civil Division, including the Small Claims Division, except appeals in administrative matters) (Ministère de la Justice, *Nombre de dossiers ouverts à la Cour supérieure et à la Cour du Québec (2012-13 à 2017-18)*, January 28, 2019, reproduced in A.R. (AGQ), vol. VII, at pp. 179-80). After the maximum limit of the Court of Québec's civil jurisdiction was increased in 2016, the number of cases heard by the Superior Court fell slightly (A.R. (AGQ), vol. IV, at p. 131). The fact remains that a large number of civil cases come before the Superior Court, which suggests that its power to state and develop private law has been preserved.

[253] Second, the impact of art. 35 *C.C.P.* on the proportion of civil cases heard in the Superior Court must be considered. The number of cases opened at

[250] Le fardeau de démontrer, suivant la prépondérance des probabilités, qu'une disposition législative entrave la capacité d'une cour supérieure de dire et de faire évoluer le droit privé m'apparaît particulièrement exigeant. C'est le cas, me semble-t-il, en raison de l'abondante preuve de nature quantitative, qualitative et englobante qu'exige cette démonstration.

D. *L'article 35 C.p.c. ne porte pas atteinte à la compétence fondamentale de la Cour supérieure en matière civile*

[251] En l'espèce, appliquant les trois facteurs mentionnés précédemment, j'arrive à la conclusion que l'art. 35 *C.p.c.* n'a pas pour effet de retirer à la Cour supérieure une partie de sa compétence fondamentale.

[252] Premièrement, en ce qui concerne l'impact de l'attribution de compétence sur le nombre d'affaires entendues par la Cour supérieure, celle-ci continue à traiter un grand nombre de dossiers en matière civile. Plus précisément, il ressort des données pour 2017-2018, postérieures à l'entrée en vigueur de l'art. 35 *C.p.c.*, qu'environ 45 p. 100 de ces dossiers ont été ouverts en Cour supérieure (63 807 dossiers devant les chambres civile, commerciale et de la famille, par rapport aux 77 021 dossiers devant la chambre civile de la Cour du Québec, y compris la division des petites créances, sauf les appels en matières administratives) (Ministère de la Justice, *Nombre de dossiers ouverts à la Cour supérieure et à la Cour du Québec (2012-13 à 2017-18)*, 28 janvier 2019, reproduit dans d.a. (PGQ), vol. VII, p. 179-180). À la suite de l'augmentation de la limite maximale de la compétence de la Cour du Québec en matière civile en 2016, le nombre d'affaires que la Cour supérieure a entendues a quelque peu diminué (d.a. (PGQ), vol. IV, p. 131). Il n'en demeure pas moins que la Cour supérieure est saisie d'un grand nombre de causes civiles, ce qui permet de conclure que son pouvoir de dire et de faire évoluer le droit privé est préservé.

[253] Deuxièmement, il convient de considérer l'impact de l'art. 35 *C.p.c.* sur la proportion des affaires civiles entendues en Cour supérieure. Le

the Superior Court in comparison with those opened at the Court of Québec remains relatively stable. More specifically, this has been so since 2005-6 (A.R. (AGQ), vol. IV, at p. 223). In fact, the proportion of civil cases opened at the Court of Québec has decreased since the 1980s — approximately 68 percent in 1980-81 and 1985-86, and 60 percent in 2005-6, 2010-11 and 2016-17 — despite the fact that the monetary ceiling of the Court of Québec's jurisdiction was less than $10,000 in the early 1980s (p. 223). Moreover, the proportion of cases heard by the Quebec Superior Court today is much higher than the proportion of cases heard by the superior courts of Upper Canada, New Brunswick and Nova Scotia at the time of Confederation, which was less than 20 percent (Fyson Report, at pp. 183, 192 and 198). This evidence shows that neither art. 35 *C.C.P.* nor the other statutory provisions that increased the monetary ceiling of the jurisdiction of the Court of Québec (or its predecessors) removed the power to state and develop private law from the Superior Court.

[254] Finally, with regard to the impact of art. 35 *C.C.P.* on the nature of the cases heard by the Superior Court, it can be said without a doubt that that court continues to hear claims on a variety of subjects as well as the judicial applications that are the most substantial in monetary terms. First of all, the Superior Court has exclusive jurisdiction to state and develop the law with respect to class actions, injunctions, and wills and successions, as well as family law and insolvency law. In addition, where there is shared jurisdiction in a field of law, the Superior Court continues to have jurisdiction over civil claims in which the amount in issue is substantial. Although art. 35 *C.C.P.* sets the Court of Québec's monetary ceiling at less than $85,000, the vast majority of the cases opened at that court involve claims not exceeding $40,000 (A.R. (AGQ), vol. V, at p. 40). Moreover, in 2016-17, only 3.3 percent of the civil cases opened at the Court of Québec (other than in the Small Claims Division) involved an amount between $70,001 and $85,000 (p. 40). On the other hand, in all civil claims before the Superior Court relating to areas of shared

nombre de dossiers ouverts en Cour supérieure par comparaison avec ceux ouverts en Cour du Québec demeure relativement stable. De façon plus précise, c'est le cas depuis 2005-2006 (d.a. (PGQ), vol. IV, p. 223). En fait, la proportion de dossiers civils ouverts en Cour du Québec a diminué depuis les années 1980 — environ 68 p. 100 en 1980-1981 et en 1985-1986 et 60 p. 100 en 2005-2006, 2010-2011 et 2016-2017 —, et ce, malgré le fait que le plafond pécuniaire de la compétence de la Cour du Québec était inférieur à 10 000 $ au début des années 1980 (p. 223). Qui plus est, la proportion des causes entendues aujourd'hui par la Cour supérieure du Québec est beaucoup plus importante que la proportion des causes entendues par les cours supérieures du Haut-Canada, du Nouveau-Brunswick et de la Nouvelle-Écosse au moment de la Confédération, proportion qui était inférieure à 20 p. 100 (Rapport Fyson, p. 183, 192 et 198). Cette preuve démontre que l'art. 35 *C.p.c.*, de même que les autres dispositions législatives qui ont haussé le plafond pécuniaire de la compétence de la Cour du Québec (ou des tribunaux qui l'ont précédée), n'ont en aucun cas retiré à la Cour supérieure son pouvoir de dire et de faire évoluer le droit privé.

[254] Enfin, en ce qui concerne l'impact de l'art. 35 *C.p.c.* sur la nature des affaires entendues par la Cour supérieure, on peut sans aucun doute affirmer que cette dernière continue d'entendre des demandes portant sur des sujets variés, de même que les demandes en justice les plus substantielles sur le plan pécuniaire. D'une part, la Cour supérieure jouit d'une compétence exclusive pour dire et faire évoluer le droit des actions collectives, des injonctions, des testaments et des successions, de même que le droit de la famille et de l'insolvabilité. D'autre part, lorsque la compétence à l'égard d'un domaine du droit est partagée, la Cour supérieure demeure compétente relativement aux demandes civiles dans lesquelles la somme en jeu est substantielle. Bien que l'art. 35 *C.p.c.* fixe à moins de 85 000 $ le plafond pécuniaire de la Cour du Québec, la grande majorité des dossiers qui y sont ouverts concernent des réclamations ne dépassant pas 40 000 $ (d.a. (PGQ), vol. V, p. 40). De plus, en 2016-2017, seulement 3,3 p. 100 des dossiers civils (autres que ceux de la division des petites créances) ouverts en Cour

jurisdiction where an amount is in issue, that amount is $85,000 or more. Despite art. 35, the Superior Court retains its power to decide civil cases on a wide range of subjects, includes cases in which the monetary claims are substantial.

[255] In short, art. 35 *C.C.P.* does not have the effect of removing from the Quebec Superior Court its jurisdiction over substantial civil claims. Its core jurisdiction in this regard remains intact. It should be noted that both the Attorney General of Quebec and the Attorney General of Canada, relying on the above factual evidence, also come to the same conclusion.

[256] This conclusion, and the holistic three-factor approach on which it is based, aligns readily with that of my colleagues as regards the application of the analytical framework from *Re Residential Tenancies Act, 1979*. At the time of Confederation, Upper Canada, New Brunswick and Nova Scotia gave the "inferior" courts a leading role in implementing various civil matters, whereas in Lower Canada, the superior courts played that role instead. The fact remains that in the first three provinces mentioned, the superior courts — as courts of original general jurisdiction — were able to state and develop the common law even though the inferior courts heard at least 80 percent of civil cases (Fyson Report, at pp. 183, 192 and 198). The same conclusion applies equally today with respect to the Superior Court's role in Quebec civil law, despite the fact that the Court of Québec now plays a major role in this area. This is one of the things that the application of the analytical framework established in *Re Residential Tenancies Act, 1979* demonstrates retrospectively. Since Confederation, Ontario, Nova Scotia, New Brunswick and Quebec have made different choices in the administration of justice in their province with regard to the role of "provincial" courts. History thus shows that the role of these courts cannot be considered immutable and that, in accordance with the constitutional limits established

du Québec concernaient une somme comprise entre 70 001 $ et 85 000 $ (p. 40). En revanche, dans toutes les demandes civiles devant la Cour supérieure portant sur des domaines de compétence partagée et où une somme est en jeu, cette somme est de 85 000 $ ou plus. Malgré l'art. 35, la Cour supérieure conserve son pouvoir de statuer sur des affaires civiles portant sur un large éventail de sujets, y compris les affaires dans lesquelles les demandes pécuniaires sont substantielles.

[255] En somme, l'art. 35 *C.p.c.* n'a pas pour effet de retirer à la Cour supérieure du Québec sa compétence sur les demandes substantielles en matière civile. Sa compétence fondamentale à cet égard demeure intacte. En se fondant sur la preuve factuelle qui précède, il convient de noter que tant le procureur général du Québec que le procureur général du Canada arrivent également à la même conclusion.

[256] Cette conclusion, et la méthode holistique comportant trois facteurs sur laquelle elle repose, s'accorde sans difficulté avec celle de mes collègues pour ce qui est de l'application du cadre d'analyse du *Renvoi sur la Loi de 1979 sur la location résidentielle*. À l'époque de la Confédération, le Haut-Canada, le Nouveau-Brunswick et la Nouvelle-Écosse attribuaient un rôle de premier plan aux tribunaux « inférieurs » dans la mise en œuvre de diverses matières civiles, tandis que dans le Bas-Canada ce rôle revenait plutôt aux cours supérieures situées sur son territoire. Il n'en demeure pas moins que, dans les trois premières provinces mentionnées, les cours supérieures — en tant que de tribunaux de droit commun — pouvaient dire et faire évoluer la common law, même si les tribunaux inférieurs y entendaient au moins 80 p. 100 des dossiers civils (Rapport Fyson, p. 183, 192 et 198). Cette même conclusion vaut tout autant aujourd'hui en ce qui a trait au rôle de la Cour supérieure en droit civil québécois, et ce, malgré le fait que la Cour du Québec joue dorénavant un rôle important dans ce domaine. C'est une des choses que l'application du cadre d'analyse établi dans le *Renvoi sur la Loi de 1979 sur la location résidentielle* permet de démontrer rétrospectivement. L'Ontario, la Nouvelle-Écosse, le Nouveau-Brunswick et le Québec ont fait, depuis la Confédération, des choix différents en matière

by s. 96, the provinces could in the past — just as they still can today — make different choices in this regard without any detrimental effect on the central and unifying role played by the superior courts in our judicial system.

VI. Conclusion

[257] For the reasons given above, I would answer the first question referred to the Court of Appeal in the affirmative and I would allow the appeals of the Conférence des juges de la Cour du Québec, the Attorney General of Quebec, the Conseil de la magistrature du Québec and the Canadian Association of Provincial Court Judges.

[258] As for the second question referred to the Court of Appeal, I defer to the majority's analysis and I would dismiss the appeal of the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec.

The following are the reasons delivered by

[259] Abella J. (dissenting) — This is a dispute brought by the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec over the constitutional impact of a $15,000 increase in the jurisdiction of provincial court judges. It is before this Court in the third decade of the 21st century and over 150 years since Confederation, yet some of the old hierarchal attitudes towards "inferior" courts linger despite progressive Copernican revolutions in almost every aspect of Canada's approach to law since our country was founded.

[260] The atavistic suggestion that this $15,000 increase adversely affects the very constitutional foundation of superior courts in Quebec, let alone the

d'administration de la justice au sein leur province relativement au rôle des tribunaux « provinciaux ». L'histoire révèle donc que le rôle de ces tribunaux ne peut être considéré comme immuable et que, conformément aux limites constitutionnelles établies par l'art. 96, les provinces pouvaient auparavant — tout comme elles peuvent encore aujourd'hui — faire des choix différents à cet égard, sans que cela se fasse au détriment du rôle central et unificateur des cours supérieures au sein de notre système judiciaire.

VI. Conclusion

[257] Pour les motifs qui précèdent, je répondrais affirmativement à la première question du renvoi soumis à la Cour d'appel et j'accueillerais les pourvois interjetés par la Conférence des juges de la Cour du Québec, le procureur général du Québec, le Conseil de la magistrature du Québec et l'Association canadienne des juges des cours provinciales.

[258] En ce qui concerne maintenant la seconde question soulevée dans le renvoi soumis à la Cour d'appel, je m'en remets à l'analyse de mes collègues majoritaires et je rejetterais le pourvoi formé par le juge en chef, la juge en chef associée et la juge en chef adjointe de la Cour supérieure du Québec.

Version française des motifs rendus par

[259] La juge Abella (dissidente) — Le présent litige a été intenté par le juge en chef, la juge en chef associée et la juge en chef adjointe de la Cour supérieure du Québec relativement aux incidences constitutionnelles d'une augmentation de 15 000 $ de la compétence des juges de la cour provinciale. Ce litige est soumis à notre Cour en cette troisième décennie du 21e siècle, plus de 150 ans après la Confédération, et pourtant certaines attitudes hiérarchiques archaïques persistent à l'endroit des tribunaux « inférieurs », malgré des révolutions coperniciennes progressistes dans presque tous les aspects de l'approche canadienne à l'égard du droit depuis la fondation de notre pays.

[260] La thèse rétrograde voulant que cette augmentation de 15 000 $ porte atteinte au fondement constitutionnel même des cours supérieures du

rule of law and national unity, is neither constitutionally mandated, historically accurate, nor desirable, and ignores what this Court has said about the importance, independence and impartiality of provincial court judges. It would also come as a surprise to the millions of people who have appeared before provincial court judges over the years in criminal, family and civil cases whose outcomes, to those people, have no less serious consequences than what occurs in superior courts.

Québec — sans parler de l'atteinte à la primauté du droit et à l'unité nationale — n'est ni constitutionnellement justifiée, ni historiquement exacte, non plus que souhaitable, et elle fait abstraction des enseignements de notre Cour sur l'importance, l'indépendance et l'impartialité des juges des cours provinciales. Elle ne manquerait pas d'étonner les millions de personnes qui ont comparu devant ces juges au fil des ans dans le cadre d'affaires criminelles, familiales et civiles dont les conséquences ne sont pas, pour ces personnes, moins sérieuses que celles des procédures se déroulant devant les cours supérieures.

Background

[261] In 2016, the legislature of Quebec increased the exclusive civil jurisdiction of the provincially appointed Court of Québec from $70,000 to $85,000. This jurisdiction has been subject to a number of increases since the mid-1960s, set out in the following table:

Year	Monetary Jurisdiction
1965	$1,000
1969	$3,000
1979	$6,000
1982	$10,000
1984	$15,000
1995	$30,000
2002	$70,000
2014	$85,000

[262] The most recent increase, however, was seen by the Superior Court of Quebec as a trespass on its jurisdiction, thereby violating s. 96 of the *Constitution Act, 1867*. As a result, the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec instituted proceedings seeking a declaration that the increase was unconstitutional.

[263] The increase is set out in art. 35 para. 1 of the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"):

Contexte

[261] En 2016, le législateur québécois a haussé de 70 000 $ à 85 000 $ la compétence civile exclusive de la Cour du Québec, une cour créée par cette province. Cette compétence a fait l'objet, depuis le milieu des années 1960, d'un certain nombre d'augmentations indiquées dans le tableau suivant :

Année	Compétence pécuniaire
1965	1 000 $
1969	3 000 $
1979	6 000 $
1982	10 000 $
1984	15 000 $
1995	30 000 $
2002	70 000 $
2014	85 000 $

[262] Toutefois, la Cour supérieure du Québec a estimé que la plus récente augmentation empiétait sur sa compétence, contrevenant de ce fait à l'art. 96 de la *Loi constitutionnelle de 1867*. En conséquence, le juge en chef, la juge en chef associée et la juge en chef adjointe de la Cour supérieure du Québec ont intenté des procédures en vue d'obtenir un jugement déclarant l'augmentation inconstitutionnelle.

[263] L'augmentation est décrite ainsi à l'art. 35 al. 1 du *Code de procédure civile*, RLRQ, c. C-25.01 (« *C.p.c.* ») :

35. The Court of Québec has exclusive jurisdiction to hear and determine applications in which the value of the subject matter of the dispute or the amount claimed, including in lease resiliation matters, is less than $85,000, exclusive of interest; it also hears and determines applications ancillary to such an application, including those for the specific performance of a contractual obligation. However, it does not have such jurisdiction in cases where jurisdiction is formally and exclusively assigned to another court or adjudicative body, or in family matters other than adoption.

[264] The Government of Quebec referred the question to the Court of Appeal of Quebec. There were two reference questions. The first is the only one at issue before us, namely:

[TRANSLATION] Are the provisions of the first paragraph of article 35 of the Code of Civil Procedure (chapter C-25.01), setting at less than $85,000 the limit to the exclusive monetary jurisdiction of the Court of Québec, valid with regard to section 96 of the Constitution Act, 1867, given the jurisdiction of Quebec over the administration of justice under paragraph 14 of section 92 of the Constitution Act, 1867?

(Décret 880-2017, (2017) 149 G.O. II, 4495)

[265] The Court of Appeal held that the constitutionally guaranteed role of superior courts would be undermined by the $15,000 increase since it encroached on and eroded the traditional jurisdiction of superior courts over [TRANSLATION] "substantial civil disputes" (2019 QCCA 1492). In its view, the previous exclusive monetary jurisdiction of $70,000 was constitutional, but raising it from $70,000 to $85,000 impermissibly altered the jurisdiction of the Superior Court.

Analysis

[266] The relevant constitutional provisions are ss. 92(14), which sets out the provincial government's authority to create courts, and 96 of the *Constitution Act, 1867* which constrains it:

35. La Cour du Québec a compétence exclusive pour entendre les demandes dans lesquelles soit la valeur de l'objet du litige, soit la somme réclamée, y compris en matière de résiliation de bail, est inférieure à 85 000 $, sans égard aux intérêts; elle entend également les demandes qui leur sont accessoires portant notamment sur l'exécution en nature d'une obligation contractuelle. Néanmoins, elle n'exerce pas cette compétence dans les cas où la loi l'attribue formellement et exclusivement à une autre juridiction ou à un organisme juridictionnel, non plus que dans les matières familiales autres que l'adoption.

[264] Le gouvernement du Québec a soumis un renvoi à la Cour d'appel du Québec relativement à cette mesure. Le renvoi comportait deux questions. Seule la première est en litige devant notre Cour, et elle est formulée ainsi :

Les dispositions du premier alinéa de l'article 35 du Code de procédure civile (chapitre C-25.01) fixant, à moins de 85 000 $, le seuil de la compétence pécuniaire exclusive de la Cour du Québec, sont-elles valides au regard de l'article 96 de la Loi constitutionnelle de 1867, étant donné la compétence du Québec sur l'administration de la justice aux termes du paragraphe 92(14) de la Loi constitutionnelle de 1867?

(Décret 880-2017, (2017) 149 G.O. II, 4495)

[265] La Cour d'appel a conclu que le rôle que jouent les cours supérieures et qui leur est garanti par la Constitution serait affaibli par l'augmentation de 15 000 $, car celle-ci a pour effet d'empiéter sur la compétence traditionnelle des cours supérieures à l'égard des « différends civils substantiels » et de l'éroder (2019 QCCA 1492). De l'avis de la Cour d'appel, la compétence pécuniaire exclusive antérieure de 70 000 $ était constitutionnelle, mais le fait de l'augmenter de 70 000 $ à 85 000 $ a modifié de manière inadmissible la compétence de la Cour supérieure.

Analyse

[266] Les dispositions constitutionnelles applicables sont le par. 92(14), qui énonce le pouvoir du gouvernement provincial de créer des tribunaux, et l'art. 96 de la *Loi constitutionnelle de 1867*, qui limite ce pouvoir :

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . .

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

. . .

96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[267] Although the text of s. 96 suggests the existence of only a simple appointment power, this Court has recognized that implicit in this provision are protections for the historical jurisdiction of the superior court, the role of its judges and the protection of the superior courts' independence. This has led this Court in its jurisprudence to attempt to balance the provinces' authority under s. 92(14) to create provincial courts and to appoint their judges, with s. 96's guarantee that some jurisdiction must remain in the hands of federally appointed superior courts.

[268] In the *Reference re Adoption Act*, [1938] S.C.R. 398 ("*Adoption Reference*"), this Court was asked to determine the validity of provincial laws empowering provincial courts to rule on a number of family law issues. Chief Justice Duff, for a unanimous Court, upheld the grant of jurisdiction. He noted that s. 92(14) provides for the existence of provincial courts as well as for the provinces' control over their administration. For him, the Constitution had to be understood in a way that provides leeway for provincial governments to expand the jurisdiction of their provincial courts.

92 Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

. . .

14. L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;

. . .

96 Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

[267] Bien que le libellé de l'art. 96 suggère l'existence d'un simple pouvoir de nomination, notre Cour a reconnu que cette disposition comporte implicitement des garanties relatives à la compétence historique des cours supérieures, au rôle de leurs juges et à la protection de l'indépendance de ces tribunaux. Cette conclusion a amené notre Cour, dans sa jurisprudence, à tenter de mettre en équilibre, d'une part, le pouvoir dont disposent les provinces en vertu du par. 92(14) de créer des tribunaux provinciaux et de nommer les juges qui y siègent, et, d'autre part, la garantie que prévoit l'art. 96 et selon laquelle certaines compétences doivent demeurer entre les mains des cours supérieures, lesquelles sont composées de juges nommés par le fédéral.

[268] Dans l'affaire *Reference re Adoption Act*, [1938] R.C.S. 398 (« *Renvoi sur l'adoption* »), la Cour était appelée à se prononcer sur la validité de lois provinciales habilitant les cours des provinces à statuer sur un certain nombre de questions relevant du droit de la famille. Dans un arrêt unanime, le juge en chef Duff a confirmé la validité de l'attribution de compétence. Il a souligné que le par. 92(14) prévoit l'existence des cours provinciales ainsi que le contrôle exercé par les provinces sur l'administration de ces tribunaux. Selon lui, la Constitution doit être interprétée de manière à accorder aux gouvernements provinciaux la latitude leur permettant d'élargir la compétence de leurs tribunaux provinciaux.

[269] This expansive provincial power was to be limited only by the principle that the jurisdiction granted must "broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96" (p. 421). Notably, Chief Justice Duff could not "accept the view that the jurisdiction of inferior [*sic*] courts" was "fixed forever as it stood at the date of Confederation" (p. 418).

[270] And in *Re Cour de Magistrat de Québec*, [1965] S.C.R. 772, the Court decided that an increase from $200 to $500 in the provincial court's monetary jurisdiction did not impermissibly turn it into a s. 96 court. Any tension between the powers set out in ss. 92(14) and 96 was to be resolved not by enshrining provincial court jurisdiction at pre-Confederation levels, but by ensuring that s. 92(14) does not undermine s. 96.

[271] In later years, the Court was asked to determine the constitutional parameters of provincial administrative tribunals and assess whether their jurisdiction trespassed on that of s. 96 courts. In *Tomko v. Labour Relations Board (N.S.)*, [1977] 1 S.C.R. 112, and *Mississauga (City) v. Peel (Municipality)*, [1979] 2 S.C.R. 244, this Court held that neither a provincial labour board's power to make cease and desist orders, nor a provincial administrative board's power to adjudicate certain disputes between municipalities, trespassed on the jurisdiction of superior courts. On the other hand, a transport tribunal's power to hear appeals from the transport commission was found to be unconstitutional (*Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638).

[272] In an attempt to operationalize the jurisprudence's approach to resolving the tension between ss. 92(14) and 96, this Court developed a three-stage test in *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 ("*Residential Tenancies*"), for analyzing the validity of a provincial grant of jurisdiction.

[269] Ce vaste pouvoir des provinces devait être limité uniquement par le principe suivant lequel la compétence accordée doit [TRADUCTION] « correspond[re] en gros au type de compétence généralement exerçable par des cours de juridiction sommaire plutôt qu'à celle exercée par les cours visées à l'art. 96 » (p. 421). En particulier, le juge en chef Duff ne pouvait « souscrire à l'opinion selon laquelle la compétence des tribunaux inférieurs [*sic*] » a été « fixée définitivement dans l'état où elle se trouvait le jour de la Confédération » (p. 418).

[270] En plus, dans l'affaire *Re Cour de Magistrat de Québec*, [1965] R.C.S. 772, la Cour a décidé qu'une augmentation faisant passer de 200 $ à 500 $ la compétence pécuniaire de la cour provinciale ne transformait pas celle-ci de manière inadmissible en une cour visée à l'art. 96. Tout conflit entre les pouvoirs énoncés au par. 92(14) et à l'art. 96 devait être résolu non pas en figeant la compétence de la cour provinciale à ce qu'elle était avant la Confédération, mais en veillant à ce que le par. 92(14) ne porte pas atteinte à l'art. 96.

[271] Au cours des années qui ont suivi, notre Cour a été appelée à déterminer les paramètres constitutionnels des tribunaux administratifs provinciaux et à examiner si leur compétence empiétait sur celle des cours visées à l'art. 96. Dans *Tomko c. Labour Relations Board (N.-É.)*, [1977] 1 R.C.S. 112, et dans *Mississauga (Ville) c. Peel (Municipalité)*, [1979] 2 R.C.S. 244, notre Cour a conclu que ni le pouvoir d'une commission provinciale des relations de travail de rendre des ordonnances de prohibition ni le pouvoir d'une instance administrative provinciale de trancher certains différends entre des municipalités n'empiétaient sur la compétence des cours supérieures. En revanche, le pouvoir d'un tribunal des transports d'entendre les appels de la Commission des transports a été jugé inconstitutionnel (*Procureur général du Québec c. Farrah*, [1978] 2 R.C.S. 638).

[272] Dans une tentative en vue d'opérationnaliser la méthode établie par la jurisprudence pour résoudre les conflits entre le par. 92(14) et l'art. 96, notre Cour a élaboré, dans le *Renvoi sur la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714 (« *Renvoi sur la location résidentielle* »), une analyse en trois

The purpose of the test is to balance the provinces' authority to develop courts, with the recognition that some areas of jurisdiction, by virtue of s. 96, must remain in the jurisdiction of superior courts. It aims to prevent legislatures from creating "shadow courts" which could usurp the jurisdiction of superior courts, undermining s. 96 courts' ability to serve their function within the Canadian judicial system. It is essentially an historical inquiry.

[273] The first stage of the test asks whether superior, district or county courts at the time of Confederation had exclusive jurisdiction over the subject matter now being given to the provincial "court". If provincial courts in a majority of the four original provinces had a "practical involvement" in adjudicating cases related to the particular subject matter at Confederation, there could be no finding of exclusive jurisdiction for s. 96 courts, since the jurisdiction was shared at the time. There was therefore no basis for preventing the province from giving the jurisdiction, even exclusively, to its own courts or tribunals.

[274] In *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238, Justice Wilson clarified that at the first stage, the "purposes of s. 96 require a strict, that is to say a narrow, approach to characterization" (p. 254). In her view, because the purpose of the analysis is to find "broad conformity" with a jurisdiction exercised at Confederation, the focus should be on the type of case at issue, not on an analysis that would "freeze" the ability of both provincial and superior courts to operate within genuinely appropriate, as opposed to technically mandated, constitutional spheres (p. 255).

[275] If the jurisdiction at issue was exclusively held by a s. 96 court at Confederation, the second

étapes afin d'examiner la validité d'une attribution provinciale de compétence. L'analyse a pour objet de mettre en équilibre, d'une part, la compétence des provinces de créer des tribunaux, et, d'autre part, la reconnaissance que certains domaines de compétence doivent, en raison de l'art. 96, demeurer du ressort des cours supérieures. L'analyse vise à empêcher les législatures de créer des « cours de justice parallèles » qui pourraient usurper la compétence des cours supérieures, ce qui minerait la capacité des cours visées à l'art. 96 de s'acquitter de leurs fonctions au sein du système judiciaire canadien. Il s'agit essentiellement d'une analyse historique.

[273] La première étape de l'analyse consiste à se demander si, au moment de la Confédération, les cours supérieures, de district ou de comté avaient compétence exclusive sur la matière qui est maintenant attribuée à la « cour » provinciale. Si, dans une majorité des quatre provinces originales, les cours provinciales avaient au moment de la Confédération un « engagement pratique » dans la résolution de litiges relatifs à la matière en cause, il était impossible de conclure que les cours visées à l'art. 96 avaient compétence exclusive, puisque la compétence était partagée à cette époque. Par conséquent, rien n'empêchait la province d'attribuer la compétence, même de façon exclusive, à ses propres cours de justice ou tribunaux administratifs.

[274] Dans l'arrêt *Sobeys Stores Ltd. c. Yeomans et Labour Standards Tribunal (N.-É.)*, [1989] 1 R.C.S. 238, la juge Wilson a précisé que, « [p]our les fins de l'art. 96, il est nécessaire d'adopter un point de vue strict, c'est-à-dire étroit, en matière de qualification » à la première étape (p. 254). À son avis, comme l'objet de l'analyse est de trouver une « correspondance générale » avec une compétence exercée au moment de la Confédération, il convient de s'attacher au type d'affaires en cause, et non de procéder à une analyse qui aurait pour effet de « fige[r] » la capacité des cours provinciales et des cours supérieures de fonctionner dans des sphères constitutionnelles véritablement appropriées, plutôt que dictées par une approche formaliste (p. 255).

[275] Si la compétence en cause appartenait exclusivement à une cour visée à l'art. 96 au moment

stage of the analysis asks whether the provincial body is acting in a judicial capacity. If not, the inquiry does not proceed further since it is not within the jurisdiction exercisable by a s. 96 court. If it is, the third stage of the analysis is triggered.

[276] The assessment at the third stage is of the provincial court or tribunal in its institutional context in order to determine whether it is exercising a judicial power that is merely subsidiary or ancillary to general administrative functions, or one that is necessary to achieve a broad policy goal. In either of these circumstances, the grant is constitutionally permissible. As Chief Justice Laskin wrote for the majority in *Tomko*, in upholding a labour board's authority, "it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears and is exercisable under the provincial legislation" (p. 120).

[277] Almost 15 years later, a layer was added to the test in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, when the Court concluded that the legislature may not, even if its grant of jurisdiction passed the *Residential Tenancies* test, reduce or impair "the core" of superior court jurisdiction. The focus of this new requirement was determining whether a grant of *exclusive* jurisdiction to a provincial body frustrated the ability of superior courts to execute their functions.

[278] The case involved a young person who was charged with contempt of court after violating a superior court's order. The legislative scheme in effect at the time stipulated that a youth court had exclusive jurisdiction to try criminal offences committed by young offenders. The Court held that although the jurisdiction granted to the provincial court had been exclusively held by s. 96 courts at Confederation

de la Confédération, il faut, à la deuxième étape de l'analyse, répondre à la question de savoir si l'organisme provincial agit à titre judiciaire. Si la réponse est négative, l'analyse prend fin, car il s'agit d'une compétence qui n'est pas exerçable par une cour visée à l'art. 96. Si la réponse est affirmative, la troisième étape de l'analyse se met alors en branle.

[276] La troisième étape consiste à considérer le tribunal judiciaire ou administratif provincial dans son contexte institutionnel, afin de déterminer s'il exerce un pouvoir judiciaire qui est simplement complémentaire ou accessoire à des fonctions administratives générales, ou qui est nécessaire à la réalisation d'un vaste objectif de politique générale. Dans l'un ou l'autre cas, l'attribution de compétence est permise par la Constitution. Comme l'a indiqué le juge en chef Laskin dans l'arrêt *Tomko*, au nom des juges majoritaires, confirmant alors le pouvoir d'une commission des relations de travail, « il ne faut pas considérer la juridiction dans l'abstrait ou les pouvoirs en dehors du contexte, mais plutôt la façon dont ils s'imbriquent dans l'ensemble des institutions où ils se situent et s'exercent en vertu de la loi provinciale » (p. 120).

[277] Près de 15 ans plus tard, dans l'arrêt *MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725, notre Cour a ajouté une exigence additionnelle à l'analyse lorsqu'elle a conclu que, même si l'attribution de compétence satisfait à l'analyse établie dans le *Renvoi sur la location résidentielle*, la législature ne peut réduire « le noyau » de la compétence des cours supérieures, leur compétence « fondamentale », ou y porter atteinte. Cette nouvelle exigence visait à déterminer si l'attribution d'une compétence *exclusive* à un organisme provincial entravait la capacité des cours supérieures de s'acquitter de leurs fonctions.

[278] L'affaire concernait un adolescent qui avait été accusé d'outrage au tribunal après avoir violé une ordonnance d'une cour supérieure. Suivant le régime législatif en vigueur à l'époque, les tribunaux pour adolescents avaient compétence exclusive pour juger les infractions criminelles commises par de jeunes contrevenants. La Cour a conclu que, bien que la compétence accordée à la cour provinciale ait été

and was clearly judicial in nature, the third stage of the *Residential Tenancies* test was nonetheless met because the youth court served a "clear and laudable" policy goal as mandated by *Tomko*.

conférée exclusivement aux cours visées à l'art. 96 au moment de la Confédération, et qu'elle soit de toute évidence de nature judiciaire, il avait néanmoins été satisfait à la troisième étape de l'analyse établie dans le *Renvoi sur la location résidentielle*, parce que le tribunal pour adolescents servait des objectifs de politique générale « clairs et louables », comme le prescrivait l'arrêt *Tomko*.

[279] Even though it passed the *Residential Tenancies* test, the Court held that giving exclusive jurisdiction to the youth court to try a contempt charge based on a breach of a superior court order was a violation of that court's core jurisdiction because it removed from the core power of s. 96 courts the jurisdiction to prosecute contempt.

[279] Même si le fait de conférer aux tribunaux pour adolescents la compétence exclusive pour juger une accusation d'outrage découlant d'un manquement à une ordonnance d'une cour supérieure satisfaisait à l'analyse établie dans le *Renvoi sur la location résidentielle*, la Cour a statué que cette attribution de compétence portait atteinte à la compétence fondamentale des cours supérieures, parce qu'elle avait retiré aux cours visées à l'art. 96 le pouvoir de juger l'infraction d'outrage.

[280] Chief Justice Lamer conceded that core jurisdiction is "difficult to define" (paras. 30 and 33). But it was unnecessary in his view to offer a comprehensive definition because "the power to punish for contempt *ex facie* is obviously within that jurisdiction" (para. 38). He did, however, offer some guidance by stating that the core powers guaranteed by s. 96 were those that formed the "essential character" of superior courts, the removal of which would "emasculat[e] the court, making it something other than a superior court" (para. 30). He added that the core is comprised of "powers which are essential to the administration of justice and the maintenance of the rule of law" (para. 38). The power to prosecute contempt was a core power because in order to function properly, a s. 96 court must be able to "ensure its orders are enforced and its process respected" (para. 37).

[280] Le juge en chef Lamer a reconnu que la compétence fondamentale est une notion « difficile à définir » (par. 30 et 33). Cependant, il n'était pas nécessaire selon lui d'en proposer une définition exhaustive, parce que « le pouvoir de punir l'outrage commis en dehors des audiences du tribunal en fait partie de toute évidence » (par. 38). Il a toutefois fourni quelques indications en affirmant que les pouvoirs fondamentaux garantis par l'art. 96 sont ceux qui constituent le « caractère essentiel » des cours supérieures et dont le retrait « affaibli[rait] la cour, en en faisant quelque chose d'autre qu'une cour supérieure » (par. 30). Il a ajouté que la compétence fondamentale comprend « les pouvoirs qui sont essentiels à l'administration de la justice et au maintien de la primauté du droit » (par. 38). Le pouvoir de juger une infraction d'outrage est un pouvoir fondamental, car pour être en mesure de fonctionner adéquatement, une cour visée à l'art. 96 doit pouvoir « garantir l'exécution de ses ordonnances ainsi que le respect de sa procédure » (par. 37).

[281] In the 1996 *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 ("*Residential Tenancies (1996)*"), the Court upheld a grant of jurisdiction over residential leases to a provincial administrative tribunal, confirming that s. 96 is primarily concerned with entrenching the

[281] En 1996, dans le *Renvoi relatif à certaines modifications à la Residential Tenancies Act (N.-É.)*, [1996] 1 R.C.S. 186 (« *Residential Tenancies (1996)* »), la Cour a confirmé la validité de l'attribution de compétence en faveur d'un tribunal administratif provincial en matière de baux résidentiels,

powers that were essential to preserving the judicial role of s. 96 judges. While the case was not decided on the basis of core jurisdiction, Chief Justice Lamer in concurring reasons, further explained the concept of the "core", characterizing it as "very narrow" so that "only critically important jurisdictions which are *essential* to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system" fall within the constitutionally protected core of s. 96 courts (para. 56 (emphasis added)).

[282] The purpose of this new core doctrine was to identify which powers could not be *removed* from superior courts, supplementing the *Residential Tenancies* test which delineates the jurisdictions which may be *given* to provincial courts or tribunals. A grant of jurisdiction to a provincial court or tribunal which respects the *Residential Tenancies* test may be exclusive, as long as the exclusivity does not engender a correlative loss of jurisdiction to the superior court's narrowly defined core jurisdiction (*Residential Tenancies (1996)*, at paras. 71 and 75). As Prof. Hogg noted, the only "constitutional restrictions on the jurisdiction that can be *withdrawn* from a superior court" are those which fall within the narrow category of "core" jurisdiction, apart from which "the nature and scope of superior-court jurisdiction are simply issues of policy to be resolved and enacted by . . . competent legislative bod[ies]" (Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at p. 7-43 (emphasis in original)).

[283] Identifying the core of a s. 96 court's jurisdiction is therefore an exercise in identifying those aspects of the superior court's power that are essential to its character and to its ability to deal

confirmant que l'art. 96 a principalement pour objet de consacrer les pouvoirs essentiels à la préservation du rôle judiciaire des juges visés à l'art. 96. Bien que l'affaire n'ait pas été tranchée sur la base de la compétence fondamentale, le juge en chef Lamer a, dans des motifs concordants, précisé davantage la notion de compétence « fondamentale », expliquant qu'elle est « très limitée », de telle sorte que seuls « les pouvoirs qui ont une importance cruciale et qui sont *essentiels* à l'existence d'une cour supérieure dotée de pouvoirs inhérents et au maintien de son rôle vital au sein de notre système juridique » font partie du noyau de pouvoirs des cours visées à l'art. 96 qui est protégé par la Constitution (par. 56 (italique ajouté)).

[282] Cette nouvelle doctrine concernant la compétence fondamentale visait à identifier les pouvoirs qui ne pouvaient pas être *retirés* aux cours supérieures, étoffant ainsi l'analyse établie dans le *Renvoi sur la location résidentielle*, laquelle permet de délimiter les compétences qui peuvent être *accordées* aux tribunaux judiciaires ou administratifs provinciaux. Une attribution de compétence à un tribunal judiciaire ou administratif provincial qui satisfait l'analyse établie dans le *Renvoi sur la location résidentielle* peut avoir un caractère exclusif, pourvu que cette exclusivité n'engendre pas une perte corrélative de compétence à l'intérieur de la compétence fondamentale définie étroitement de la cour supérieure (*Residential Tenancies (1996)*, par. 71 et 75). Comme l'a fait observer le professeur Hogg, les seules [TRADUCTION] « restrictions d'ordre constitutionnel applicables quant aux pouvoirs qui peuvent être *retirés* à une cour supérieure » sont celles visant la catégorie étroite des pouvoirs faisant partie de la compétence « fondamentale » et, exception faite de ces pouvoirs, « la nature et la portée de la compétence des cours supérieures sont simplement des questions de politique générale auxquelles [. . .] les organ[es] législatif[s] compétent[s] doivent trouver des solutions et les édicter » (Peter W. Hogg, *Constitutional Law of Canada* (5e éd. suppl. (feuilles mobiles)), vol. 1, p. 7-43 (en italique dans l'original)).

[283] Définir la compétence fondamentale d'une cour visée à l'art. 96 consiste donc à identifier les aspects de cette compétence qui sont essentiels à sa nature et à sa capacité de traiter de manière efficace

effectively with the cases properly before it. That is why this Court said in *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, at para. 60, that a rule prohibiting courts from compelling documents covered by Cabinet confidences did not violate s. 96 because the rule "ha[d] not substantially altered the role of the judiciary from their function under the common law regime" (see also *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] 3 S.C.R. 3, at para. 22; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, at para. 27).

[284] The latest case that addressed the core of s. 96 jurisdiction was *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 S.C.R. 31, where the Court found that constraints on the superior court's ability to waive hearing fees which were too burdensome for litigants violated s. 96 because they left some individuals without *any* access to a court or tribunal. Chief Justice McLachlin explained the rationale as follows:

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts. [para. 32]

The applicants who could not access the superior court had no alternative, competent public forum in which to resolve their disputes, leading Chief Justice

les affaires dont elle est régulièrement saisie. C'est la raison pour laquelle, dans l'arrêt *Babcock c. Canada (Procureur général)*, [2002] 3 R.C.S. 3, par. 60, la Cour a statué qu'une règle interdisant aux tribunaux de contraindre la production de documents confidentiels du Cabinet ne violait pas l'art. 96, parce que la règle « n'a[vait] pas modifié fondamentalement le rôle de la magistrature par rapport aux fonctions qu'elle exerçait sous le régime de la common law » (voir aussi *Ontario c. Criminal Lawyers' Association of Ontario*, [2013] 3 R.C.S. 3, par. 22; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220; *Noël c. Société d'énergie de la Baie James*, [2001] 2 R.C.S. 207, par. 27).

[284] L'arrêt *Trial Lawyers Association of British Columbia c. Colombie-Britannique (Procureur général)*, [2014] 3 R.C.S. 31, est la plus récente affaire ayant porté sur la compétence fondamentale des cours visées à l'art. 96. Dans cette affaire, la Cour a conclu que des règles limitant la capacité de la cour supérieure de dispenser des plaideurs du paiement de frais d'audience trop onéreux portaient atteinte à l'art. 96, parce qu'elles privaient certaines personnes de *tout* accès à une cour de justice ou à un tribunal administratif. La juge en chef McLachlin a expliqué ainsi le raisonnement appuyant cette conclusion :

> Les cours supérieures ont toujours eu pour tâche de résoudre des différends opposant des particuliers et de trancher des questions de droit privé et de droit public. Des mesures qui empêchent des gens de s'adresser à cette fin aux tribunaux vont à l'encontre de cette fonction fondamentale des cours de justice. Considérées dans le contexte institutionnel du système de justice canadien, la résolution de ces différends et les décisions qui en résultent en matière de droit privé et de droit public sont des aspects centraux des activités des cours supérieures. De fait, les plaideurs constituent l'« achalandage » de ces tribunaux. Empêcher l'exercice de ces activités attaque le cœur même de la compétence des cours supérieures que protège l'art. 96 de la *Loi constitutionnelle de 1867*. Par conséquent, des frais d'audience qui ont pour effet de nier à des gens l'accès aux tribunaux portent atteinte à la compétence fondamentale des cours supérieures. [par. 32]

Les demandeurs concernés, qui ne pouvaient pas avoir accès à la cour supérieure, ne disposaient d'aucun autre forum public compétent à qui s'adresser

McLachlin to conclude that the superior court must preserve its inherent jurisdiction to hear claims that would otherwise go unresolved.

[285] As all of this jurisprudence shows, the first step of the analysis is to characterize the grant of jurisdiction to the provincial court.

[286] This Court's jurisprudence confirms that the boundaries of provincial court jurisdiction need not be drawn along the precise borders that existed at Confederation; rather, the inquiry centers on the type of case being heard. It is a functional approach which examines the purpose of the grant of jurisdiction.

[287] The operative question in the appeal before us is whether, at Confederation, superior courts in the four original provinces had *exclusive* jurisdiction over the type of monetary claims which were granted to the Court of Québec in art. 35. If they did not, the first stage of the *Residential Tenancies* test is met, which essentially means that it passes the *Residential Tenancies* test, period. In my view, the evidence is clear that the superior courts did not have exclusive jurisdiction at Confederation over what the Court of Appeal identified as "substantial claims". It is true that they had jurisdiction beyond a certain monetary threshold, but that does not mean that theirs was a more substantial jurisdiction.

[288] Currently, the jurisdiction granted to the provincial court by art. 35 is the power to adjudicate civil claims worth up to $85,000. The monetary cap is indicative of an inflection point, chosen by the legislature, to balance the jurisdiction of the provincial and the superior court. For the purpose of the *Residential Tenancies* test, the question is whether this point reflects the historical balance between provincial and superior courts. As Justice McLachlin

pour faire résoudre leurs différends, ce qui a amené la juge en chef McLachlin à conclure que la cour supérieure doit conserver sa compétence inhérente d'entendre des demandes qui autrement ne seraient pas tranchées.

[285] Comme le démontre toute cette jurisprudence, la première étape de l'analyse consiste à qualifier l'attribution de compétence à la cour provinciale.

[286] La jurisprudence de notre Cour confirme qu'il n'est pas nécessaire que les limites de la compétence des cours provinciales correspondent aux frontières précises qui existaient au moment de la Confédération; l'analyse doit plutôt être axée sur le type d'affaires qu'elles entendent. Il s'agit d'une approche fonctionnelle, qui s'attache à examiner l'objet de l'attribution de compétence.

[287] La question primordiale dans le pourvoi dont nous sommes saisis est celle de savoir si, au moment de la Confédération, les cours supérieures dans les quatre provinces originales avaient compétence *exclusive* sur le type de réclamations pécuniaires confiées à la Cour du Québec par l'art. 35. Si ce n'est pas le cas, il est alors satisfait à la première étape de l'analyse établie dans le *Renvoi sur la location résidentielle*, ce qui signifie concrètement que l'attribution de compétence satisfait à l'analyse, un point c'est tout. À mon avis, il ressort clairement de la preuve que, au moment de la Confédération, les cours supérieures n'avaient pas compétence exclusive sur ce que la Cour d'appel a qualifié de « réclamations substantielles ». Il est vrai que ces cours avaient compétence au-delà d'un seuil pécuniaire donné, mais cela ne veut pas dire que leur compétence était plus substantielle.

[288] Actuellement, la compétence conférée par l'art. 35 à la cour provinciale est le pouvoir de trancher des litiges civils d'un montant maximal de 85 000 $. Le plafond pécuniaire est indicatif d'un point d'inflexion, choisi par la législature, qui vise à équilibrer la compétence de la cour provinciale et celle de la cour supérieure. Pour les besoins de l'analyse établie dans le *Renvoi sur la location résidentielle*, la question qui se pose est celle de savoir si ce point reflète

wrote in *Residential Tenancies (1996)*, at para. 75, "If the inferior [*sic*] courts before Confederation alone exercised the power, or shared it in a practical way with the future superior courts, s. 96 is not engaged and *no further enquiry is required*" (emphasis added).

[289] In determining the historical involvement of provincial courts in deciding civil claims, it is instructive to look at the proportion of cases that were heard by different courts at Confederation (*Residential Tenancies (1996)*, at para. 77; *Sobeys Stores*, at p. 260). At the time, in most provinces, a majority of civil claims were heard by provincial courts. Each of the original provinces had slightly different systems of civil justice.

[290] The provincial courts with the most civil jurisdiction at Confederation were the division courts, which had broad civil jurisdiction subject to a monetary limit. The division courts in Upper Canada had a $40 limit on their jurisdiction in tort and a $100 limit on their jurisdiction for debt, or breach of contract (Donald Fyson, *Civil Justice in Mid-Nineteenth-Century British North America: Court Structure, Judges and Recourse to the Courts in Lower Canada, Upper Canada, New Brunswick and Nova Scotia*, April 10, 2018, at p. 28). In New Brunswick, the justices of the peace had jurisdiction over tort claims worth $8 and debt claims worth $20 but the City Court of Saint John could hear cases from within the city which were worth up to $80 (pp. 36 and 39). In Nova Scotia, justices of the peace could hear cases of debt worth up to $80 and the City Court of Halifax could hear cases worth up to $80 (pp. 43 and 46).

[291] In Upper Canada the division courts heard 83 percent of cases, in New Brunswick the justices

l'équilibre historique entre les cours provinciales et supérieures. Comme l'a écrit la juge McLachlin dans l'arrêt *Residential Tenancies (1996)*, par. 75 : « Si seuls les tribunaux inférieurs [*sic*] d'avant la Confédération exerçaient le pouvoir en question ou le partageaient dans la pratique avec les tribunaux qui allaient devenir les cours supérieures, l'art. 96 n'est alors pas visé et *il n'est pas nécessaire de poursuivre l'examen* » (italique ajouté).

[289] Pour déterminer quel était, sur le plan historique, l'engagement des cours provinciales dans la résolution des litiges civils, il est instructif d'examiner la proportion d'affaires qui étaient entendues par différents tribunaux au moment de la Confédération (*Residential Tenancies (1996)*, par. 77; *Sobeys Stores*, p. 260). À ce moment-là, dans la plupart des provinces, la majorité des litiges civils étaient entendus par les cours provinciales. Chacune des provinces originales était dotée d'un système de justice civile légèrement différent.

[290] Les tribunaux provinciaux qui possédaient la plus vaste compétence au moment de la Confédération étaient les cours de division, qui disposaient d'une large compétence civile soumise à une limite pécuniaire. La compétence des cours de division du Haut-Canada en matière de responsabilité délictuelle était limitée à 40 $, alors que leur compétence en matière de recouvrement de créances ou de rupture de contrat se limitait à 100 $ (Donald Fyson, *Civil Justice in Mid-Nineteenth-Century British North America : Court Structure, Judges and Recourse to the Courts in Lower Canada, Upper Canada, New Brunswick and Nova Scotia*, 10 avril 2018, p. 28). Au Nouveau-Brunswick, les juges de paix avaient compétence sur les actions en responsabilité délictuelle d'une valeur de 8 $ et en recouvrement de créances d'une valeur de 20 $, mais la cour municipale de Saint John pouvait entendre des affaires locales d'une valeur maximale de 80 $ (p. 36 et 39). En Nouvelle-Écosse, les juges de paix pouvaient entendre des affaires en recouvrement de créances d'une valeur maximale de 80 $, et la cour municipale de Halifax pouvait entendre des affaires d'une valeur maximale de 80 $ (p. 43 et 46).

[291] Dans le Haut-Canada, les cours de division entendaient 83 p. 100 des affaires. Tant au

of the peace and City Court together heard 81 percent of cases, and in Nova Scotia the justices of the peace and City Court also heard 81 percent of cases (pp. 85, 94 and 100). In Lower Canada, in 1866, the more local rural circuit courts themselves s. 96 courts, heard approximately 55 percent of cases, whereas the Superior Court heard approximately 5 percent of cases and the remaining 40 percent of cases were heard by various provincial courts (p. 72).

[292] Comparing the proportion of cases heard then with today's distribution shows that a grant of $85,000 of civil jurisdiction, like the grant of $70,000 in 2002, not only continues to respect the balance struck at the time of Confederation, but leaves superior courts with more civil jurisdiction than they had at that time. In three of the four original provinces, superior courts heard less than 20 percent of civil claims. Today, the Superior Court of Quebec hears about 28 percent of civil claims (Ministère de la Justice, *Nombre de dossiers ouverts à la Cour supérieure et à la Cour du Québec (2012-13 à 2017-18)*). This represents a proportionally greater involvement for the Superior Court today than that of s. 96 courts across the colonies in the 1860s.

[293] Clearly, the superior courts at Confederation did *not* have exclusive jurisdiction over civil claims in general. Any exclusive jurisdiction was limited to a small proportion of civil claims above a certain monetary threshold. This threshold was not, however, a marker which indicated when claims became substantial, it simply aimed to maintain a balance between the different types of courts in operation at the time. While the superior courts had jurisdiction over amounts above $100, as Justice Wilson noted in *Sobeys Stores* this did not mean that the provincial courts did not *also* have jurisdiction over "substantial" claims:

Nouveau-Brunswick qu'en Nouvelle-Écosse, les juges de paix et les cours municipales entendaient, ensemble, 81 p. 100 des affaires (p. 85, 94 et 100). Dans le Bas-Canada, en 1866, les tribunaux itinérants des régions rurales, qui étaient eux-mêmes des cours visées à l'art. 96, entendaient environ 55 p. 100 des affaires, tandis que la Cour supérieure en entendait environ 5 p. 100, et le reste des affaires — 40 p. 100 — étaient entendues par divers tribunaux provinciaux (p. 72).

[292] Si on compare la proportion des affaires entendues à l'époque avec la proportion actuelle, on constate que l'attribution d'une compétence pécuniaire de 85 000 $ en matière civile, tout comme l'attribution d'une compétence de 70 000 $ en 2002, respecte non seulement l'équilibre établi au moment de la Confédération, mais accorde également aux cours supérieures une compétence civile plus vaste que celle dont elles disposaient alors. Dans trois des quatre provinces originales, les cours supérieures entendaient moins de 20 p. 100 des réclamations civiles. Aujourd'hui, la Cour supérieure du Québec entend environ 28 p. 100 des réclamations civiles (Ministère de la Justice, *Nombre de dossiers ouverts à la Cour supérieure et à la Cour du Québec (2012-13 à 2017-18)*). Ce chiffre représente, proportionnellement, un engagement plus grand de la Cour supérieure aujourd'hui que celui des cours visées à l'art. 96 dans l'ensemble des colonies dans les années 1860.

[293] De toute évidence, au moment de la Confédération, les cours supérieures *n*'avaient *pas* compétence exclusive sur les réclamations civiles en général. Dans les cas où il y avait compétence exclusive, celle-ci se limitait à une petite proportion de réclamations civiles dont la valeur dépassait un seuil pécuniaire donné. Toutefois, ce seuil ne constituait pas une marque indiquant le point où les réclamations devenaient substantielles, il visait simplement à maintenir l'équilibre entre les différents types de tribunaux qui existaient à l'époque. Même si les cours supérieures avaient compétence à l'égard des litiges d'une valeur supérieure à 100 $, comme l'a fait remarquer la juge Wilson dans l'arrêt *Sobeys Stores*, cela ne signifiait pas que les cours provinciales n'avaient pas elles *aussi* compétence à l'égard de réclamations « substantielles » :

An examination of the court system in pre-Confederation Upper Canada reveals . . . that inferior courts had sufficient shared involvement in the area of unjust dismissal. The Division Courts, of which there could be as many as twelve per district, were the forerunners of today's Small Claims Courts, and their civil jurisdiction was defined in *An Act respecting the Division Courts*, C.S.U.C. 1859, c. 19, s. 55:

> **55.** The Judge of every Division Court may hold plea of, and may hear and determine in a summary way, for or against persons, bodies corporate or otherwise:
>
> . . .
>
> 2. All claims and demands of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed one hundred dollars, and except in cases in which a jury is legally demanded by a party as hereinafter provided, he shall be sole judge in all actions brought in such Division Courts, and shall determine all questions of law and fact in relation thereto, and he may make such orders, judgments or decrees thereupon as appear to him just and agreeable to equity and good conscience, and every such order, judgment and decree, shall be final and conclusive between the parties.

Given inflation, a contract *jurisdiction of up to $100 in 1867 must be considered the equivalent of quite a substantial monetary jurisdiction today*. Since the Division Court system also covered the entire colony, I would conclude that at Confederation jurisdiction in the area of unjust dismissal was shared by superior and inferior courts to an extent sufficient to pass the historical test. [Emphasis added; pp. 269-70.]

[294] Since, as this passage from *Sobeys Stores* confirms, both courts shared jurisdiction over "substantial" monetary claims, the superior courts did not have exclusive jurisdiction over civil claims at Confederation, nor were they ever the only court entrusted with deciding substantial cases. This means that art. 35 *C.C.P.* is a *prima facie* valid grant of exclusive jurisdiction to the provincial court under the *Residential Tenancies* test.

Un examen du système judiciaire antérieur à la Confédération dans le Haut-Canada révèle [. . .] un engagement partagé suffisant des tribunaux inférieurs en matière de congédiement abusif. Les cours divisionnaires, dont il pouvait y avoir jusqu'à douze par district, ont été les précurseurs des cours des petites créances d'aujourd'hui; leur compétence civile a été définie dans la loi intitulée *An Act respecting the Division Courts*, C.S.U.C. 1859, chap. 19, art. 55:

> [TRADUCTION] **55.** Le juge d'une cour divisionnaire peut entendre et trancher de façon sommaire, en faveur ou à l'encontre de toute personne, corps constitués ou autre :
>
> . . .
>
> 2. Toute réclamation et demande fondée sur une obligation, sur un compte ou l'inexécution d'un contrat ou d'une convention, ou toute demande de paiement d'argent, en espèces ou non, lorsque la somme ou le solde réclamé n'excède pas cent dollars et, sauf dans les cas où un jury est légalement exigé par l'une des parties, tel qu'il est ci-après prévu, il est seul juge dans toutes les actions intentées dans les cours divisionnaires, il statue sur toutes les questions de droit et de fait y relatives et il rend à leur égard les ordonnances ou jugements qui lui paraissent justes et conformes à l'équité et à la conscience et tout jugement ou ordonnance de ce genre est final et lie définitivement les parties.

Compte tenu de l'inflation, une *compétence* en matière contractuelle *s'élevant jusqu'à 100 $ en 1867 doit être considérée comme l'équivalent d'une compétence monétaire fort substantielle de nos jours*. Comme le système des cours divisionnaires s'étendait aussi à l'ensemble de la colonie, je conclus qu'à l'époque de la Confédération les cours supérieures et les tribunaux inférieurs se partageaient suffisamment la compétence en matière de congédiement abusif pour satisfaire au critère historique. [Italique ajouté; p. 269-270.]

[294] Étant donné, comme le confirme ce passage tiré de l'arrêt *Sobeys Stores*, que les deux cours se partageaient la compétence à l'égard des réclamations pécuniaires « substantielles », les cours supérieures n'avaient pas compétence exclusive sur les réclamations civiles au moment de la Confédération, et elles n'ont jamais été non plus les seules cours investies du pouvoir de trancher des affaires substantielles. Cela signifie que l'art. 35 *C.p.c.* constitue *prima facie* une attribution valide d'une compétence exclusive à la cour provinciale suivant l'analyse établie dans le *Renvoi sur la location résidentielle*.

[295] The Court of Appeal, however, reframed the reference question as follows: "By limiting the jurisdiction of the Superior Court of Quebec to adjudicate disputes in civil matters to cases in which the value in dispute is $85,000 and more, is the legislature infringing on the core jurisdiction of the Superior Court of Quebec to adjudicate private law disputes?" As a result, it did not apply the *Residential Tenancies* test at all, relying exclusively on finding a violation of the Superior Court's core jurisdiction. It acknowledged Justice Wilson's quote in *Sobeys Stores* that provincial courts enjoyed "quite a substantial monetary jurisdiction" at Confederation but nonetheless drew the inference that since superior courts had exclusive jurisdiction over claims worth more than $100, they had jurisdiction over "substantial civil disputes".

[296] Its argument for creating a new core of "substantial civil disputes" amounts to this: since the provincial court had jurisdiction over what were deemed to be "quite substantial" claims of $100, and since the superior courts had jurisdiction over claims of more than $100, the superior court's jurisdiction was over "more substantial" claims and therefore the superior courts had jurisdiction over *all* substantial claims.

[297] How do we calculate the difference between what Justice Wilson called "quite substantial" civil claims heard by the provincial court, and the "substantial" civil claims arrogated to the superior courts by the Court of Appeal, let alone for the purpose of constitutional analysis? The artificiality of the exercise is reinforced by the Court of Appeal's conclusion that claims worth up to $70,000 were not substantial but that anything more is. How much money does it take to qualify for "substantial" status? After all, one litigant's substantial amount may be another litigant's spare change, as George Bernard Shaw wryly demonstrated through the following exchange in *Pygmalion* between Professor Henry

[295] Toutefois, la Cour d'appel a reformulé ainsi la question du renvoi : « [E]n limitant la compétence de la Cour supérieure du Québec de trancher les différends en matière civile aux affaires dans lesquelles la valeur de l'objet en litige est de 85 000 $ et plus, la législature porte-t-elle atteinte à la compétence fondamentale de la Cour supérieure du Québec de trancher des différends de droit privé? » Il s'ensuit que la Cour d'appel n'a pas appliqué du tout l'analyse établie dans le *Renvoi sur la location résidentielle*, se concentrant exclusivement sur la question de savoir s'il y a eu atteinte à la compétence fondamentale de la Cour supérieure. Bien qu'elle ait cité les propos formulés par la juge Wilson dans l'arrêt *Sobeys Stores* selon lesquels les cours provinciales jouissaient d'une « compétence monétaire fort substantielle » au moment de la Confédération, la Cour d'appel a néanmoins tiré l'inférence que, comme les cours supérieures avaient compétence exclusive sur les réclamations de plus de 100 $, elles avaient compétence sur les « différends civils substantiels ».

[296] Son argument au soutien de la création d'une nouvelle compétence fondamentale sur les « différends civils substantiels » peut être résumé ainsi : comme la cour provinciale avait compétence sur des réclamations de 100 $, considérées comme « fort substantielles », et comme les cours supérieures avaient compétence sur les réclamations de plus de 100 $, la compétence de la cour supérieure portait sur des réclamations « plus substantielles » et, par conséquent, les cours supérieures avaient compétence sur *toutes* les réclamations substantielles.

[297] Comment calcule-t-on la différence entre ce que la juge Wilson qualifiait de réclamations civiles « fort substantielle[s] » entendues par la cour provinciale et les réclamations civiles « substantielles » attribuées à tort par la Cour d'appel aux cours supérieures, a fortiori pour les besoins d'une analyse constitutionnelle? Le caractère artificiel de l'opération ressort avec encore plus d'acuité à la lumière de la conclusion de la Cour d'appel portant que les réclamations d'une valeur allant jusqu'à 70 000 $ ne sont pas substantielles, mais que toutes celles excédant ce montant le sont. À combien doit s'élever une réclamation pour être qualifiée de « substantielle »? Après tout, une somme substantielle pour un plaideur

Higgins and his friend Colonel Pickering, where Higgins explains to Pickering why he is prepared to accept Liza Doolittle's few coins instead of his normal rates for language instruction:

HIGGINS . . . You know, Pickering, if you consider a shilling, not as a simple shilling, but as a percentage of this girl's income, it works out as fully equivalent to sixty or seventy guineas from a millionaire.

PICKERING How so?

HIGGINS Figure it out. A millionaire has about 150 pounds a day. She earns about half-a-crown. She offers me two-fifths of her day's income for a lesson. Two-fifths of a millionaire's income for a day would be somewhere about 60 pounds. It's handsome. By George, it's enormous! [I]t's the biggest offer I ever had.

LIZA [*rising, terrified*] Sixty pounds! What are you talking about? I never offered you sixty pounds. Where would I get —

(1913 (reprinted 2008), at pp. 43-44)

[298] The Court of Appeal asserted that superior courts have an untouchable core over civil matters and that this core guarantees litigants the right to have their matters adjudicated by a s. 96 court. It concluded that the power of superior courts to hear civil cases was part of the integral functions of superior courts and that to remove this power would emasculate the courts or fundamentally alter their nature. In support of this proposition, it relies on a single statement from *B.C. Trial Lawyers*, at para. 32, indicating that the core jurisdiction of superior courts involves the power to "resolve disputes between individuals and decide questions of private . . . law".

[299] In my respectful view, *B.C. Trial Lawyers* did not broaden the core monetary jurisdiction of superior courts. The case stands for the proposition that

peut être de la petite monnaie pour un autre, comme l'a ironiquement démontré George Bernard Shaw dans l'échange suivant, tiré de la pièce *Pygmalion*, entre le professeur Henry Higgins et son ami, le colonel Pickering, où Higgins explique à Pickering pourquoi il est prêt à accepter les quelques pièces que lui offre Liza Doolittle, plutôt que son tarif habituel, en guise de paiement pour des leçons de langue :

HIGGINS [. . .] Dites donc, Pickering, si vous considérez un franc non comme un simple franc, mais par rapport au gain de cette fille, vous voyez qu'il est largement l'équivalent de douze ou quinze cents francs d'un millionnaire.

PICKERING Comment cela?

HIGGINS Prenez des chiffres. Un millionnaire a environ trois mille francs par jour. Et elle, elle gagne environ quatre francs par jour. Elle m'offre deux cinquièmes de son revenu quotidien pour une leçon. Or, les deux cinquièmes du revenu quotidien d'un millionnaire se monteraient à environ douze cents francs. C'est beau. Pardieu, c'est énorme! C'est l'offre la plus forte que j'aie jamais eue!

LIZA [*se levant, terrifiée*] Douze cents balles! Mais d'quoi que vous parlez? Jamais j'vous ai offert douze cents balles. Où c'est que j'irais les . . .

((1967), p. 55-56)

[298] La Cour d'appel a affirmé que les cours supérieures possèdent un noyau intouchable de compétence en matière civile, et que ce noyau garantit aux plaideurs le droit de faire trancher leurs litiges par une cour visée à l'art. 96. Elle a conclu que le pouvoir des cours supérieures d'entendre des litiges civils fait partie intégrante des fonctions de ces tribunaux, et que leur retirer ce pouvoir les affaiblirait considérablement ou modifierait fondamentalement leur nature. Au soutien de cette proposition, elle invoque une seule déclaration, tirée de l'arrêt *B.C. Trial Lawyers*, par. 32, selon laquelle la compétence fondamentale des cours supérieures inclut le pouvoir de « résoudre des différends opposant des particuliers et de trancher des questions de droit privé ».

[299] Avec égards, l'arrêt *B.C. Trial Lawyers* n'a pas élargi le champ de la compétence pécuniaire fondamentale des cours supérieures. Cet arrêt permet

when hearing fees leave litigants without the opportunity to access a public, independent and impartial tribunal, superior court judges must have discretion to waive those fees. It does not stand for the principle that litigants have an unfettered constitutional right to bring all civil disputes to a superior court.

[300] My colleagues Justices Côté and Martin conclude that absent protections for a core jurisdiction over civil claims, the superior courts will no longer be able to provide "jurisprudential guidance on private law" (at para. 86), jeopardizing the "rule of law" in this country. While it is clear that this Court has recognized a link between core jurisdiction and the rule of law, my colleagues have, with respect, vastly overstated the reach of that concept. In the s. 96 context, "the rule of law" means that superior courts must have the autonomy to enforce their own judgments, that courts must be impartial and independent and that superior courts must maintain residual jurisdiction over cases which otherwise have not been assigned to a competent forum (*MacMillan Bloedel*; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*P.E.I. Reference*"); *B.C. Trial Lawyers*). The rule of law does not mean that if some questions of private law are determined in one independent and impartial forum rather than another, Canada's "actual order of positive laws" will be impermissibly altered (Côté and Martin JJ.'s reasons, at para. 85).

[301] There is no doubt that legislation cannot have the effect of taking away the authority superior courts need in order to make sure that they can effectively adjudicate the claims which are properly before them and to enforce their orders in those cases, but "core" jurisdiction has been held to be a narrow concept, not a malleable one. It is intended to protect only the essential role and function of superior courts. As long as the "essential character" of superior courts is neither undermined nor impaired, provincial legislatures are constitutionally entitled to exercise their

d'affirmer que, lorsque des frais d'audience empêchent des plaideurs d'avoir accès à un tribunal public, indépendant et impartial, les juges des cours supérieures doivent disposer du pouvoir discrétionnaire de dispenser les plaideurs de ces frais. Il n'établit pas le principe que les plaideurs possèdent un droit constitutionnel absolu de soumettre tous litiges civils à une cour supérieure.

[300] Mes collègues les juges Côté et Martin concluent qu'en l'absence de mesures protégeant la compétence fondamentale en matière de réclamations civiles, les cours supérieures ne seront plus capables de développer « la jurisprudence en matière de droit privé » (par. 86), ce qui compromettrait la « primauté du droit » au pays. Bien qu'il soit évident que la Cour a reconnu l'existence d'un lien entre la compétence fondamentale et la primauté du droit, mes collègues ont, soit dit en tout respect, grandement exagéré la portée de ce concept. Dans le contexte de l'art. 96, la « primauté du droit » signifie que les cours supérieures doivent disposer de l'autonomie nécessaire pour faire respecter leurs propres décisions, elles doivent être impartiales et indépendantes, et elles doivent conserver une compétence résiduelle sur les affaires qui n'ont pas été assignées à un forum compétent (*MacMillan Bloedel*; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi relatif à l'Î.-P.-É.* »); *B.C. Trial Lawyers*). La primauté du droit ne signifie pas que si certaines questions de droit privé sont tranchées par un forum impartial et indépendant plutôt que par un autre, l'« ordre réel de droit positif » au Canada sera modifié de façon inacceptable (motifs des juges Côté et Martin, par. 85).

[301] Il ne fait aucun doute qu'une mesure législative ne peut pas avoir pour effet de retirer aux cours supérieures le pouvoir dont elles ont besoin pour statuer efficacement sur les litiges qui leur sont régulièrement soumis et pour faire respecter les ordonnances qu'elle rendent dans ces affaires, mais il a été jugé que la compétence « fondamentale » est un concept étroit, et non pas un concept malléable. Il vise à protéger uniquement la fonction et le rôle essentiels des cours supérieures. Tant que le « caractère essentiel » des cours supérieures n'est ni

jurisdiction under s. 92(14) by creating and authorizing provincial courts, even exclusively, to respond to local justice needs, not as those needs existed at Confederation, but as they exist now.

[302] There is no evidence that reducing the civil jurisdiction of the Superior Court of Quebec by $15,000 has impaired the ability of the Superior Court to perform any of its recognized core functions. In fact, art. 35 *C.C.P.* does not alter *any* of the characteristics or attributes of the Superior Court of Quebec, let alone materially. The notion that our superior courts have inherited some core power over the development of private law from the pre-Confederation English courts of inherent jurisdiction is irreconcilable with the fact that superior courts, since Confederation, have shared that role with a number of provincial courts. In other words, superior courts have never had the exclusive responsibility of guiding the development of private law. This role, therefore, cannot be part of superior courts' core jurisdiction. The "core" test from *MacMillan Bloedel*, no matter how it is applied, results in the conclusion that reducing the exclusive jurisdiction of the Superior Court by $15,000 does not impair the core of that court in any way.

[303] Although the classic application of the *Residential Tenancies*/*MacMillan Bloedel* test is dispositive of the appeal, this case reveals some of the fault lines of that approach. It may be time to consider replacing the test in a way that updates the law on the relationship between ss. 92(14) and 96 and synchronizes it with this Court's approach to constitutional interpretation generally and, in particular, with Chief Justice Lamer's observations in *Residential Tenancies (1996)* where he invoked Lord Sankey's famous admonition in the 1929 "Persons" case (*Edwards v. Attorney-General for Canada*, [1930]

compromis ni affaibli, les législatures provinciales sont constitutionnellement autorisées à exercer la compétence que leur accorde le par. 92(14) en créant des cours provinciales et en les habilitant, même de façon exclusive, à répondre aux besoins locaux en matière de justice, non pas aux besoins tels qu'ils existaient au moment de la Confédération, mais tels qu'ils existent maintenant.

[302] Il n'y a aucune preuve que le fait de réduire de 15 000 $ la compétence civile de la Cour supérieure du Québec compromet sa capacité de s'acquitter de l'une ou l'autre de ses fonctions fondamentales reconnues. En fait, l'art. 35 *C.p.c.* n'a pas pour effet de modifier *quelque* caractéristique ou attribut de la Cour supérieure du Québec, encore moins de façon concrète. L'idée selon laquelle nos cours supérieures ont hérité des tribunaux anglais préconfédératifs dotés d'une compétence inhérente un certain pouvoir fondamental sur l'évolution du droit privé est incompatible avec le fait que, depuis la Confédération, les cours supérieures ont partagé ce rôle avec un certain nombre de cours provinciales. En d'autres termes, les cours supérieures n'ont jamais eu la responsabilité exclusive de guider l'évolution du droit privé. Par conséquent, ce rôle ne saurait faire partie de la compétence fondamentale des cours supérieures. Peu importe comment il est appliqué, le critère relatif au noyau de pouvoirs ou à la compétence fondamentale énoncé dans l'arrêt *MacMillan Bloedel* mène à la conclusion que le fait de réduire de 15 000 $ la compétence exclusive de la Cour supérieure n'affaiblit d'aucune manière la compétence fondamentale de ce tribunal.

[303] Bien que l'application classique de l'analyse établie dans les arrêts *Renvoi sur la location résidentielle* et *MacMillan Bloedel* permette de trancher le pourvoi, la présente affaire révèle certaines des lacunes de cette approche. Il est peut-être temps d'envisager de remplacer l'analyse de manière à actualiser le droit relatif à l'interaction entre le par. 92(14) et l'art. 96 et à le mettre en phase avec la méthode d'interprétation constitutionnelle de la Cour en général et, plus particulièrement, avec les observations suivantes du juge en chef Lamer dans *Residential Tenancies (1996)*, dans lequel ce

A.C. 124 (P.C.)) that the Constitution is a "living tree" to be interpreted flexibly:

> Notwithstanding the importance of s. 96 in its institutional context (i.e. the protection of the independence and the "core" jurisdiction of superior courts), we have recognized that *a constitution is a "living tree"* which must be capable of accommodating new areas and new interests. Consequently, a flexible approach has been adopted in determining when judicial power may be transferred to inferior courts and tribunals.
>
> Consistent with this flexible approach, this Court, on occasion, has expressed sympathy for the proposition that s. 96 should not be interpreted so as to thwart or unduly restrict the future growth of provincial administrative tribunals. We have acknowledged that *"[a]daptations must be permitted to allow the legislatures scope to deal effectively with emerging social problems and concerns, and to develop new techniques of dispute resolution and the expeditious disposition of relatively minor disputes" for the benefit of its citizenry*. After all, the Constitution is a document for the people and one of the most important goals of any system of dispute resolution is to serve well those who make use of it. For most civil matters, individual litigants are largely concerned with obtaining access to inexpensive and expedient adjudication.
>
> The challenge for this Court is to balance these institutional and individual concerns while ensuring that s. 96 continues to play an important and meaningful role in Canadian society. [Emphasis added; citations omitted; text in brackets in original; paras. 27-29.]

[304] That living tree has been well watered by this Court, not only to protect both provincial and federal spheres of jurisdiction, but also to give them flexibility when doing so does not materially impair the other's ability to exercise its constitutional mandate. This has come to be known as flexible or cooperative federalism and has been used by this Court as an aid in interpreting the Constitution and resolving

dernier a invoqué la célèbre mise en garde de lord Sankey dans l'affaire « Persons » de 1929 (*Edwards c. Attorney-General for Canada*, [1930] A.C. 124 (C.P.)), selon laquelle la Constitution est comme un « arbre » et doit recevoir une interprétation souple :

> Malgré l'importance de l'art. 96 du point de vue institutionnel (c'est-à-dire le fait qu'il protège l'indépendance et la compétence fondamentale des cours supérieures), nous avons reconnu qu'*une constitution est comme un « arbre »*, et qu'elle doit être capable d'adaptation à de nouveaux domaines et à de nouveaux intérêts. Par conséquent, une démarche souple a été adoptée afin de déterminer dans quels cas des pouvoirs judiciaires peuvent être transférés à des tribunaux inférieurs et à des tribunaux administratifs.
>
> Conformément à cette démarche souple, notre Cour a, à l'occasion, indiqué qu'elle comprenait l'argument que l'art. 96 ne doit pas être interprété de façon à faire échec à la croissance que sont appelés à connaître les tribunaux administratifs provinciaux, ou de façon à restreindre indûment cette croissance. Nous avons reconnu que *« [d]es adaptations doivent être permises de façon à donner aux législatures la possibilité de faire face aux nouveaux problèmes et intérêts sociaux et de mettre au point de nouvelles techniques de solution des litiges et de règlement rapide des litiges relativement peu importants » pour le bénéfice de ses citoyens*. Après tout, la Constitution est un document fait pour le peuple, et l'un des objectifs les plus importants de tout mécanisme de règlement des différends est de bien servir ceux qui y ont recours. Règle générale, en matière civile, les particuliers plaideurs sont surtout intéressés à recourir à des mécanismes décisionnels rapides et peu coûteux.
>
> La difficulté que doit surmonter notre Cour est de trouver un équilibre entre les considérations institutionnelles et les préoccupations des individus, tout en faisant en sorte que l'art. 96 continue de jouer un rôle important et utile dans la société canadienne. [Italique ajouté; références omises; texte entre crochets dans l'original; par. 27-29.]

[304] Cet arbre a été bien arrosé par notre Cour, non seulement pour protéger les sphères de compétence provinciale et fédérale, mais aussi pour donner à l'une une certaine extension lorsque le faire n'affaiblit pas de façon appréciable la capacité de l'autre de s'acquitter de son mandat constitutionnel. Ce principe que l'on appelle désormais le fédéralisme souple ou coopératif a été appliqué par notre Cour comme

tensions between federal and provincial heads of power (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32; *R. v. Comeau*, [2018] 1 S.C.R. 342, at para. 77).

[305] In *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, for example, this Court held that a provincial Act aimed at protecting heritage objects could apply to the artifacts of Indigenous people, even though the Act had a disproportionate effect on the people regulated by federal jurisdiction over aboriginal affairs under s. 91(24). Cooperative federalism is also why this Court's jurisprudence on the division of powers recognizes that the provincial and federal powers are not watertight compartments, and that both levels of government can legislate over the same subject matter so long as there is no operational conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161). Provincial laws will not be invalid simply because they *affect* an area that could have been federally regulated, there must be some form of impairment or frustration of purpose (Hogg, at pp. 15-28 to 15-29 and 16-4 to 16-10.6). It is an approach that recognizes that "[i]t is . . . fundamental . . . that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another" (*Reference re Securities Act*, [2011] 3 S.C.R. 837, at para. 7). And in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, this Court stated that a "legitimate interplay between federal and provincial powers" should be favoured to doctrines which strictly limit provincial authority (paras. 36-37).

[306] This approach to federalism not only accepts that overlap between federal and provincial powers is "inevitable", but that it is useful because it allows governments to respond to a complex interplay of issues (*NIL/TU,O Child and Family Services Society*

un outil d'aide à l'interprétation de la Constitution et à la résolution des conflits entre les chefs de compétence fédéraux et provinciaux (*Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 32; *R. c. Comeau*, [2018] 1 R.C.S. 342, par. 77).

[305] À titre d'exemple, dans l'arrêt *Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)*, [2002] 2 R.C.S. 146, la Cour a conclu qu'une loi provinciale protégeant les objets patrimoniaux pouvait s'appliquer aux artefacts des peuples autochtones, même si la loi avait un effet disproportionné sur les personnes relevant du pouvoir fédéral sur les questions autochtones prévu au par. 91(24). Le fédéralisme coopératif est aussi la raison pour laquelle la jurisprudence de la Cour sur le partage des compétences reconnaît que les pouvoirs provinciaux et fédéraux ne sont pas des compartiments étanches et que les deux ordres de gouvernement peuvent légiférer sur la même matière, pour autant qu'il n'y ait pas de conflit d'application (*Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161). Les lois provinciales ne seront pas invalides simplement parce qu'elles *touchent* à un domaine qui aurait pu être régi par le fédéral; il doit exister une forme d'atteinte ou d'entrave à la réalisation d'un objectif (Hogg, p. 15-28 à 15-29 et 16-4 à 16-10.6). C'est une approche qui reconnaît que « [l]a proposition suivant laquelle tant les pouvoirs fédéraux que ceux des provinces doivent être respectés et qu'un pouvoir ne peut être utilisé d'une manière telle que cela revienne en réalité à en vider un autre de son essence constitue un principe fondamental du fédéralisme » (*Renvoi relatif à la Loi sur les valeurs mobilières*, [2011] 3 R.C.S. 837, par. 7). Qui plus est, dans l'arrêt *Banque canadienne de l'Ouest c. Alberta*, [2007] 2 R.C.S. 3, la Cour a déclaré qu'une « interaction légitime des pouvoirs fédéraux et provinciaux » devait être privilégiée par rapport aux doctrines qui limitent strictement les pouvoirs des provinces (par. 36-37).

[306] Une telle approche à l'égard du fédéralisme accepte non seulement qu'un chevauchement entre les pouvoirs fédéraux et provinciaux est « inévitable », mais également qu'il est utile parce qu'il permet aux gouvernements de répondre à un

v. B.C. Government and Service Employees' Union, [2010] 2 S.C.R. 696, at paras. 42-43). It also explains this Court's permissive approach to paramountcy, a doctrine which invalidates provincial laws which *interfere* with federal laws (*Chatterjee v. Ontario (Attorney General)*, [2009] 1 S.C.R. 624, at para. 53). In *Orphan Well Association v. Grant Thornton Ltd.*, [2019] 1 S.C.R. 150, this Court said: "Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority" (para. 66). Similarly, in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] 3 S.C.R. 419, the Court explained that a "restrained approach" to paramountcy was in order and that a harmonious approach favouring compatibility should be taken (para. 21).

ensemble complexe de questions (*NIL/TU,O Child and Family Services Society c. B.C. Government and Service Employees' Union*, [2010] 2 R.C.S. 696, par. 42-43). Cette approche explique également l'interprétation permissive de la Cour à l'égard de la prépondérance, doctrine qui invalide les lois provinciales qui *empiètent* sur des lois fédérales (*Chatterjee c. Ontario (Procureur général)*, [2009] 1 R.C.S. 624, par. 53). Dans l'arrêt *Orphan Well Association c. Grant Thornton Ltd.*, [2019] 1 R.C.S. 150, la Cour a affirmé que « [l]e conflit doit être défini de façon étroite pour que chaque ordre de gouvernement puisse agir aussi librement que possible dans sa sphère de compétence constitutionnelle respective » (par. 66). De même, dans l'arrêt *Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, [2015] 3 R.C.S. 419, la Cour a expliqué que les tribunaux doivent adopter une « approche restrictive » à l'égard de la prépondérance et qu'une interprétation harmonieuse favorisant la compatibilité doit être privilégiée (par. 21).

[307] Most recently, in *Comeau*, the Court decided that provincially enacted prohibitions on owning liquor purchased from an entity other than the provincial commission did not violate s. 121 of the Constitution which protects the free transfer of goods throughout the country. The Court explained that

[307] Récemment, dans l'arrêt *Comeau*, la Cour a jugé que des dispositions édictées par une province qui prohibaient la possession de boissons alcooliques achetées auprès d'une entité autre que la société des alcools provinciale ne contrevenaient pas à l'art. 121 de la Constitution qui protège la libre circulation des marchandises dans l'ensemble du pays. La Cour a donné les explications suivantes :

> s. 121 prohibits the imposition of charges on goods crossing provincial boundaries — tariffs and tariff-like measures. At the same time, the historical *evidence nowhere suggests that provinces, for example, would lose their power to legislate under s. 92 of the Constitution Act, 1867 for the benefit of their constituents even if that might have impacts on interprovincial trade*. [Emphasis added; para. 67.]

> . . . l'art. 121 interdit l'imposition de tarifs et d'autres mesures semblables sur les biens qui circulent d'une province à une autre. Parallèlement, *la preuve* historique *n'indique nullement que les provinces, par exemple, perdraient leur pouvoir de légiférer en vertu de l'art. 92 de la Loi constitutionnelle de 1867 dans l'intérêt de leurs citoyens, même si cela pouvait avoir une incidence sur le commerce interprovincial*. [Italique ajouté; par. 67.]

It called for "provisions like s. 121" being "interpreted in a way that does not deprive Parliament and provincial legislatures of the powers granted to them to deal effectively with problems that arise" (para. 72). Moreover, it explained: "An expansive interpretation of federal powers is typically met with calls for recognition of broader provincial powers,

La Cour a indiqué que « [l]'interprétation » donnée aux « dispositions comme l'art. 121 [. . .] doit être telle qu'elle ne prive pas le Parlement et les législatures des pouvoirs qui leur sont conférés pour traiter efficacement les problèmes qui se posent » (par. 72). En outre, la Cour a expliqué qu'une « interprétation large des pouvoirs fédéraux s'accompagne

and vice versa; the two are in a symbiotic relationship" (para. 79).

[308] There is no reason why such an approach should not be extended to our understanding of the relationship between s. 92(14), which allows provinces to create courts of civil or criminal jurisdiction, and s. 96.

[309] As Prof. Hogg noted, this Court's approach to s. 96 has been "regrettable" and an "impediment to much new regulatory or social policy" (p. 7-38.1). He also criticized the parochialism of the *Residential Tenancies* test:

> . . . [The *Residential Tenancies* test] is not satisfactory as constitutional-law doctrine. Each of the three steps is vague and disputable in many situations, and small differences between the provinces in their history or institutional arrangements can spell the difference between the validity and invalidity of apparently similar administrative tribunals . . . . The courts are unlikely to abandon doctrine which has been built up over a long time; nor are they likely to abandon their concern (which I regard as extravagant) to prevent the erosion of superior-court jurisdiction. [pp. 7-49 to 7-50]

[310] Other scholars have argued that the test itself is unduly technical and history-based, making it antithetical to this Court's practice of applying purposive constitutional interpretation. In their view, too rigorous an application of the test may lead to institutions being frozen in time in a way that makes them [TRANSLATION] "outdated and inefficient" (Gaétan Migneault, "L'administration de la justice et la structure judiciaire canadienne" (2006), 37 *R.D.U.S.* 41, at p. 43; see also J. Gareth Morley, "Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada" (2016), 53 *Osgoode Hall L.J.* 745).

habituellement d'appels à la reconnaissance de pouvoirs provinciaux plus larges, et vice versa; ces pouvoirs sont en symbiose » (par. 79).

[308] Il n'y a aucune raison de ne pas élargir cette approche à notre conception de la relation entre le par. 92(14), qui habilite les provinces à créer des tribunaux de juridiction civile ou criminelle, et l'art. 96.

[309] Comme l'a souligné le professeur Hogg, l'approche appliquée par notre Cour à l'égard de l'art. 96 est [TRADUCTION] « regrettable » et constitue un « obstacle à beaucoup de nouvelles politiques réglementaires ou sociales » (p. 7-38.1). Il a aussi critiqué le particularisme de l'analyse établie dans le *Renvoi sur la location résidentielle* :

> [TRADUCTION] . . . [L'analyse établie dans le *Renvoi sur la location résidentielle*] n'est pas satisfaisante comme doctrine de droit constitutionnel. Chacune des trois étapes est vague et contestable dans bien des situations, et de petites divergences entre les provinces du point de vue de leur histoire ou de leurs pratiques institutionnelles peuvent être déterminantes quant à la validité ou à l'invalidité de tribunaux administratifs apparemment similaires [. . .] Il est peu probable que les tribunaux abandonnent une doctrine qui s'est développée sur une longue période; ou encore qu'ils renoncent à leur souci (que je considère extravagant) de prévenir l'érosion de la compétence des cours supérieures. [p. 7-49 à 7-50]

[310] D'autres auteurs soutiennent que l'analyse elle-même est excessivement technique et axée sur l'histoire, et de ce fait antithétique à la pratique de notre Cour consistant à appliquer une interprétation constitutionnelle téléologique. À leur avis, une application trop stricte de l'analyse pourrait avoir pour effet de figer les institutions dans le temps, d'une manière qui les rendrait « désu[ètes] et inefficace[s] » (Gaétan Migneault, « L'administration de la justice et la structure judiciaire canadienne » (2006), 37 *R.D.U.S.* 41, p. 43; voir aussi J. Gareth Morley, « Dead Hands, Living Trees, Historic Compromises : The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada » (2016), 53 *Osgoode Hall L.J.* 745).

[311] The principles of regional diversity and subsidiarity add philosophical oxygen to the need for the generous approach to the authority of provincial governments to make jurisdictional grants to provincial adjudicative bodies called for by Chief Justice Duff in the *Adoption Reference*, Justice Wilson in *Sobeys Stores* and Chief Justice Lamer in *Residential Tenancies (1996)*. In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, at para. 3, Justice L'Heureux-Dubé explained that subsidiarity is based on the principle that decisions "are often best [made] at a level of government that is not only effective, but also closest to the citizens affected" (see also *Canadian Western Bank*, at para. 45). Justices LeBel and Deschamps in *Reference re Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457, at para. 183, confirmed the significance of the approach when they said that the notion of subsidiarity recognizes that the level of government "closest to the citizen" is in "the best position to respond to the citizen's concerns". Ensuring the ability of local governments to more freely address local concerns in turn "facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective" (para. 183, quoting *Reference re Secession of Quebec*, at para. 58).

[312] Provincial governments are closer to the issues affecting most people who use the courts and to the realities of local issues. They are therefore better placed to recognize and address local concerns with the justice system. Provincial legislatures must be able to facilitate access to justice by empowering courts and tribunals which are responsive to those needs of the justice system.

[313] This Court's judgment in the first *Residential Tenancies* reference was not particularly concerned with the benefits of flexible federalism. Rather, it was animated by a number of protective aspirations

[311] Les principes de diversité régionale et de subsidiarité étayent philosophiquement le besoin d'appliquer, à l'égard du pouvoir des gouvernements provinciaux d'attribuer des compétences aux organismes juridictionnels provinciaux, l'interprétation libérale préconisée par le juge en chef Duff dans le *Renvoi sur l'adoption*, par la juge Wilson dans l'arrêt *Sobeys Stores* et par le juge en chef Lamer dans l'arrêt *Residential Tenancies (1996)*. Dans l'affaire *114957 Canada Ltée (Spraytech, Société d'arrosage) c. Hudson (Ville)*, [2001] 2 R.C.S. 241, par. 3, la juge L'Heureux-Dubé a expliqué que la subsidiarité repose sur le principe que « le niveau de gouvernement le mieux placé pour [prendre des décisions est] celui qui est le plus apte à le faire, non seulement sur le plan de l'efficacité mais également parce qu'il est le plus proche des citoyens touchés » (voir aussi *Banque canadienne de l'Ouest*, par. 45). Dans le *Renvoi relatif à la Loi sur la procréation assistée*, [2010] 3 R.C.S. 457, par. 183, les juges LeBel et Deschamps ont confirmé l'importance de cette approche, lorsqu'ils ont affirmé que le principe de la subsidiarité permet de reconnaître que l'ordre de gouvernement « le plus proche du citoyen » est « le plus à même de répondre aux préoccupations de ce citoyen ». S'assurer que les gouvernements régionaux sont en mesure de répondre plus librement aux préoccupations locales « facilite [. . .] la participation à la démocratie en conférant des pouvoirs au gouvernement que l'on croit le mieux placé pour atteindre un objectif sociétal donné » (par. 183, citant l'arrêt *Renvoi relatif à la sécession du Québec*, par. 58).

[312] Les gouvernements provinciaux sont plus près des questions qui touchent la plupart des personnes s'adressant aux tribunaux, ainsi que des réalités des enjeux locaux. Ils sont par conséquent mieux placés pour reconnaître les préoccupations locales concernant le système de justice et pour y répondre. Les législatures provinciales doivent être capables de faciliter l'accès à la justice en habilitant à cette fin les tribunaux judiciaires et administratifs qui répondent aux besoins du système de justice.

[313] La décision de la Cour dans le premier *Renvoi sur la location résidentielle* ne s'attachait pas particulièrement aux avantages d'un fédéralisme souple. Elle était plutôt animée par un certain nombre

for s. 96 courts. The first was the desire to promote national unity through the preservation of a unitary court system. As this Court explained in *Residential Tenancies*:

> . . . the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts. *What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.* [Emphasis added; p. 728.]

[314] The second was ensuring that disputes are adjudicated by impartial and independent courts. The close relationship between the preservation of s. 96 jurisdiction and the need for an independent judiciary was explained in *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704, at p. 720, where the Court said:

> The traditional independence of English Superior Court judges has been raised to the level of a fundamental principle of our federal system by the *Constitution Act, 1867* and cannot have less importance and force in the administration of criminal law than in the case of civil matters. Under the Canadian constitution the Superior Courts are independent of both levels of government. The provinces constitute, maintain and organize the Superior Courts; the federal authority appoints the judges. The judicature sections of the *Constitution Act, 1867 guarantee the independence of the Superior Courts*; they apply to Parliament as well as to the Provincial Legislatures. [Emphasis added.]

[315] The link between judicial independence and the imposition of constraints on provincial court jurisdiction was explained by Justice Wilson in *Sobeys Stores* when she observed that much of the s. 96 jurisprudence "establishes the proposition that, while the jurisdiction of the inferior [*sic*] courts will not be frozen as of the date of Confederation, neither will it be substantially expanded *so as to undermine the independence of the judiciary which s. 96 protects*" (p. 253 (emphasis added)).

d'aspirations protectrices à l'égard des cours visées à l'art. 96. La première était le désir de promouvoir l'unité nationale par la préservation d'un système judiciaire unitaire. Comme l'a expliqué notre Cour dans le *Renvoi sur la location résidentielle* :

> . . . on détruirait [. . .] l'effet qu'on voulait donner à l'art. 96 si une province pouvait adopter une loi créant un tribunal, nommer ses juges et lui attribuer la compétence des cours supérieures. *Ce qu'on concevait comme un fondement constitutionnel solide de l'unité nationale, au moyen d'un système judiciaire unitaire, serait gravement sapé à sa base.* [Italique ajouté; p. 728.]

[314] La seconde était de veiller à ce que les litiges soient tranchés par des tribunaux impartiaux et indépendants. La relation étroite qui existe entre la préservation de la compétence prévue à l'art. 96 et le besoin de pouvoir compter sur une magistrature indépendante a été expliquée dans l'arrêt *McEvoy c. Procureur général du Nouveau-Brunswick*, [1983] 1 R.C.S. 704, p. 720, où la Cour a affirmé ce qui suit :

> La *Loi constitutionnelle de 1867* érige en principe fondamental de notre régime fédéral l'indépendance traditionnelle des juges des cours supérieures anglaises et cette indépendance ne peut être moins importante et moins vitale dans l'administration du droit criminel qu'elle ne l'est dans les affaires civiles. Aux termes de la Constitution canadienne, les cours supérieures sont indépendantes des deux paliers de gouvernement. Les provinces créent, maintiennent et organisent les cours supérieures; le fédéral nomme les juges. Les articles de la *Loi constitutionnelle de 1867* qui portent sur l'organisation judiciaire *garantissent l'indépendance des cours supérieures*; ils s'appliquent aussi bien au Parlement qu'aux législatures provinciales. [Italique ajouté.]

[315] Le lien entre l'indépendance judiciaire et l'imposition de contraintes limitant la compétence des cours provinciales a été expliqué par la juge Wilson dans l'arrêt *Sobeys Stores*, lorsqu'elle a fait observer qu'une grande partie de la jurisprudence relative à l'art. 96 « établit que, si la compétence des tribunaux inférieurs [*sic*] ne saurait être figée à la date de la Confédération, elle ne saurait non plus être substantiellement élargie *au point de saper l'indépendance du pouvoir judiciaire que protège l'art. 96* » (p. 253 (italique ajouté)).

[316] In this way, the Court's approach to s. 96 was said to reinforce Prof. W. R. Lederman's theory that certain cases *must* be heard by superior courts because they must be decided by *independent* courts ("The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769 and 1139). The rationale for narrowly circumscribing the provincial power over courts and tribunals was not that there is some inherent value in the judiciary being appointed by the federal government, it was in ensuring that the independence of the country's judiciary was not eroded through the creation of "shadow courts". Chief Justice Lamer reiterated this point in *Residential Tenancies (1996)* when he explained that the s. 96 jurisprudence is concerned with protecting the "independence and the 'core' jurisdiction of superior courts" (para. 27).

[316] Suivant ce point de vue, on a dit que l'approche de la Cour en ce qui concerne l'art. 96 renforçait la théorie du professeur W. R. Lederman selon laquelle certaines affaires *doivent* être entendues par des cours supérieures, parce qu'elles doivent être tranchées par des tribunaux *indépendants* (« The Independence of the Judiciary » (1956), 34 *R. du B. can.* 769 et 1139). Le raisonnement justifiant de circonscrire étroitement le pouvoir des provinces en ce qui concerne les cours de justice et les tribunaux administratifs n'était pas qu'il y a une valeur intrinsèque dans le fait que des juges soient nommés par le fédéral, mais qu'il fallait veiller à ce que l'indépendance de la magistrature au pays ne soit pas érodée par la création de « cours de justice parallèles ». Le juge en chef Lamer a réitéré ce point dans l'arrêt *Residential Tenancies Act (1996)*, lorsqu'il a expliqué que la jurisprudence relative à l'art. 96 vise à protéger « l'indépendance et la compétence fondamentale des cours supérieures » (par. 27).

[317] But the assumption that the Constitution protected the independence only of superior courts disintegrated in the 1997 *P.E.I. Reference* dealing with the constitutionality of different provincial schemes for remunerating provincial court judges. The specific issue was determining whether the Constitution ensured the independence and impartiality of *provincially* appointed judges and whether legislative modifications to those judges' pay structure undermined that independence.

[317] Cependant, la thèse voulant que la Constitution protège uniquement l'indépendance des cours supérieures s'est effritée dans le *Renvoi relatif à l'Î.-P.-É.* de 1997, qui portait sur la constitutionnalité de différents régimes provinciaux de rémunération des juges des cours provinciales. La question précise consistait à déterminer si la Constitution protégeait l'indépendance et l'impartialité des juges nommés par les *provinces* et si les modifications législatives apportées à la structure de rémunération de ces juges avaient pour effet de miner cette indépendance.

[318] Chief Justice Lamer concluded that the time had come to recognize that the Constitution's preamble recognized that *all* courts, including provincial courts, enjoyed constitutionally protected independence. In his view, the maintenance of strong judicial institutions was so fundamental to the maintenance of our constitutional order that the provincial power to create courts under s. 92(14) "implie[s]" those protections (para. 108). In turn, the constitutionalization of the independence of provincial courts helps maintain "the rule of law". Of particular significance in the appeal before us, Chief Justice Lamer concluded that the purpose of s. 96 could now shift away from the protection of national unity and toward "the maintenance of the rule of law through the protection

[318] Le juge en chef Lamer a conclu que le temps était venu d'admettre que le préambule de la Constitution reconnaissait que *tous* les tribunaux, y compris les cours provinciales, jouissent d'une indépendance protégée constitutionnellement. Selon lui, le maintien d'institutions judiciaires solides était si fondamental à la préservation de notre ordre constitutionnel que le pouvoir provincial de créer des tribunaux en vertu du par. 92(14) « impli[que] » ces protections (par. 108). À son tour, la constitutionnalisation de l'indépendance des cours provinciales aide à maintenir « la primauté du droit ». Fait important dans le pourvoi dont nous sommes saisis, le juge en chef Lamer a conclu que l'objet de l'art. 96 pouvait désormais s'éloigner de la protection de

of the judicial role" (para. 88). But the rule of law that requires that competent and independent adjudicators decide questions of law "should be indifferent as to which independent court or tribunal is entitled to ensure that enforcement" (Peter W. Hogg and Cara F. Zwibel, "The rule of law in the Supreme Court of Canada" (2005), 55 *U.T.L.J.* 715, at p. 731).

[319] By guaranteeing the same constitutional protection for judicial independence to both superior and provincial courts, and their joint designation as defenders of the rule of law, the *P.E.I. Reference* represented a fundamental change in the constitutional attributes of the Canadian judiciary, a change which, in my respectful view, made the utility and legitimacy of a strict approach to s. 96, especially through the *Residential Tenancies* test, wobblier.

[320] Since the original purpose of the *Residential Tenancies* test was ensuring that provinces did not establish courts or administrative tribunals with adjudicative jurisdiction over matters which would remove the jurisdiction of an *independent* court to adjudicate justiciable disputes, the concern was no longer relevant after the *P.E.I. Reference* (see Patrick Healy, "Constitutional Limitations upon the Allocation of Trial Jurisdiction to the Superior or Provincial Court in Criminal Matters" (2003), 48 *Crim. L.Q.* 31, at p. 35). As Prof. Healy observed, this Court's approach to the legislative allocation of jurisdiction "over-states the significance of the superior court and understates the significance of the provincial court" (p. 67).

[321] Given the constitutionally enshrined independence of the provincial courts, they are as well placed to uphold the rule of law independently as the

l'unité nationale et s'attacher au « maintien de la primauté du droit par la protection du rôle des tribunaux » (par. 88). Mais la primauté du droit, qui requiert que ce soit des décideurs compétents et indépendants qui tranchent les questions de droit, [TRADUCTION] « devrait être indifférente quant à l'identité du tribunal judiciaire ou administratif indépendant qui est habilité à assurer le respect de la loi » (Peter W. Hogg et Cara F. Zwibel, « The rule of law in the Supreme Court of Canada » (2005), 55 *U.T.L.J.* 715, p. 731).

[319] Du fait qu'il a garanti la même protection constitutionnelle en matière d'indépendance judiciaire aux cours supérieures ainsi qu'aux cours provinciales, et qu'il les a désignées toutes deux comme des défenseures de la primauté du droit, le *Renvoi relatif à l'Î.-P.-É.* a représenté un changement fondamental dans les attributs constitutionnels de l'appareil judiciaire canadien, un changement qui, avec égards pour l'opinion contraire, a rendu plus incertaines l'utilité et la légitimité d'une approche stricte à l'égard de l'art. 96, en particulier au moyen de l'analyse établie dans le *Renvoi sur la location résidentielle*.

[320] Comme l'objectif initial de l'analyse établie dans le *Renvoi sur la location résidentielle* était de faire en sorte que les provinces ne créent pas de cours de justice ou de tribunaux administratifs possédant, à l'égard de certaines questions, une compétence juridictionnelle qui aurait pour effet de retirer à un tribunal *indépendant* le pouvoir de trancher des différends justiciables, la préoccupation n'était plus justifiée après le *Renvoi relatif à l'Î.-P.-É.* (voir Patrick Healy, « Constitutional Limitations upon the Allocation of Trial Jurisdiction to the Superior or Provincial Court in Criminal Matters » (2003), 48 *Crim. L.Q.* 31, p. 35). Ainsi que l'a fait observer le professeur Healy, l'approche de notre Cour relativement à l'attribution de compétences juridictionnelles par voie législative [TRADUCTION] « surestime l'importance de la cour supérieure et sous-estime celle de la cour provinciale » (p. 67).

[321] Étant donné que l'indépendance des cours provinciales est consacrée par la Constitution, ces dernières sont aussi bien placées que les cours

superior courts. Appeals to the rule of law and independence, therefore, can no longer serve to narrow the jurisdiction of provincial courts.

[322] As the *P.E.I. Reference* suggests, this newly articulated acknowledgment of the independence of provincial courts makes them a partner in protecting national unity. The principle of national unity was detailed by Justice McLachlin in her dissent in *MacMillan Bloedel*:

> The result is a network of related Canadian courts ensuring judicial independence, interprovincial uniformity, and minimum standards of decision making throughout the country. This in turn provides "a strong constitutional base for national unity". [Citation omitted; para. 51.]

[323] This confirms that there is not some inherent quality in superior court judges which makes them uniquely capable of ensuring minimum standards of justice. The constitutionalization of the independence and impartiality of provincial courts dispels this notion. Increased constitutional recognition of the important role of provincially appointed judges within the Canadian judiciary does nothing to diminish the independence and impartiality of our courts. On the contrary, it enhances the judiciary as a whole and the public's perception that the provincial court judges they appear before to have their liberty or livelihood or support and custody rights determined are no less judicial because they are appointed by a different level of government. To paraphrase Gertrude Stein, to them a judge is a judge is a judge.

[324] As Prof. Hogg explained, the unitary nature of our court system stems from the fact that provincially and federally administered courts apply both federal and provincial law and are slotted into

supérieures pour faire respecter de manière indépendante la primauté du droit. Il n'est donc plus justifié désormais d'invoquer la primauté du droit et l'indépendance pour restreindre la compétence des cours provinciales.

[322] Comme le suggère le *Renvoi relatif à l'Î.-P.-É.*, cette reconnaissance récemment articulée de l'indépendance des cours provinciales fait de celles-ci des partenaires dans la protection de l'unité nationale. Le principe de l'unité nationale a été explicité par la juge McLachlin, dans ses motifs dissidents dans l'arrêt *MacMillan Bloedel* :

> Il en résulte un réseau de tribunaux canadiens connexes qui garantit l'indépendance judiciaire, l'uniformité entre les provinces et l'existence de normes minimales en matière décisionnelle partout au pays, ce qui offre un « fondement constitutionnel solide de l'unité nationale ». [Référence omise; par. 51.]

[323] Cela confirme que les juges des cours supérieures ne possèdent pas quelque qualité intrinsèque qui les rendrait singulièrement aptes à assurer des normes minimales de justice. La constitutionnalisation de l'indépendance et de l'impartialité des cours provinciales écarte cette notion. La reconnaissance constitutionnelle accrue du rôle important que jouent les juges nommés par les provinces au sein de l'appareil judiciaire canadien ne diminue en rien l'indépendance et l'impartialité de nos tribunaux. Au contraire, elle renforce l'ensemble de l'appareil judiciaire ainsi que la perception des membres du public selon laquelle les juges des cours provinciales devant lesquels ils se présentent pour faire trancher leur droit à la liberté ou à leur gagne-pain, ou encore leurs droits à une pension alimentaire ou à la garde de leurs enfants, n'agissent pas moins judiciairement parce qu'ils sont nommés par un ordre de gouvernement différent. Pour paraphraser Gertrude Stein, pour les membres du public, un juge est un juge est un juge.

[324] Comme l'a expliqué le professeur Hogg, la nature unitaire de notre système judiciaire découle du fait que tant les cours de justice administrées par les provinces que celles administrées par

a judicial hierarchy which ultimately culminates at the Supreme Court of Canada:

> The administration of justice in Canada has important unitary as well as federal characteristics. Of course, as one would expect in a federal country, there is a separate hierarchy of provincial courts in each province. But these courts, whether they were in existence at the time of Confederation or were established later under s. 92(14), are not confined to deciding cases arising under provincial laws. *The provincial power over the administration of justice in the province enables a province to invest its courts with jurisdiction over the full range of cases, whether the applicable law is federal or provincial or constitutional. Then, there is an appeal from the provincial court of appeal, which stands at the top of each provincial hierarchy, to the Supreme Court of Canada.* Although the Supreme Court of Canada is established by federal legislation, it is more of a national than a federal court, because it is a "general court of appeal for Canada", with power to hear appeals from the provincial courts (as well as from the federal courts, which are described later) in all kinds of cases, whether the applicable law is federal or provincial or constitutional. *The position of the Supreme Court of Canada, with its plenary jurisdiction, at the top of each provincial hierarchy, has the effect of melding the ten provincial hierarchies into a single national system.* [Emphasis added; p. 7-3.]

[325] Relatedly, Justice La Forest offered the following comments on our unitary court system in *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, a case about whether a provincial small claims court had jurisdiction over claims arising from federal matters:

> In assessing the constitutional issues, it is well to remember that the court system in Canada is, in general, a unitary one under which provincially constituted inferior and superior courts of original and appellate jurisdiction apply federal as well as provincial laws under a hierarchical arrangement culminating in the Supreme Court

le fédéral appliquent à la fois les lois fédérales et les lois provinciales, et elles sont partie intégrante d'une hiérarchie judiciaire ayant à son sommet la Cour suprême du Canada :

> [TRADUCTION] L'administration de la justice au Canada présente d'importantes caractéristiques unitaires et fédérales. Bien entendu, comme on peut s'y attendre dans un pays fédéral, il existe une hiérarchie distincte de tribunaux provinciaux dans chaque province. Cependant, que ces tribunaux aient existé au moment de la Confédération ou qu'ils aient été créés plus tard en vertu du par. 92(14), ils ne se limitent pas à juger des affaires fondées sur des lois provinciales. *Le pouvoir dont dispose une province en matière d'administration de la justice lui permet de conférer à ses tribunaux compétence sur l'éventail complet des litiges, qu'il s'agisse de droit fédéral, provincial ou constitutionnel. Puis, il y a appel de la décision de la cour d'appel de la province — laquelle se situe au sommet de la hiérarchie judiciaire de chaque province — à la Cour suprême du Canada.* Bien que cette dernière ait été établie par une loi fédérale, elle est davantage une cour nationale qu'une cour fédérale, puisqu'elle est une « cour générale d'appel pour le Canada », dotée du pouvoir d'entendre des appels de décisions des cours provinciales (ainsi que des cours fédérales, qui sont décrites plus loin) dans tous types d'affaires, que le droit applicable soit du droit fédéral, provincial ou constitutionnel. *La place qu'occupe la Cour suprême du Canada, dotée de sa compétence plénière, au-dessus de chaque hiérarchie provinciale, a pour effet de fusionner les dix hiérarchies provinciales en un seul système national.* [Italique ajouté; p. 7-3.]

[325] Dans le même ordre d'idées, le juge La Forest a formulé les commentaires suivants au sujet de notre système judiciaire unitaire dans l'arrêt *Ontario (Procureur général) c. Pembina Exploration Canada Ltd.*, [1989] 1 R.C.S. 206, une affaire soulevant la question de savoir si une cour des petites créances provinciale avait compétence à l'égard de demandes portant sur un domaine de compétence fédérale :

> En examinant les questions constitutionnelles, il convient de se rappeler que le système judiciaire canadien est, de façon générale, un système unitaire en vertu duquel les tribunaux provinciaux d'instance inférieure et supérieure qui ont compétence en première instance et en appel appliquent les lois tant fédérales que provinciales

of Canada established by Parliament under s. 101 of the *Constitution Act, 1867*.

. . .

I have already referred to my view that a province may, in the exercise of its powers under s. 92(14), confer general jurisdiction on its courts, and that I saw no reason why this power did not extend to courts of inferior jurisdiction. Indeed, it seems to me that the essentially unitary structure of the Canadian judicial system invites this conclusion. From Confederation to this day, the courts in the provinces, barring inconsistent federal laws, have decided every type of dispute imaginable. As Hogg, has put it: "It did not matter whether a dispute raised a question of constitutional law, federal law, provincial law, or a mixture of the three, the provincial courts still had jurisdiction." They may not, in strictness, be national courts, but they are the ordinary courts of the land to which the citizen customarily turns when he has need to resort to the administration of justice. [Citation omitted; pp. 215 and 225.]

[326] Moreover, in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, Justice Bastarache held that a provincial administrative tribunal could hear cases dealing with aboriginal law in carrying out its otherwise valid provincial mandate. He offered a few comments on the notion of a unitary court system, explaining that our unitary system of justice "encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals" (para. 22).

[327] Article 35 *C.C.P.* does not create a dualist justice system, nor does it threaten to do so. Decisions of the Court of Québec are subject to appeals before the Court of Appeal and the Supreme Court of Canada. Just as judicial review "integrates provincial tribunals into the unitary system of justice", the possibility of appeals culminating before this Court draws the Court of Québec into our unitary system (*Paul*, at para. 22). In addition, the Court of Québec regularly deals with matters of federal law through its expansive criminal jurisdiction. This adjudication of federal and provincial claims, which exists and

selon une structure hiérarchisée ayant à son sommet la Cour suprême du Canada établie par le Parlement en vertu de l'art. 101 de la *Loi constitutionnelle de 1867*.

. . .

J'ai déjà fait état de mon opinion qu'une province peut, dans l'exercice de ses pouvoirs en vertu du par. 92(14), conférer à ses tribunaux une compétence générale et que je ne voyais aucune raison pour laquelle ce pouvoir ne s'étendrait pas aux tribunaux d'instance inférieure. En effet, il me semble que la structure essentiellement unitaire du système judiciaire canadien nous invite à tirer cette conclusion. Depuis la Confédération jusqu'à ce jour, les tribunaux des provinces ont, sous réserve de règles de droit fédérales incompatibles, statué sur tous les types de litiges imaginables. Comme Hogg l'a affirmé : [TRADUCTION] « Il importait peu que le litige soulève une question de droit constitutionnel, de droit fédéral, de droit provincial, ou d'un mélange des trois, les tribunaux provinciaux avaient néanmoins compétence ». Ils ne sont peut-être pas, à proprement parler, des tribunaux nationaux mais ils sont les tribunaux ordinaires du pays auxquels les citoyens recourent habituellement pour l'administration de la justice [Référence omise; p. 215 et 225.]

[326] En outre, dans l'arrêt *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S. 585, le juge Bastarache a conclu qu'un tribunal administratif provincial pouvait entendre des affaires de droit autochtone dans l'accomplissement de sa mission provinciale valide. Il a formulé quelques commentaires sur la notion de système judiciaire unitaire, expliquant que le nôtre « englobe les tribunaux de droit commun, les cours fédérales, les cours créées par une loi provinciale et les tribunaux administratifs » (par. 22).

[327] L'article 35 *C.p.c.* ne crée pas un système judiciaire dualiste, pas plus qu'il ne menace d'en créer un. Les décisions de la Cour du Québec sont susceptibles d'appel à la Cour d'appel de cette province et à la Cour suprême du Canada. Tout comme le contrôle judiciaire « intègre les tribunaux administratifs dans le système judiciaire unitaire », la possibilité qu'il y ait appel jusqu'à notre Cour intègre la Cour du Québec dans notre système unitaire (*Paul*, par. 22). De plus, la Cour du Québec se penche régulièrement sur des questions relevant du droit fédéral en raison de sa compétence étendue en matière criminelle.

has long existed throughout Canada, does nothing to fragment our court system and in fact reinforces its integrated character.

[328] I accept that the notion of core jurisdiction protects "critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system". These are the jurisdictions which are essential to the maintenance of our Constitution and which ensure that superior courts are not rendered ineffective. More generally, it must also be recognized that wholesale transfers of jurisdiction which deprive superior courts of a meaningful involvement in the types of cases over which they have traditionally held *exclusive* jurisdiction will violate s. 96.

[329] But the fact that an exercise of provincial authority under s. 92(14) has an impact on the jurisdiction of superior courts should not, on its own, mean that the grant is unconstitutional. As Justice McLachlin explained in her dissent in *MacMillan Bloedel*, "short of *impairing* s. 96 courts, nothing in the Constitution suggests that Parliament should not be able to clothe inferior [*sic*] tribunals with s. 96 powers" (para. 54 (emphasis added)). This impairment will occur when provincial courts "usur[p] the functions of superior courts" (*Residential Tenancies (1996)*, at para. 73). This leads, it seems to me, to an approach not unlike the one this Court applies in any case of apparent tension between ss. 91 and 92, namely a focus on whether the impugned legislative action has materially impaired or frustrated another head of power, *not* on whether it has simply had an incidental effect on it.

[330] Unlike the multi-factored test proposed by my colleagues, this more flexible approach is in

L'exercice de ce pouvoir de statuer sur des demandes fondées sur des règles de droit fédérales et provinciales, qui existe depuis longtemps partout au Canada, ne fragmente d'aucune façon notre système judiciaire et, en fait, il renforce son caractère intégré.

[328] J'admets que la notion de compétence fondamentale protège « les pouvoirs qui ont une importance cruciale et qui sont essentiels à l'existence d'une cour supérieure dotée de pouvoirs inhérents et au maintien de son rôle vital au sein de notre système juridique ». Il s'agit des pouvoirs qui sont essentiels au maintien de notre Constitution et qui font en sorte que les cours supérieures ne deviennent pas inefficaces. De façon plus générale, il faut également reconnaître que les transferts globaux de compétence qui privent les cours supérieures d'une participation réelle dans le type d'affaires sur lesquelles elles ont traditionnellement détenu une compétence *exclusive* porteront atteinte à l'art. 96.

[329] Cependant, le fait que l'exercice par une province des pouvoirs que lui confère le par. 92(14) ait une incidence sur la compétence des cours supérieures ne devrait pas, à lui seul, avoir pour effet d'entraîner l'inconstitutionnalité d'une attribution de compétence. Comme l'a expliqué la juge McLachlin dans ses motifs dissidents dans l'arrêt *MacMillan Bloedel*, « rien dans la Constitution ne laisse entendre que le Parlement ne peut pas conférer à des tribunaux inférieurs [*sic*] des pouvoirs visés à l'art. 96 [. . .] pourvu que cela *n'affaiblisse pas* les cours visées à l'art. 96 » (par. 54 (italique ajouté)). Un tel affaiblissement survient lorsque les cours provinciales « usurpent les fonctions réservées aux cours supérieures » (*Residential Tenancies (1996)*, par. 73). Cela conduit, il me semble, à une approche qui n'est pas sans rappeler celle que notre Cour applique dans toute affaire où il y a apparence de conflit entre les art. 91 et 92, c'est-à-dire en s'attachant à la question de savoir si la mesure législative contestée a porté atteinte à un autre chef de compétence ou entravé la mise en œuvre de celui-ci de manière importante, et *non* à celle de savoir si la mesure a simplement eu une incidence accessoire sur ce chef de compétence.

[330] Contrairement à l'analyse multifactorielle proposée par mes collègues, cette approche plus

line with Chief Justice Duff's proscription in the *Adoption Reference* against "fixing" provincial court jurisdiction in time as well as Chief Justice Lamer's recognition in *Residential Tenancies (1996)* that s. 96 must be interpreted in accordance with the notion that our Constitution is a living tree. It also accounts for Prof. Hogg's argument that it is "unwise" to introduce stringent restrictions on the legislatures' ability to create provincial courts to address a vague, often "extravagant" concern that provinces will erode the jurisdiction of superior courts (pp. 7-50 and 7-51).

souple respecte la mise en garde formulée par le juge en chef Duff dans le *Renvoi sur l'adoption* contre le fait de « figer » dans le temps la compétence des cours provinciales, ainsi que la reconnaissance par le juge en chef Lamer dans l'affaire *Residential Tenancies (1996)* que l'art. 96 doit être interprété conformément à la notion voulant que notre Constitution est un arbre. Cela tient également compte de l'argument du professeur Hogg selon lequel il est [TRADUCTION] « peu judicieux » d'assujettir à des restrictions strictes la capacité des législatures de créer des cours provinciales, et ce, afin de dissiper une vague crainte, souvent « extravagante », que les provinces mineront la compétence des cours supérieures (p. 7-50 et 7-51).

[331] The focus should be on ensuring that s. 96 is not rendered "*meaningless* through . . . the provincial competence to constitute, maintain and organize provincial courts" (*Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252, at p. 264 (emphasis added)). As Chief Justice Lamer stated in *Residential Tenancies (1996)*, the provinces' power under s. 92(14) may be freely exercised so long as "s. 96 continues to play an important and meaningful role in Canadian society" (para. 29).

[331] Il faudrait s'attacher à veiller à ce que l'art. 96 « *ne perde tout son sens* par suite de l'exercice par les provinces de leur compétence pour créer, maintenir et organiser des cours provinciales » (*Renvoi relatif à la Loi sur les jeunes contrevenants (Î.-P.-É.)*, [1991] 1 R.C.S. 252, p. 264 (italique ajouté)). Comme l'a affirmé le juge en chef Lamer dans *Residential Tenancies (1996)*, les provinces peuvent exercer librement le pouvoir qui leur est conféré par le par. 92(14) tant et aussi longtemps que « l'art. 96 continue de jouer un rôle important et utile dans la société canadienne » (par. 29).

[332] As such, it seems to me that in essence, the only relevant question in determining whether a grant of jurisdiction to a provincial court violates s. 96 is whether the grant materially impairs the "essential character" and functions of superior courts. In other words, what can the superior court no longer do because of the grant of jurisdiction to the provincial court or tribunal, and how does this loss represent a "critically important jurisdiction" that is essential to its existence as a superior court of inherent jurisdiction?

[332] En conséquence, il me semble que, essentiellement, la seule question qu'il faut se poser pour décider si la compétence attribuée à une cour provinciale contrevient à l'art. 96 est celle de savoir si cette attribution de compétence porte atteinte de façon appréciable au « caractère essentiel » et aux fonctions des cours supérieures. Autrement dit, quelles sont les fonctions que la cour supérieure ne peut plus exercer en raison de l'attribution de compétence au tribunal judiciaire ou administratif provincial, et en quoi cette perte représente-t-elle des « pouvoirs qui ont une importance cruciale » et qui sont essentiels à son existence en tant que cour supérieure dotée d'une compétence inhérente?

[333] In this appeal, despite the $15,000 increase in exclusive provincial court jurisdiction under art. 35 *C.C.P.*, the jurisdictional loss of this amount by the Superior Court of Quebec has not prevented it in any

[333] Dans le présent pourvoi, malgré l'augmentation de 15 000 $ de la compétence exclusive de la cour provinciale en vertu de l'art. 35 *C.p.c.*, la perte de compétence correspondant à ce montant par la

material way from playing its usual role in deciding the kind of civil cases it has always heard. In fact, it now hears a higher proportion of civil cases than superior courts did in three of the four provinces at the time of Confederation. On that finding alone, the proposition that the essential character of s. 96 courts in Quebec has been impaired is untenable. Even if, as Justice Wilson suggests in *Sobeys Stores*, the balancing act between ss. 92(14) and 96 aims to preserve "the original bargain [of Confederation]", it cannot be that the "bargain" is breached by an exercise of provincial power which leaves provincial courts with proportionally *less* civil jurisdiction than they had in 1867 (p. 263).

Cour supérieure du Québec ne l'a pas empêchée de quelque manière concrète que ce soit de jouer son rôle habituel et de juger le genre d'affaires civiles qu'elle a toujours entendues. En fait, elle entend maintenant une plus grande proportion d'affaires civiles que ne le faisaient les cours supérieures dans trois des quatre provinces au moment de la Confédération. Sur la base de cette seule conclusion, la thèse selon laquelle il a été porté atteinte, au Québec, au caractère essentiel des cours visées à l'art. 96 est insoutenable. Même si, comme le suggère la juge Wilson dans *Sobeys Stores*, la mise en équilibre du par. 92(14) et de l'art. 96 vise à préserver le « pacte originaire [de la Confédération] », on se saurait dire qu'il y a manquement à ce « pacte » par suite de l'exercice par une province de ses pouvoirs, exercice au terme duquel les cours provinciales se retrouvent dotées d'une compétence civile proportionnellement *moindre* que celle qu'elles possédaient en 1867 (p. 263).

[334] No matter the approach taken in analyzing art. 35 *C.C.P.*, it is a valid exercise of the province's right under s. 92(14) to administer justice and to constitute courts of civil jurisdiction in Quebec. I see nothing in the grant of jurisdiction at issue here that trespasses on or materially impairs the jurisdiction of Quebec's superior court judges. There is no evidence that the exercise of this power has materially impaired the ability of superior courts to exercise their constitutional functions or that it has had *any* meaningful adverse impact on the jurisdiction protected by s. 96. Consequently, the answer to the reference question is that art. 35 is "valid with regard to section 96 of the Constitution Act, 1867".

[334] Peu importe l'approche adoptée pour analyser l'art. 35 *C.p.c.*, cette disposition représente un exerce valide du droit dont dispose la province en vertu du par. 92(14) d'administrer la justice et de créer des cours de compétence civile au Québec. Je ne vois rien dans l'attribution de compétence en litige ici qui empiète sur la compétence des juges de la Cour supérieure du Québec ou qui porte atteinte de manière appréciable à cette compétence. Il n'y a aucune preuve que l'exercice de ce pouvoir a porté atteinte de manière appréciable à la capacité des cours supérieures d'exercer leurs fonctions constitutionnelles ou a eu *quelque* effet préjudiciable concret sur la compétence protégée par l'art. 96. Par conséquent, la réponse à la question du renvoi est que l'art. 35 est « valid[e] au regard de l'article 96 de la Loi constitutionnelle de 1867 ».

[335] The system of civil justice enacted by the provincial legislature respects the balance between ss. 92(14) and 96 by ensuring that both provincially and federally appointed courts have a meaningful role in providing access to justice. The Court of Québec today is, as provincial courts have always been, an important court which combines with the Superior Court to form a strong network of courts for

[335] Le système de justice civile établi par la législature provinciale respecte l'équilibre entre le par. 92(14) et l'art. 96 en faisant en sorte que tant les cours dont les juges sont nommés par la province que celles dont les juges sont nommés par le fédéral jouent un rôle concret en matière d'accès à la justice. Aujourd'hui, la Cour du Québec est, comme l'ont toujours été les cours provinciales, une

litigants across the province. As Chief Justice Lamer remarked in *Residential Tenancies (1996)*, it is important to recall that "the Constitution is a document for the people and one of the most important goals of any system of dispute resolution is to serve well those who make use of it" (para. 28). A mature constitutional relationship between these two important judicial partners in delivering access to justice goes a long way towards serving well "those who make use of it", namely, the public.

[336] I would allow the appeal. Raising the exclusive jurisdiction of the Court of Québec by $15,000, to an $85,000 limit, is constitutional.

Appendix

Constitution Act, 1867

Exclusive Powers of Provincial Legislatures

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . .

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

. . .

VII. Judicature

96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

. . .

cour importante qui forme, de concert avec la Cour supérieure, un solide réseau de tribunaux servant les plaideurs partout dans la province. Comme l'a fait remarquer le juge en chef Lamer dans l'arrêt *Residential Tenancies (1996)*, il est important de se rappeler que « la Constitution est un document fait pour le peuple, et l'un des objectifs les plus importants de tout mécanisme de règlement des différends est de bien servir ceux qui y ont recours » (par. 28). L'existence d'une relation constitutionnelle mature entre ces deux importants partenaires judiciaires assurant l'accès à la justice contribue considérablement à « bien servir ceux qui y ont recours », en l'occurrence le public.

[336] Je suis d'avis d'accueillir le pourvoi. La hausse de 15 000 $ de la compétence exclusive de la Cour du Québec, qui fait passer sa limite à 85 000 $, est constitutionnelle.

Annexe

Loi constitutionnelle de 1867

Pouvoirs exclusifs des législatures provinciales

92 Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

. . .

14 L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;

. . .

VII. Judicature

96 Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

. . .

98 The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99 (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

. . .

100 The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101 The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

. . .

IX. Miscellaneous Provisions

. . .

129 Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

98 Les juges des cours de Québec seront choisis parmi les membres du barreau de cette province.

99 (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.

. . .

100 Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada.

101 Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.

. . .

IX. Dispositions diverses

. . .

129 Sauf toute disposition contraire prescrite par la présente loi, — toutes les lois en force en Canada, dans la Nouvelle-Écosse ou le Nouveau-Brunswick, lors de l'union, — tous les tribunaux de juridiction civile et criminelle, — toutes les commissions, pouvoirs et autorités ayant force légale, — et tous les officiers judiciaires, administratifs et ministériels, en existence dans ces provinces à l'époque de l'union, continueront d'exister dans les provinces d'Ontario, de Québec, de la Nouvelle-Écosse et du Nouveau-Brunswick respectivement, comme si l'union n'avait pas eu lieu; mais ils pourront, néanmoins (sauf les cas prévus par des lois du parlement de la Grande-Bretagne ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande), être révoqués, abolis ou modifiés par le parlement du Canada, ou par la législature de la province respective, conformément à l'autorité du parlement ou de cette législature en vertu de la présente loi.

Appeals dismissed without costs, WAGNER C.J. *and* ROWE J. *dissenting in part and* ABELLA J. *dissenting.*

Solicitors for Conférence des juges de la Cour du Québec: Borden Ladner Gervais, Montréal.

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

Solicitors for Conseil de la magistrature du Québec: Fasken Martineau DuMoulin, Montréal.

Solicitors for the Canadian Association of Provincial Court Judges: Power Law, Ottawa.

Solicitors for the Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec: Langlois avocats, Montréal; William J. Atkinson, avocat, Montréal.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

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

Solicitor for the intervener the Attorney General of Alberta: Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Edmonton.

Solicitors for the intervener the Canadian Council of Chief Judges: Field, Edmonton.

Solicitors for the intervener the Trial Lawyers Association of British Columbia: Hunter Litigation Chambers, Vancouver.

Solicitors for the intervener the Canadian Superior Courts Judges Association: Norton Rose Fulbright Canada, Montréal.

Pourvois rejetés sans dépens, le juge en chef WAGNER *et le juge* ROWE *sont dissidents en partie et la juge* ABELLA *est dissidente.*

Procureurs de la Conférence des juges de la Cour du Québec : Borden Ladner Gervais, Montréal.

Procureur du procureur général du Québec : Procureur général du Québec, Québec.

Procureurs du Conseil de la magistrature du Québec : Fasken Martineau DuMoulin, Montréal.

Procureurs de l'Association canadienne des juges des cours provinciales : Juristes Power, Ottawa.

Procureurs du juge en chef, de la juge en chef associée et de la juge en chef adjointe de la Cour supérieure du Québec : Langlois avocats, Montréal; William J. Atkinson, avocat, Montréal.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de l'Alberta : Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Edmonton.

Procureurs de l'intervenant Canadian Council of Chief Judges : Field, Edmonton.

Procureurs de l'intervenante Trial Lawyers Association of British Columbia : Hunter Litigation Chambers, Vancouver.

Procureurs de l'intervenante l'Association canadienne des juges des cours supérieures : Norton Rose Fulbright Canada, Montréal.

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

v.

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

- and -

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

v.

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

and

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

Procureur général du Canada *Appelant/Intimé au pourvoi incident*

c.

Terri Jean Bedford, Amy Lebovitch et Valerie Scott *Intimées/Appelantes au pourvoi incident*

- et -

Procureur général de l'Ontario *Appelant/Intimé au pourvoi incident*

c.

Terri Jean Bedford, Amy Lebovitch et Valerie Scott *Intimées/Appelantes au pourvoi incident*

et

Procureur général du Québec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secrétariat du Programme commun des Nations Unies sur le VIH/sida, Association des libertés civiles de la Colombie-Britannique, Alliance évangélique du Canada, Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Association canadienne des centres contre les agressions à caractère sexuel, Association des femmes autochtones du Canada, Association canadienne des Sociétés Elizabeth Fry, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle,

sexuel, Vancouver Rape Relief Society, Christian Legal Fellowship, Catholic Civil Rights League, REAL Women of Canada, David Asper Centre for Constitutional Rights, Simone de Beauvoir Institute, AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution and Aboriginal Legal Services of Toronto Inc. *Interveners*

Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel, Vancouver Rape Relief Society, Alliance des chrétiens en droit, Ligue catholique des droits de l'homme, REAL Women of Canada, David Asper Centre for Constitutional Rights, Institut Simone de Beauvoir, AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution et Aboriginal Legal Services of Toronto Inc. *Intervenants*

INDEXED AS: CANADA (ATTORNEY GENERAL) *v.* BEDFORD

2013 SCC 72

File No.: 34788.

2013: June 13; 2013: December 20.*

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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

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

RÉPERTORIÉ : CANADA (PROCUREUR GÉNÉRAL) *c.* BEDFORD

2013 CSC 72

N° du greffe : 34788.

2013 : 13 juin; 2013 : 20 décembre*.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Droit à la sécurité de la personne — Liberté d'expression — Droit criminel — Prostitution — Maisons de débauche — Proxénétisme — Communiquer en public à des fins de prostitution — Contestation par des prostituées des dispositions du Code criminel qui interdisent les maisons de débauche, le proxénétisme et la communication en public à des fins de prostitution — Allégation selon laquelle ces dispositions portent atteinte au droit à la sécurité de la personne garanti à l'art. 7 en empêchant les prostituées de prendre des mesures susceptibles de les protéger contre la violence de certains clients — Allégation supplémentaire suivant laquelle l'interdiction de communiquer en public à des fins de prostitution porte atteinte à la liberté d'expression garantie aux prostituées — Charte canadienne des droits et libertés, art. 1, 2b), 7 — Code criminel, L.R.C. 1985, ch. C-46, art. 197(1), 210, 212(1)j), 213(1)c).

* Un jugement a été rendu le 17 janvier 2014, modifiant le par. 164 des deux versions des motifs. Les modifications ont été incorporées dans les présents motifs.

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

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

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

Tribunaux — Décisions — Stare decisis — Norme de contrôle — Contestation par des prostituées des dispositions du Code criminel qui interdisent les maisons de débauche, le proxénétisme et la communication en public à des fins de prostitution — À quelles conditions un juge de première instance peut-il réexaminer les conclusions de la Cour suprême du Canada dans le Renvoi sur la prostitution selon lesquelles les interdictions visant les maisons de débauche et la communication sont valides? — Degré de déférence que commandent les conclusions du juge de première instance sur des faits sociaux ou législatifs.

B, L et S — trois prostituées ou ex-prostituées — ont sollicité un jugement déclarant que trois dispositions du *Code criminel*, L.R.C. 1985, ch. C-46, qui criminalisent diverses activités liées à la prostitution, portent atteinte au droit que leur garantit l'art. 7 de la *Charte* : l'art. 210 crée l'acte criminel de tenir une maison de débauche ou de s'y trouver; l'al. 212(1)*j*) interdit de vivre des produits de la prostitution d'autrui; l'al. 213(1)*c*) interdit la communication en public à des fins de prostitution. Elles font valoir que ces restrictions apportées à la prostitution compromettent la sécurité et la vie des prostituées en ce qu'elles les empêchent de prendre certaines mesures de protection contre les actes de violence, telles l'embauche d'un garde ou l'évaluation préalable du client. Elles ajoutent que l'al. 213(1)*c*) porte atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte* et qu'aucune des dispositions n'est sauvegardée par l'article premier.

La Cour supérieure de justice de l'Ontario a fait droit à la demande et déclaré, sans effet suspensif, que chacune des dispositions contestées du *Code criminel* porte atteinte à un droit ou à une liberté garantis par la *Charte* et ne peut être sauvegardée par application de l'article premier. La Cour d'appel de l'Ontario a convenu de l'inconstitutionnalité de l'art. 210 et radié le mot « prostitution » de la définition de « maison de débauche » applicable à cette disposition, mais elle a suspendu l'effet de la déclaration d'invalidité pendant 12 mois. Elle a statué que l'al. 212(1)*j*) constitue une atteinte injustifiable au droit garanti à l'art. 7 et ordonné d'interpréter la disposition de manière que l'interdiction vise seulement les personnes qui vivent de la prostitution d'autrui « dans des situations d'exploitation », comme si ces mots y étaient employés. Elle a par ailleurs estimé que l'interdiction de communiquer prévue à l'al. 213(1)*c*) n'est attentatoire ni à la liberté garantie par l'al. 2*b*), ni au droit que consacre l'art. 7. Les procureurs généraux se pourvoient contre la déclaration d'inconstitutionnalité de l'art. 210 et de l'al. 212(1)*j*) du *Code*. B, L et S se pourvoient de manière incidente relativement à la constitutionnalité de l'al. 213(1)*c*) et à la mesure prise pour remédier à l'inconstitutionnalité de l'art. 210.

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

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

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

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

Arrêt : Les pourvois sont rejetés, et le pourvoi incident est accueilli. L'article 210, en ce qui concerne la prostitution, et les al. 212(1)*j*) et 213(1)*c*) du *Code criminel* sont déclarés incompatibles avec la *Charte*. Le mot « prostitution » est supprimé de la définition de « maison de débauche » figurant au par. 197(1) du *Code criminel* pour les besoins de l'art. 210 uniquement. L'effet de la déclaration d'invalidité est suspendu pendant un an.

Les trois dispositions contestées, qui visent principalement à empêcher les nuisances publiques et l'exploitation des prostituées, ne résistent pas au contrôle constitutionnel. Elles portent atteinte au droit à la sécurité de la personne que l'art. 7 garantit aux prostituées, et ce, d'une manière non conforme aux principes de justice fondamentale. Point n'est besoin de déterminer si notre Cour devrait rompre avec la conclusion qu'elle a tirée dans le *Renvoi sur la prostitution*, à savoir que l'al. 213(1)*c*) ne porte pas atteinte à la liberté garantie à l'al. 2*b*), ou la réexaminer, puisqu'il est possible de trancher en l'espèce sur le fondement du seul art. 7.

La règle du *stare decisis* issue de la common law est subordonnée à la Constitution et ne saurait avoir pour effet d'obliger un tribunal à valider une loi inconstitutionnelle. Une juridiction inférieure ne peut toutefois pas faire abstraction d'un précédent qui fait autorité, et la barre est haute lorsqu'il s'agit d'en justifier le réexamen. Les conditions sont réunies lorsqu'une nouvelle question de droit se pose ou qu'il y a modification importante de la situation ou de la preuve. En l'espèce, la juge de première instance pouvait trancher la question nouvelle de savoir si les dispositions en cause portent atteinte ou non au droit à la sécurité de la personne garanti à l'art. 7 car, dans le *Renvoi sur la prostitution*, les juges majoritaires de la Cour statuent uniquement en fonction du droit à la liberté physique de la personne garanti par l'art. 7. Qui plus est, dans le *Renvoi sur la prostitution*, les principes de justice fondamentale sont examinés sous l'angle de l'imprécision de la criminalisation indirecte et de l'acceptabilité de celle-ci. En l'espèce, ce sont le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné qui sont allégués, des notions qui ont en grande partie vu le jour au cours des 20 dernières années. La juge de première instance n'était cependant pas admise à trancher la question de savoir si la disposition sur la communication constitue une limitation justifiée de la liberté d'expression. Notre Cour s'était prononcée sur ce point dans le *Renvoi sur la prostitution*, et la juge était liée par cette décision.

Les conclusions tirées en première instance sur des faits sociaux ou législatifs commandent la déférence. La norme de contrôle applicable aux conclusions de fait —

social, or legislative — remains palpable and overriding error.

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

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

qu'elles portent sur les faits en litige, des faits sociaux ou des faits législatifs — demeure celle de l'erreur manifeste et dominante.

Les dispositions contestées ont un effet préjudiciable sur la sécurité des prostituées et mettent donc en jeu le droit garanti à l'art. 7. La norme qui convient est celle du « lien de causalité suffisant », appliquée avec souplesse, celle retenue à juste titre par la juge de première instance. Les interdictions augmentent tous les risques auxquels s'exposent les demanderesses lorsqu'elles se livrent à la prostitution, une activité qui est en soi légale. Elles ne font pas qu'encadrer la pratique de la prostitution. Elles franchissent un pas supplémentaire déterminant par l'imposition de conditions *dangereuses* à la pratique de la prostitution : elles empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection. Le lien de causalité n'est pas rendu inexistant par les actes de tiers (clients et proxénètes) ou le prétendu choix des intéressées de se prostituer. Bien que certaines prostituées puissent correspondre au profil de celle qui choisit librement de se livrer à l'activité économique risquée qu'est la prostitution (ou qui a un jour fait ce choix), de nombreuses prostituées n'ont pas vraiment d'autre solution que la prostitution. De plus, le fait que le comportement des proxénètes et des clients soit la source immédiate des préjudices subis par les prostituées ne change rien. La violence d'un client ne diminue en rien la responsabilité de l'État qui rend une prostituée plus vulnérable à cette violence.

Les demanderesses ont également établi que l'atteinte à leur droit à la sécurité n'est pas conforme aux principes de justice fondamentale, lesquels sont censés intégrer les valeurs fondamentales qui sous-tendent notre ordre constitutionnel. Dans la présente affaire, les valeurs fondamentales qui nous intéressent s'opposent à l'arbitraire (*absence de lien* entre l'effet de la loi et son objet), à la portée excessive (la disposition va trop loin et empiète sur *quelque* comportement sans lien avec son objectif) et à la disproportion totale (l'effet de la disposition est totalement disproportionné à l'objectif de l'État). Il s'agit de trois notions distinctes, mais la portée excessive est liée au caractère arbitraire en ce que l'absence de lien entre l'effet de la disposition et son objectif est commune aux deux. Les trois notions supposent de comparer l'atteinte aux droits qui découle de la loi avec l'objectif de la loi, et non avec son efficacité; elles ne s'intéressent pas à la réalisation de l'objectif législatif ou au pourcentage de la population qui bénéficie de l'application de la loi ou qui en pâtit. L'analyse se veut qualitative, et non quantitative. La question que commande l'art. 7 est celle de savoir si une disposition législative intrinsèquement

bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

Applying these principles to the impugned provisions, the negative impact of the bawdy-house prohibition (s. 210) on the applicants' security of the person is grossly disproportionate to its objective of preventing public nuisance. The harms to prostitutes identified by the courts below, such as being prevented from working in safer fixed indoor locations and from resorting to safe houses, are grossly disproportionate to the deterrence of community disruption. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. Second, the purpose of the living on the avails of prostitution prohibition in s. 212(1)(*j*) is to target pimps and the parasitic, exploitative conduct in which they engage. The law, however, punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security of prostitutes, for example, legitimate drivers, managers, or bodyguards. It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes *some* conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is consequently overbroad. Third, the purpose of the communicating prohibition in s. 213(1)(*c*) is not to eliminate street prostitution for its own sake, but to take prostitution off the streets and out of public view in order to prevent the nuisances that street prostitution can cause. The provision's negative impact on the safety and lives of street prostitutes, who are prevented by the communicating prohibition from screening potential clients for intoxication and propensity to violence, is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

While the Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1, some of their arguments under s. 7 are properly addressed at this stage of the analysis. In particular, they attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work

mauvaise prive *qui que ce soit* du droit à la vie, à la liberté ou à la sécurité de sa personne; un effet totalement disproportionné, excessif ou arbitraire sur une seule personne suffit pour établir l'atteinte au droit garanti à l'art. 7.

Si l'on applique ces notions aux dispositions contestées, l'effet préjudiciable de l'interdiction des maisons de débauche (art. 210) sur le droit à la sécurité des demanderesses est totalement disproportionné à l'objectif de prévenir les nuisances publiques. Les préjudices subis par les prostituées selon les juridictions inférieures (p. ex. le fait de ne pouvoir travailler dans un lieu fixe, sûr et situé à l'intérieur, ni avoir recours à un refuge sûr) sont totalement disproportionnés à l'objectif de réprimer le désordre public. Le législateur a le pouvoir de réprimer les nuisances, mais pas au prix de la santé, de la sécurité et de la vie des prostituées. L'interdiction faite à l'al. 212(1)*j*) de vivre des produits de la prostitution d'autrui vise à réprimer le proxénétisme, ainsi que le parasitisme et l'exploitation qui y sont associés. Or, la disposition vise toute personne qui vit des produits de la prostitution d'autrui sans établir de distinction entre celui qui exploite une prostituée et celui qui peut accroître la sécurité d'une prostituée (tel le chauffeur, le gérant ou le garde du corps véritable). La disposition vise également toute personne qui fait affaire avec une prostituée, y compris un comptable ou un réceptionniste. *Certains* actes sans aucun rapport avec l'objectif de prévenir l'exploitation des prostituées tombent ainsi sous le coup de la loi. La disposition sur le proxénétisme a donc une portée excessive. L'alinéa 213(1)*c*), qui interdit la communication, vise non pas à éliminer la prostitution dans la rue comme telle, mais bien à sortir la prostitution de la rue et à la soustraire au regard du public afin d'empêcher les nuisances susceptibles d'en découler. Son effet préjudiciable sur le droit à la sécurité et à la vie des prostituées de la rue, du fait que ces dernières sont empêchées de communiquer avec leurs clients éventuels afin de déterminer s'ils sont intoxiqués ou enclins à la violence, est totalement disproportionné au risque de nuisance causée par la prostitution de la rue.

Même si les procureurs généraux ne prétendent pas sérieusement que, si elles sont jugées contraires à l'art. 7, les dispositions en cause peuvent être justifiées en vertu de l'article premier, certaines des thèses qu'ils défendent en fonction de l'art. 7 sont reprises à juste titre à cette étape de l'analyse. En particulier, ils tentent de justifier la disposition sur le proxénétisme par la nécessité d'un libellé général afin que tombent sous le coup de son application toutes les relations empreintes d'exploitation. Or, la disposition vise non seulement

with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships. The impugned laws are not saved by s. 1.

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

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Referred to: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *R. v. Pierce* (1982), 37 O.R. (2d) 721; *R. v. Worthington* (1972), 10 C.C.C. (2d) 311; *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Grilo* (1991), 2 O.R. (3d) 514; *R. v. Barrow* (2001), 54 O.R. (3d) 417; *R. v. Head* (1987), 59 C.R. (3d) 80; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R.

le chauffeur ou le garde du corps, qui peut en réalité être un proxénète, mais aussi la personne qui entretient avec la prostituée des rapports manifestement dénués d'exploitation (p. ex. un réceptionniste ou un comptable). La disposition n'équivaut donc pas à une atteinte minimale. Pour les besoins du dernier volet de l'analyse fondée sur l'article premier, son effet bénéfique — protéger les prostituées contre l'exploitation — ne l'emporte pas non plus sur son effet qui empêche les prostituées de prendre des mesures pour accroître leur sécurité et, peut-être, leur sauver la vie. Les dispositions contestées ne sont pas sauvegardées par application de l'article premier.

La conclusion que les dispositions contestées portent atteinte à des droits garantis par la *Charte* ne dépouille pas le législateur du pouvoir de décider des lieux et des modalités de la prostitution, à condition qu'il exerce ce pouvoir sans porter atteinte aux droits constitutionnels des prostituées. L'encadrement de la prostitution est un sujet complexe et délicat. Il appartiendra au législateur, s'il le juge opportun, de concevoir une nouvelle approche qui intègre les différents éléments du régime actuel. Au vu de l'ensemble des intérêts en jeu, il convient de suspendre l'effet de la déclaration d'invalidité pendant un an.

Jurisprudence

Arrêts mentionnés : *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458; *R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401; *R. c. Pierce* (1982), 37 O.R. (2d) 721; *R. c. Worthington* (1972), 10 C.C.C. (2d) 311; *R. c. Downey*, [1992] 2 R.C.S. 10; *R. c. Grilo* (1991), 2 O.R. (3d) 514; *R. c. Barrow* (2001), 54 O.R. (3d) 417; *R. c. Head* (1987), 59 C.R. (3d) 80; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307; *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519; *Nouveau-Brunswick (Ministre de la Santé et des Services*

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communautaires) c. G. (J.), [1999] 3 R.C.S. 46; *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486; *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791; *R. c. Heywood*, [1994] 3 R.C.S. 761; *R. c. Demers*, 2004 CSC 46, [2004] 2 R.C.S. 489; *R. c. Khawaja*, 2012 CSC 69, [2012] 3 R.C.S. 555; *R. c. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57; *R. c. Clay*, 2003 CSC 75, [2003] 3 R.C.S. 735; *Rockert c. La Reine*, [1978] 2 R.C.S. 704; *R. c. Zundel*, [1992] 2 R.C.S. 731; *Shaw c. Director of Public Prosecutions*, [1962] A.C. 220; *Schachter c. Canada*, [1992] 2 R.C.S. 679.

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POURVOIS et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Rosenberg, Feldman, MacPherson et Cronk), 2012 ONCA 186, 109 O.R. (3d) 1, 290 O.A.C. 236, 346 D.L.R. (4th) 385, 282 C.C.C. (3d) 1, 256 C.R.R. (2d) 143, 91 C.R. (6th) 257, [2012] O.J. No. 1296 (QL), 2012 CarswellOnt 3557, qui a confirmé en partie une décision de la juge Himel,

(3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Appeals dismissed and cross-appeal allowed.

Michael H. Morris, *Nancy Dennison* and *Gail Sinclair*, for the appellant/respondent on cross-appeal the Attorney General of Canada.

Jamie C. Klukach, *Christine Bartlett-Hughes* and *Megan Stephens*, for the appellant/respondent on cross-appeal the Attorney General of Ontario.

Alan N. Young, *Marlys A. Edwardh* and *Daniel Sheppard*, for the respondents/appellants on cross-appeal.

Sylvain Leboeuf and *Julie Dassylva*, for the intervener the Attorney General of Quebec.

Katrina E. Pacey, *Joseph J. Arvay*, *Q.C.*, *Elin R. S. Sigurdson*, *Lisa C. Glowacki* and *M. Kathleen Kinch*, for the interveners the Pivot Legal Society, the Downtown Eastside Sex Workers United Against Violence Society and the PACE Society.

Written submissions only by *Michael A. Feder* and *Tammy Shoranick*, for the intervener the Secretariat of the Joint United Nations Programme on HIV/AIDS.

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

Georgialee A. Lang and *Donald Hutchinson*, for the intervener the Evangelical Fellowship of Canada.

Jonathan A. Shime, *Megan Schwartzentruber* and *Renée Lang*, for the interveners the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS and the HIV & AIDS Legal Clinic Ontario.

Janine Benedet and *Fay Faraday*, for the interveners the Canadian Association of Sexual Assault Centres, the Native Women's Association of

2010 ONSC 4264, 102 O.R. (3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Pourvois rejetés et pourvoi incident accueilli.

Michael H. Morris, *Nancy Dennison* et *Gail Sinclair*, pour l'appelant/intimé au pourvoi incident le procureur général du Canada.

Jamie C. Klukach, *Christine Bartlett-Hughes* et *Megan Stephens*, pour l'appelant/intimé au pourvoi incident le procureur général de l'Ontario.

Alan N. Young, *Marlys A. Edwardh* et *Daniel Sheppard*, pour les intimées/appelantes au pourvoi incident.

Sylvain Leboeuf et *Julie Dassylva*, pour l'intervenant le procureur général du Québec.

Katrina E. Pacey, *Joseph J. Arvay*, *c.r.*, *Elin R. S. Sigurdson*, *Lisa C. Glowacki* et *M. Kathleen Kinch*, pour les intervenantes Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society et PACE Society.

Argumentation écrite seulement par *Michael A. Feder* et *Tammy Shoranick*, pour l'intervenant le Secrétariat du Programme commun des Nations Unies sur le VIH/sida.

Brent B. Olthuis, *Megan Vis-Dunbar* et *Michael Sobkin*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Georgialee A. Lang et *Donald Hutchinson*, pour l'intervenante l'Alliance évangélique du Canada.

Jonathan A. Shime, *Megan Schwartzentruber* et *Renée Lang*, pour les intervenants le Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS et HIV & AIDS Legal Clinic Ontario.

Janine Benedet et *Fay Faraday*, pour les intervenants l'Association canadienne des centres contre les agressions à caractère sexuel, l'Association

Canada, the Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel and the Vancouver Rape Relief Society.

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

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

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

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

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

des femmes autochtones du Canada, l'Association canadienne des Sociétés Elizabeth Fry, l'Action ontarienne contre la violence faite aux femmes, la Concertation des luttes contre l'exploitation sexuelle, le Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel et Vancouver Rape Relief Society.

Robert W. Staley, *Ranjan K. Agarwal* et *Amanda C. McLachlan*, pour les intervenantes l'Alliance des chrétiens en droit, la Ligue catholique des droits de l'homme et REAL Women of Canada.

Joseph J. Arvay, *c.r.*, et *Cheryl Milne*, pour l'intervenant David Asper Centre for Constitutional Rights.

Walid Hijazi, pour l'intervenant l'Institut Simone de Beauvoir.

Gwendoline Allison, pour l'intervenante AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution.

Christa Big Canoe et *Emily R. Hill*, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

TABLE OF CONTENTS

TABLE DES MATIÈRES

The judgment of the Court was delivered by

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

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

I. The Case

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

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

Version française du jugement de la Cour rendu par

[1] LA JUGE EN CHEF — Au Canada, offrir ses services sexuels contre de l'argent n'est pas un crime. Par contre, tenir une maison de débauche, vivre des produits de la prostitution d'autrui ou communiquer avec quelqu'un en public en vue d'un acte de prostitution constituent des actes criminels. On fait valoir que ces restrictions apportées à la prostitution compromettent la sécurité et la vie des prostituées et qu'elles sont de ce fait inconstitutionnelles.

[2] Les pourvois et le pourvoi incident ne visent pas à déterminer si la prostitution doit être légale ou non, mais bien si les dispositions adoptées par le législateur fédéral pour encadrer sa pratique résistent au contrôle constitutionnel. Je conclus qu'elles n'y résistent pas. Je suis donc d'avis de les invalider avec effet suspensif et de renvoyer la question au législateur afin qu'il redéfinisse les modalités de cet encadrement.

I. Le dossier

[3] Les demanderesses — trois prostituées ou ex-prostituées — ont sollicité un jugement qui déclare inconstitutionnelles trois dispositions du *Code criminel*, L.R.C. 1985, ch. C-46.

[4] Les trois dispositions contestées criminalisent diverses activités liées à la prostitution. Elles visent principalement à empêcher les nuisances publiques et l'exploitation des prostituées. Suivant l'art. 210, est coupable d'une infraction quiconque, selon le cas, habite une maison de débauche, est trouvé, sans excuse légitime, dans une maison de débauche ou, en qualité de propriétaire, locateur, occupant ou locataire d'un local, en permet sciemment l'utilisation comme maison de débauche. L'alinéa 212(1)*j*) dispose qu'est coupable d'un acte criminel quiconque vit des produits de la prostitution d'autrui. L'alinéa 213(1)*c*) crée l'infraction d'arrêter ou de tenter d'arrêter une personne ou de communiquer ou de tenter de communiquer avec elle dans un endroit public dans le but de se livrer à la prostitution ou de retenir les services sexuels d'une personne qui s'y livre.

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

[6] The applicants allege that all three provisions infringe s. 7 of the *Canadian Charter of Rights and Freedoms* by preventing prostitutes from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violent clients. The applicants also allege that s. 213(1)(*c*) infringes s. 2(*b*) of the *Charter*, and that none of the provisions are saved under s. 1.

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

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

[5] Or, la prostitution n'est pas elle-même illégale. Échanger des services sexuels contre de l'argent n'est pas contraire à la loi. Le régime actuel ne permet que deux types de prostitution : celle qui se pratique dans la rue et celle qui est « itinérante », où la prostituée se déplace pour aller à la rencontre de son client dans un endroit convenu, chez lui par exemple. Cette limitation témoigne d'un choix de politique générale du législateur. Il est loisible à ce dernier de limiter les modalités et les lieux d'exercice de la prostitution à condition qu'il le fasse sans porter atteinte aux droits constitutionnels des prostituées.

[6] Les demanderesses soutiennent que les dispositions portent toutes trois atteinte au droit garanti à l'art. 7 de la *Charte canadienne de droits et libertés* en ce qu'elles empêchent les prostituées de prendre certaines mesures pour se prémunir contre les actes de violence, telles l'embauche d'un garde ou l'évaluation préalable du client. Elles ajoutent que l'al. 213(1)*c*) porte atteinte à une liberté garantie à l'al. 2*b*) de la *Charte* et qu'aucune des dispositions n'est sauvegardée par l'article premier.

[7] Dans sa décision, la juge de première instance relate l'histoire personnelle de chacune des trois demanderesses à partir de leurs témoignages (2010 ONSC 4264, 102 O.R. (3d) 321).

[8] Terri Jean Bedford est née en 1959 à Collingwood, en Ontario. En 2010, elle se prostituait depuis 14 ans et avait travaillé dans différentes villes canadiennes. Elle a été tour à tour prostituée dans la rue, employée de salon de massage, escorte, propriétaire et directrice d'une agence d'escortes, puis dominatrice. Elle a connu une enfance et une adolescence difficiles pendant lesquelles elle a subi divers types de violence. Elle a également été victime d'actes de violence pendant ses années de prostitution, surtout, a-t-elle expliqué, lorsqu'elle travaillait dans la rue. Elle en conclut que la prostitution pratiquée à l'intérieur est moins risquée que la prostitution dans la rue, même si elle reconnaît que la sécurité à l'intérieur peut varier d'un lieu à l'autre. M^me^ Bedford a été déclarée coupable d'avoir tenu et habité une maison de débauche, deux infractions qui lui ont valu des amendes et une peine d'emprisonnement de 15 mois.

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

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

[11] Amy Lebovitch was born in Montréal in 1979. She comes from a stable background and attended both CEGEP and university. She currently works as a prostitute and has done so since approximately 1997 in various cities in Canada. She worked first as a street prostitute, then as an escort, and later in a fetish house. Ms. Lebovitch considers herself lucky that she was never subjected to violence during her years working on the streets. She moved off the streets to work at the escort agency after seeing other women's injuries and hearing stories of the violence suffered by other street prostitutes. Ms. Lebovitch maintains that she felt safer in an indoor location; she attributed remaining safety issues mainly to poor management. Ms. Lebovitch experienced one notable instance of violence, which

[9] Lorsqu'elle dirigeait un service d'escortes dans les années 1980, M[me] Bedford prenait diverses mesures de sécurité, dont les suivantes. Assurer la présence sur place d'une autre personne lors de la visite d'un nouveau client; faire en sorte que la prostituée soit amenée au lieu de rendez-vous, puis en soit ramenée par son petit ami, son mari ou un chauffeur; appeler l'hôtel où le rendez-vous est donné pour vérifier le nom du client et le numéro de sa chambre; composer le numéro de téléphone du client pour s'assurer que c'était le bon lorsque la rencontre avait lieu chez le client; refuser tout rendez-vous à un client qui semblait intoxiqué; s'assurer que le numéro de carte de crédit correspondait au nom du client. Pour autant qu'elle sache, aucune de ses employées n'a été victime d'actes de violence de la part de clients pendant cette période. À un certain moment au cours des années 1990, M[me] Bedford a ouvert le « Bondage Bungalow » où elle a offert des services de dominatrice. Elle y a également pris des mesures de sécurité et n'a connu qu'un seul incident de [TRADUCTION] « violence véritable » (décision de première instance, par. 30).

[10] Pour l'heure, M[me] Bedford ne se livre pas à la prostitution. Elle aimerait reprendre ses activités de dominatrice dans un lieu sûr, à l'intérieur, mais elle craint d'engager alors sa responsabilité criminelle. Elle ajoute ne pas vouloir non plus que ses collaborateurs s'exposent à des accusations de proxénétisme.

[11] Née en 1979 à Montréal, Amy Lebovitch a grandi dans une famille stable et a fréquenté le cégep et l'université. Elle se livre actuellement à la prostitution. Elle a commencé vers 1997 et a travaillé dans plusieurs villes du Canada. Elle s'est d'abord prostituée dans la rue, puis comme escorte et, enfin, dans une maison fétichiste. Elle s'estime chanceuse de n'avoir jamais été victime de violence au cours des années où elle a travaillé dans la rue. Elle a quitté ce milieu pour devenir escorte après avoir vu les blessures infligées à d'autres prostituées de la rue et avoir entendu le récit des actes de violence commis à leur endroit. M[me] Lebovitch soutient qu'elle se sent davantage en sécurité lorsqu'elle se livre à la prostitution à l'intérieur. Selon elle, les incidents qui s'y produisent malgré tout sont

she did not report to the police out of fear of police scrutiny and the possibility of criminal charges.

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

[13] Valerie Scott was born in Moncton, New Brunswick, in 1958. She is currently the executive director of SPOC, and she no longer works as a prostitute. In the past, she worked indoors, from her home or in hotel rooms; she also worked as a prostitute on the street, in massage parlours, and she ran a small escort business. She has never been charged with a criminal offence of any kind. When Ms. Scott worked from home, she would screen new clients by meeting them in public locations. She never experienced significant harm working from home. Around 1984, as awareness about HIV/AIDS increased, Ms. Scott was compelled to work as a street prostitute, since indoor clients felt entitled not to wear condoms. On the street, she was subjected to threats of violence, as well as verbal and physical abuse. Ms. Scott described some precautions street

essentiellement attribuables à une mauvaise gestion. Elle n'a connu qu'un seul cas de violence digne de mention, qu'elle n'a toutefois pas dénoncé de crainte d'attirer l'attention de la police sur ses activités et d'être accusée au criminel.

[12] À l'heure actuelle, M^me^ Lebovitch se prostitue essentiellement chez elle, de manière autonome. Elle prend diverses précautions, dont s'assurer que le numéro de téléphone du client n'est pas masqué, refuser un client qui semble ivre, intoxiqué ou par ailleurs rebutant, s'enquérir au départ des attentes du client, lui demander son nom au complet et vérifier son identité à l'assistance annuaire, obtenir des références d'un client fiable et appeler un tiers — son « ange gardien » — à l'arrivée du client et peu avant qu'il ne parte. M^me^ Lebovitch craint d'être accusée et déclarée coupable de tenir une maison de débauche et que sa demeure soit confisquée en conséquence. Elle affirme que la peur d'être accusée au criminel l'a parfois amenée à travailler dans la rue. Elle craint également que son conjoint ne soit accusé de proxénétisme. Elle n'a jamais fait l'objet d'accusations au pénal. Elle est porte-parole bénévole de l'organisme Sex Professionals of Canada (« SPOC ») et consigne par ailleurs les incidents que lui signalent des prostituées victimes de violence ou de vol de la part de clients. M^me^ Lebovitch dit aimer son travail et n'entend pas en changer dans un avenir prévisible.

[13] Née en 1958 à Moncton, au Nouveau-Brunswick, Valerie Scott est actuellement directrice administrative de SPOC. Elle ne travaille plus comme prostituée, mais elle l'a fait, à l'intérieur, chez elle ou dans des chambres d'hôtel, dans la rue et dans des salons de massage. Elle a aussi dirigé une petite agence d'escortes. Elle n'a jamais été accusée de la moindre infraction criminelle. Lorsqu'elle travaillait chez elle, elle soumettait tout nouveau client à une évaluation préalable lors d'une rencontre dans un lieu public. Elle n'a alors jamais eu d'ennuis graves. Vers 1984, les craintes accrues suscitées par le VIH/SIDA l'ont amenée à travailler dans la rue car les clients qu'elle recevait chez elle se croyaient dispensés du port du condom. Dans la rue, elle a été l'objet de menaces de violence ainsi que d'agressions verbales et physiques. Elle fait

prostitutes took prior to the enactment of the communicating law, including working in pairs or threes and having another prostitute visibly write down the client's licence plate number, so he would know he was traceable if something was to go wrong.

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

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

état de certaines précautions que les prostituées de la rue prenaient avant l'adoption des dispositions interdisant la communication, dont le travail à deux ou à trois ou la prise ostensible du numéro de plaque du client par une autre prostituée afin que ce dernier sache qu'on pouvait le retracer si les choses tournaient mal.

[14] M^me^ Scott a été militante. Elle a notamment fait campagne contre le projet de loi C-49 (dont est issue la disposition actuelle interdisant la communication). Elle dit qu'après l'interdiction de la communication, la Canadian Organization for the Rights of Prostitutes (« CORP ») a commencé à recevoir des appels de prostituées qui constataient une répression policière accrue et un plus grand nombre d'incidents avec des clients. C'est pourquoi elle a participé à la mise sur pied à Toronto d'un centre d'aide aux prostituées dont les services étaient offerts sur place et au téléphone. Dès la première année, M^me^ Scott s'est entretenue avec environ 250 prostituées dont les principaux sujets de préoccupation étaient la violence des clients et les conséquences juridiques d'une arrestation. En 2000, elle a créé SPOC afin de donner une nouvelle impulsion au travail entrepris par la CORP. C'est à titre de directrice administrative de cet organisme qu'elle a témoigné en 2005 devant le Sous-comité parlementaire de l'examen des lois sur le racolage. Au fil des ans, elle se serait entretenue avec environ 1 500 femmes qui se livrent à la prostitution. Si les appelantes ont gain de cause, M^me^ Scott aimerait se mettre à son compte et offrir des services de prostitution à l'intérieur. Elle reconnaît qu'un client peut se révéler dangereux tant à l'intérieur qu'à l'extérieur, mais elle prendrait des précautions, comme la vérification de l'identité du client, la présence d'une autre personne à proximité qui puisse intervenir au besoin lors d'un rendez-vous et l'embauche d'un garde du corps.

[15] Les trois demanderesses ont demandé, sur le fondement de l'al. 14.05(3)g.1) des *Règles de procédure civile*, R.R.O. 1990, Règl. 194, que les dispositions qui limitent la prostitution soient déclarées inconstitutionnelles. Le dossier de preuve compte plus de 25 000 pages et 88 volumes. La preuve par affidavit s'accompagne d'une foule d'études, de rapports, d'articles de journaux, d'extraits de textes

other documents. Some of the affiants were cross-examined.

II. Legislation

[16] The relevant legislation is as follows:

Canadian Charter of Rights and Freedoms

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

2. Everyone has the following fundamental freedoms:

. . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

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

Criminal Code

197. (1) In this Part,

. . .

"common bawdy-house" means a place that is

(*a*) kept or occupied, or

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

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

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

(2) Every one who

de loi et des Débats de la Chambre des communes, et de nombreux autres documents. Certains déposants ont été contre-interrogés.

II. Dispositions législatives

[16] Les dispositions législatives applicables sont les suivantes :

Charte canadienne des droits et libertés

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

2. Chacun a les libertés fondamentales suivantes :

. . .

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

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.

Code criminel

197. (1) Les définitions qui suivent s'appliquent à la présente partie.

. . .

« maison de débauche » Local qui, selon le cas :

a) est tenu ou occupé;

b) est fréquenté par une ou plusieurs personnes,

à des fins de prostitution ou pour la pratique d'actes d'indécence.

210. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque tient une maison de débauche.

(2) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, selon le cas :

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

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

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

is guilty of an offence punishable on summary conviction.

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

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

212. (1) Every one who

. . .

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

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

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

. . .

a) habite une maison de débauche;

b) est trouvé, sans excuse légitime, dans une maison de débauche;

c) en qualité de propriétaire, locateur, occupant, locataire, agent ou ayant autrement la charge ou le contrôle d'un local, permet sciemment que ce local ou une partie du local soit loué ou employé aux fins de maison de débauche.

(3) Lorsqu'une personne est déclarée coupable d'une infraction visée au paragraphe (1), le tribunal fait signifier un avis de la déclaration de culpabilité au propriétaire ou locateur du lieu à l'égard duquel la personne est déclarée coupable, ou à son agent, et l'avis doit contenir une déclaration portant qu'il est signifié selon le présent article.

(4) Lorsqu'une personne à laquelle un avis est signifié en vertu du paragraphe (3) n'exerce pas immédiatement tout droit qu'elle peut avoir de résilier la location ou de mettre fin au droit d'occupation que possède la personne ainsi déclarée coupable, et que, par la suite, un individu est déclaré coupable d'une infraction visée au paragraphe (1) à l'égard du même local, la personne à qui l'avis a été signifié est censée avoir commis une infraction visée au paragraphe (1), à moins qu'elle ne prouve qu'elle a pris toutes les mesures raisonnables pour empêcher le renouvellement de l'infraction.

212. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque, selon le cas :

. . .

j) vit entièrement ou en partie des produits de la prostitution d'une autre personne.

213. (1) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, dans un endroit soit public soit situé à la vue du public et dans le but de se livrer à la prostitution ou de retenir les services sexuels d'une personne qui s'y livre :

. . .

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

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

III. Prior Decisions

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

[17] The application judge, Himel J., concluded that the applicants had private interest standing to challenge the provisions. She held that the decision of this Court upholding the bawdy-house and communicating law in the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 ("*Prostitution Reference*"), did not prevent her from reviewing their constitutionality because: (1) s. 7 jurisprudence has evolved considerably since 1990; in particular, the doctrines of arbitrariness, overbreadth and gross disproportionality had not yet been fully articulated and therefore were not argued or considered in the *Prostitution Reference*; (2) the evidentiary record before her was much richer, based on research not available in 1990; (3) the social, political and economic assumptions underlying the *Prostitution Reference* may no longer be valid; and (4) the type of expression at issue differed from that considered in the *Prostitution Reference*.

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

With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes

c) soit arrête ou tente d'arrêter une personne ou, de quelque manière que ce soit, communique ou tente de communiquer avec elle.

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

III. Décisions des juridictions inférieures

A. *Cour supérieure de justice de l'Ontario (la juge Himel)*

[17] En première instance, la juge Himel conclut que les demanderesses ont qualité pour agir dans l'intérêt privé et contester les dispositions. Elle estime que le *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123 (« *Renvoi sur la prostitution* »), dans lequel notre Cour confirme la validité des dispositions sur les maisons de débauche et la communication à des fins de prostitution, ne l'empêche pas d'examiner leur constitutionnalité, car (1) la jurisprudence relative à l'art. 7 a beaucoup évolué depuis 1990 et, plus particulièrement, les notions de caractère arbitraire, de portée excessive et de disproportion totale n'étaient pas encore bien arrêtées, de sorte qu'elles n'avaient pas été invoquées ou examinées dans cette affaire, (2) le dossier de preuve est beaucoup plus étoffé et repose sur les résultats de recherches qui n'étaient pas disponibles en 1990, (3) les données sociales, politiques et économiques qui sous-tendent le *Renvoi sur la prostitution* ne sont peut-être plus valables et (4) l'expression considérée en l'espèce diffère de celle examinée dans le *Renvoi sur la prostitution*.

[18] Après examen du régime législatif existant et de la preuve offerte, la juge Himel conclut que les dispositions contestées portent toutes trois atteinte au droit à la liberté (en raison du risque d'emprisonnement) et à la sécurité (en raison du risque accru de préjudice) des demanderesses et d'autres personnes dans la même situation. Le risque accru de violence créé par les dispositions « suffit » pour mettre en jeu le droit à la sécurité de la personne garanti à l'art. 7. Elle déclare :

[TRADUCTION] À l'égard de l'art. 210, les preuves indiquent que travailler à l'intérieur est la façon la plus

who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(*j*), prostitution, including legal out-call work, may be made less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(*c*) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial stage of a potential transaction, thereby putting them at an increased risk of violence.

In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence. [paras. 361-62]

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

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

[21] Himel J. found the prohibition against living on the avails of prostitution (s. 212(1)(*j*)) arbitrary, overbroad and grossly disproportionate. While targeting exploitation by pimps, the provision

sécuritaire de vendre des services à caractère sexuel. Pourtant, les prostituées qui tentent d'accroître leur niveau de sécurité en travaillant à l'intérieur sont passibles d'une sanction pénale. Relativement à l'al. 212(1)*j*), la prostitution, y compris le travail légal « itinérant », pourrait être plus sécuritaire si la prostituée avait le droit d'embaucher un adjoint ou un garde du corps. Pourtant, de telles relations de travail sont illégales en raison de la disposition interdisant de vivre des produits de la prostitution. En dernier lieu, l'al. 213(1)*c*) interdit aux prostituées de la rue, qui sont de loin les plus vulnérables et font l'objet d'un nombre alarmant d'actes de violence, de présélectionner les clients à l'étape initiale, et cruciale, de la transaction possible, les exposant ainsi à un risque accru de violence.

En conclusion, ces trois dispositions empêchent les prostituées de prendre des précautions, certaines extrêmement rudimentaires, qui pourraient réduire le risque de violence à leur endroit. Les prostituées sont obligées de choisir entre la liberté et la sécurité de leur personne. Ainsi, bien que ce soit le client qui, en fin de compte, fasse subir la violence à la prostituée, je suis d'avis que la loi contribue suffisamment à empêcher qu'une prostituée prenne des mesures qui pourraient réduire le risque d'une telle violence. [par. 361-362]

[19] La juge Himel conclut que la privation du droit à la sécurité qui en résulte n'est pas conforme aux principes de justice fondamentale, dont celui qui empêche le législateur de porter atteinte au droit à la sécurité de la personne par l'adoption d'une disposition arbitraire ou totalement disproportionnée ou dont la portée est trop grande.

[20] À son avis, la disposition sur les maisons de débauche (l'art. 210) a une portée trop grande en ce qu'elle vise pratiquement tout lieu et réprime des actes qui n'ont rien à voir avec l'objectif d'empêcher les nuisances publiques. De plus, le préjudice infligé est totalement disproportionné compte tenu du nombre peu élevé de plaintes pour nuisance. Empêcher les prostituées de se livrer à la prostitution dans un lieu établi, situé à l'intérieur, les contraint à renoncer à leur liberté (par l'observation de la loi) ou à leur sécurité personnelle.

[21] La juge Himel estime que l'interdiction du proxénétisme (l'al. 212(1)*j*)) est arbitraire et totalement disproportionnée, et que sa portée est trop grande. Même si elle est censée réprimer

encompasses virtually anyone who provides services to prostitutes. Prostitutes are forced to work alone, increasing the risk of harm, or work with people prepared to break the law. It increases reliance on pimps, and is therefore arbitrary. It catches non-exploitative relationships, and is therefore overbroad. And it creates the risk of severe violence from pimps and exploiters, making it grossly disproportionate.

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

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

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

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

[25] The majority of the Court of Appeal, *per* Doherty, Rosenberg and Feldman J.J.A. (with whom the minority *per* MacPherson J.A. concurred on these issues), agreed with the application judge that the bawdy-house and living on the avails provisions were unconstitutional on the basis that they

l'exploitation par le proxénète, la disposition vise pratiquement toute personne qui offre des services à une prostituée. Celle-ci est obligée soit de travailler seule, ce qui augmente le risque auquel elle s'expose, soit de travailler avec des gens qui sont disposés à contrevenir à la loi. L'interdiction accroît la dépendance des prostituées envers les souteneurs, ce qui la rend arbitraire. Elle s'applique à des rapports exempts d'exploitation, de sorte que sa portée est trop grande. Enfin, elle crée un risque de violence grave de la part des proxénètes et des exploiteurs, d'où son caractère totalement disproportionné.

[22] Enfin, la juge Himel statue que l'interdiction de communiquer en vue de se livrer à la prostitution (l'al. 213(1)*c*)) va à l'encontre du principe de la proportionnalité. Parce qu'elle empêche les prostituées de jauger leurs clients — une mesure essentielle à l'accroissement de leur sécurité —, l'interdiction les expose à un danger disproportionné au faible avantage social obtenu. Elle porte par ailleurs atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte*.

[23] La juge Himel opine que l'atteinte au droit et à la liberté garantis à l'art. 7 et à l'al. 2*b*) qui découle des dispositions en cause ne peut se justifier en vertu de l'article premier de la *Charte.*

[24] Elle déclare donc inconstitutionnelles, sans effet suspensif, les dispositions créant les infractions de communication aux fins de prostitution et de proxénétisme, et elle modifie l'interdiction de tenir une maison de débauche par la suppression du mot « prostitution » dans la définition de « maison de débauche » figurant au par. 197(1) pour les besoins de l'art. 210.

B. *Cour d'appel de l'Ontario (les juges Doherty, Rosenberg, Feldman, MacPherson et Cronk)*

[25] Les juges majoritaires de la Cour d'appel (les juges Doherty, Rosenberg et Feldman, avec l'accord des juges minoritaires sur ces points exprimé par le juge MacPherson) conviennent avec la juge de première instance que les dispositions sur les maisons de débauche et le proxénétisme sont

engaged the security of the person in a way that was not in accordance with the principles of fundamental justice (2012 ONCA 186, 109 O.R. (3d) 1). In particular, the majority found as follows.

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

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

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

inconstitutionnelles parce qu'elles portent atteinte à la sécurité de la personne d'une manière non conforme aux principes de justice fondamentale (2012 ONCA 186, 109 O.R. (3d) 1). Ils concluent notamment ce qui suit.

[26] Selon eux, l'interdiction des maisons de débauche a une portée trop grande et un effet sur le droit à la sécurité qui est totalement disproportionné à l'avantage obtenu. Ils conviennent de supprimer le mot « prostitution » dans la définition de « maison de débauche », mais suspendent l'effet de l'invalidation pendant 12 mois.

[27] Ils opinent que l'interdiction du proxénétisme n'est pas arbitraire, contrairement à ce qu'affirme la juge de première instance, mais que sa portée est trop grande et qu'elle est totalement disproportionnée par ses effets. Toutefois, au lieu d'invalider la disposition, ils en restreignent la portée en l'interprétant largement comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés (par. 267).

[28] Les juges majoritaires de la Cour d'appel concluent que l'interdiction de communiquer en public à des fins de prostitution est constitutionnelle. Même si elle porte atteinte à la sécurité de la personne, elle est conforme aux principes de justice fondamentale. La disposition vise à empêcher les nuisances causées par le racolage, et elle n'est pas arbitraire. Elle a permis d'assurer la quiétude des quartiers résidentiels. Sa portée n'est pas trop grande et elle n'est pas totalement disproportionnée. Pour arriver à la conclusion que la disposition est totalement disproportionnée, la juge de première instance a eu tort de sous-estimer l'objectif sans égard à la preuve et d'accorder trop d'importance aux répercussions sur le droit à la sécurité des prostituées. La preuve ne démontrait pas que l'impossibilité de communiquer avec des clients contribuait aux ennuis des prostituées au point d'avoir un effet totalement disproportionné à l'avantage obtenu. Les juges majoritaires s'estiment également liés par le *Renvoi sur la prostitution* et ils concluent que la disposition porte atteinte à la liberté garantie à l'al. 2*b*) de la *Charte*, mais que cette atteinte est justifiée au regard de l'article premier de la *Charte*.

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

[29] Sous la plume du juge MacPherson, les juges minoritaires (dissidents sur ce seul point) auraient invalidé l'interdiction de communiquer à des fins de prostitution sur le fondement de l'art. 7 et de l'article premier de la *Charte* au motif qu'elle est totalement disproportionnée à l'objectif législatif de réprimer la nuisance sociale. Selon eux, (1) ses répercussions sont aussi graves, sinon plus, que celles des autres dispositions, (2) la juge de première instance a correctement énoncé l'objectif de la disposition, (3) le dossier permettait de conclure que l'évaluation du client est essentielle à la sécurité des prostituées, (4) la disposition empêche non seulement cette évaluation, mais nuit à la sécurité des prostituées en les obligeant à travailler dans des endroits isolés et dangereux, (5) la disposition a des répercussions sur les prostituées les plus vulnérables, celles de la rue, ce qui compromet le droit à l'égalité garanti à l'art. 15, (6) notre récent arrêt *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134 appuie la conclusion d'atteinte au droit garanti à l'art. 7 et (7) l'effet combiné de mesures législatives ayant pour effet d'obliger les prostituées à exercer leurs activités dans la rue tout en les empêchant de jauger leurs clients éventuels va également dans le sens de l'inconstitutionnalité. Cette conclusion des juges minoritaires les dispense d'examiner l'al. 2*b*) de la *Charte*.

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

[30] Pour en arriver à leurs conclusions, les juges majoritaires formulent accessoirement un certain nombre d'observations importantes.

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

[31] En ce qui concerne la règle du *stare decisis* et la question de savoir si la juge était liée par le *Renvoi sur la prostitution*, la Cour d'appel interprète strictement les conditions auxquelles un juge de première instance peut réexaminer une décision antérieure de notre Cour au regard de mutations sociales, économiques ou politiques. Le juge ne peut modifier le droit établi. Il doit s'en tenir à des conclusions sur les faits et la crédibilité afin de constituer le dossier de preuve à partir duquel notre Cour pourra ensuite se prononcer. Les motifs pour lesquels un tribunal peut s'écarter de ses propres décisions antérieures ne sauraient permettre à une

determining what constitutes a reasonable limit on a right under s. 1 of the *Charter* (paras. 75-76).

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

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

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

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

juridiction inférieure de remettre en question un arrêt qui la lie. Ce principe vaut lorsqu'il s'agit de déterminer ce qui constitue une limite raisonnable à l'exercice d'un droit au sens de l'article premier de la *Charte* (par. 75-76).

[32] S'agissant de la causalité requise pour emporter l'application de l'art. 7, la Cour d'appel explique que l'analyse traditionnelle ne convient pas lorsque ce sont les dispositions d'une loi, et non les actes d'un fonctionnaire, qui auraient porté atteinte à un droit garanti par l'art. 7. Il faut plutôt recourir à une analyse factuelle et pragmatique pour déterminer ce que les dispositions interdisent ou prescrivent, quelles sont leurs répercussions sur les intéressés et s'il en résulte une atteinte à un droit garanti (par. 107-109).

[33] En ce qui concerne la déférence qui s'impose à l'égard des conclusions de fait tirées en première instance, la Cour d'appel opine que les conclusions sur des faits sociaux ou législatifs ne commandent pas la déférence de la juridiction d'appel, tandis que celles sur la crédibilité des déposants et l'objectivité des témoins experts la commandent (par. 128-131).

[34] S'agissant de l'objet des dispositions, la Cour d'appel rejette la prétention du procureur général de l'Ontario suivant laquelle leur objectif primordial est de supprimer la prostitution ou, du moins, de la décourager. À son avis, il faut plutôt cerner l'objet de chacune des dispositions séparément, dans son propre contexte historique (par. 165-170).

[35] Quant aux principes de justice fondamentale, la Cour d'appel statue que le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné appellent des examens sous des angles différents du lien entre la disposition contestée et l'objectif législatif. Le caractère arbitraire s'entend de l'absence de rapport entre l'objectif de la loi et ses effets préjudiciables sur la sécurité de la personne. Une disposition a une portée trop grande lorsqu'elle limite le droit à la sécurité de la personne plus qu'il n'est nécessaire pour atteindre son objectif. Une disposition est par ailleurs totalement disproportionnée lorsque ses répercussions sont si extrêmes qu'elles ne peuvent être justifiées par son objet (par. 143-149).

IV. Discussion

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

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

A. *Preliminary Issues*

(1) Revisiting the *Prostitution Reference*

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

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

[40] In this case, the precedent in question is the Supreme Court of Canada's 1990 advisory opinion in the *Prostitution Reference*, which upheld the constitutionality of the prohibitions on

IV. Analyse

[36] Les procureurs généraux appelants se pourvoient contre le jugement de la Cour d'appel qui déclare inconstitutionnels l'art. 210 et l'al. 212(1)*j*) du *Code*. Les intimées se pourvoient de manière incidente relativement à la constitutionnalité de l'al. 213(1)*c*) et à la mesure prise par la Cour d'appel pour remédier à l'inconstitutionnalité de l'art. 210.

[37] Avant de passer aux moyens fondés sur la *Charte*, j'examine d'abord deux questions préliminaires. Premièrement, les juges de première instance et notre Cour sont-ils liés par le *Renvoi sur la prostitution* de 1990, qui confirme la validité des dispositions interdisant les maisons de débauche et la communication à des fins de prostitution? Deuxièmement, quel degré de déférence commandent les conclusions tirées en première instance sur des faits sociaux ou législatifs?

A. *Questions préliminaires*

(1) Réexamen du *Renvoi sur la prostitution*

[38] La notion de certitude du droit exige que les tribunaux suivent et appliquent les précédents qui font autorité. C'est d'ailleurs l'assise fondamentale de la common law.

[39] La question de savoir à quelles conditions il est possible de s'écarter d'un précédent, le cas échéant, se présente de deux manières. Elle se pose premièrement du point de vue « hiérarchique ». À quelles conditions une juridiction inférieure peut-elle, le cas échéant, s'écarter du précédent établi par une juridiction supérieure? Elle se pose deuxièmement du point de vue « collégial ». À quelles conditions une juridiction comme notre Cour peut-elle, le cas échéant, s'écarter de ses propres précédents?

[40] Dans la présente affaire, le précédent correspond à l'avis consultatif de la Cour dans le *Renvoi sur la prostitution* de 1990, qui confirme la constitutionnalité des interdictions faites par deux des

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

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

[42] In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence

trois dispositions contestées en l'espèce de tenir une maison de débauche et communiquer à des fins de prostitution. Dans ce renvoi, la Cour devait décider si les dispositions portaient atteinte au droit ou à la liberté garantis à l'art. 7 ou à l'al. 2*b*) de la *Charte* et, dans l'affirmative, si cette limite était justifiée par application de l'article premier. Elle conclut que ni l'une ni l'autre des dispositions ne sont incompatibles avec l'art. 7 et que, même si l'interdiction de communiquer à des fins de prostitution porte atteinte à une liberté garantie à l'al. 2*b*), il s'agit d'une limite justifiable suivant l'article premier de la *Charte*. Bien que les avis consultatifs puissent ne pas être juridiquement contraignants, dans les faits, il sont suivis (G. Rubin, « The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law » (1960), 6 *R.D. McGill* 168, p. 175).

[41] La juge de première instance dit pouvoir réexaminer les conclusions tirées dans le *Renvoi sur la prostitution* parce que les questions de droit soulevées relativement à l'art. 7 sont différentes étant donné l'évolution du droit dans le domaine, que le dossier de preuve est plus étoffé et fait état de résultats de recherches qui n'étaient pas disponibles en 1990, que les données sociales, politiques et économiques sous-jacentes ne sont plus valables et que l'expression alors en cause (commerciale) diffère de celle considérée dans la présente affaire (celle qui contribue à la sécurité). La Cour d'appel exprime son désaccord au sujet de l'al. 2*b*) et explique que le tribunal de première instance invité à rompre avec un précédent en raison de nouveaux éléments de preuve ou de nouvelles données sociales, politiques ou économiques peut tirer des conclusions de fait susceptibles d'être examinées ensuite par une juridiction supérieure, mais ne peut les appliquer pour arriver à une solution différente de celle retenue dans le précédent (par. 76).

[42] À mon avis, le juge du procès peut se pencher puis se prononcer sur une prétention d'ordre constitutionnel qui n'a pas été invoquée dans l'affaire antérieure; il s'agit alors d'une nouvelle question de droit. De même, le sujet peut être réexaminé lorsque de nouvelles questions de droit sont soulevées par suite d'une évolution importante du droit ou qu'une

that fundamentally shifts the parameters of the debate.

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

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

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

modification de la situation ou de la preuve change radicalement la donne.

[43] L'intervenant David Asper Centre for Constitutional Rights fait valoir que la règle du *stare decisis* propre à la common law est subordonnée à la Constitution et ne saurait avoir pour effet d'obliger un tribunal à valider une loi inconstitutionnelle. À son avis, une juridiction inférieure ne doit pas s'en tenir au rôle de [TRADUCTION] « simple exécutant » qui constitue un dossier et tire des conclusions sans se livrer à l'analyse du droit (m.i., par. 25).

[44] Je partage cet avis. Mais comme le signale aussi l'intervenant, la juridiction inférieure ne peut faire abstraction d'un précédent qui fait autorité, et la barre est haute lorsqu'il s'agit de justifier le réexamen d'un précédent. Rappelons que, selon moi, le réexamen est justifié lorsqu'une nouvelle question de droit se pose ou qu'il y a modification importante de la situation ou de la preuve. Cette approche met en balance les impératifs que sont le caractère définitif et la stabilité avec la reconnaissance du fait qu'une juridiction inférieure doit pouvoir exercer pleinement sa fonction lorsqu'elle est aux prises avec une situation où il convient de revoir un précédent.

[45] Il s'ensuit que, en l'espèce, la juge pouvait trancher la question de savoir si les dispositions en cause respectaient ou non le droit à la sécurité de la personne garanti à l'art. 7 de la *Charte*. Dans le *Renvoi sur la prostitution*, les juges majoritaires statuent uniquement en fonction du droit à la liberté physique de la personne garanti à l'art. 7. Seul le juge Lamer, qui s'exprime en son nom personnel, aborde la question de la sécurité de la personne, et ce, dans le seul contexte des droits économiques. Contrairement à ce que prétend le procureur général du Canada, le fait que le droit en cause garanti par l'art. 7 soit celui à la liberté économique ou à la sécurité de la personne *n'*est *pas* [TRADUCTION] « une distinction sans importance » (m.a., par. 94). Les droits garantis à l'art. 7 sont des « intérêts indépendants auxquels la Cour doit respectivement donner un sens indépendant » (*R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 52). Qui plus est, dans le *Renvoi sur la prostitution*, la Cour a examiné les

overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years.

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

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

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

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

principes de justice fondamentale sous l'angle de l'imprécision de la criminalisation indirecte et de son acceptabilité. En l'espèce, ce sont le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné qui sont allégués, des notions qui ont en grande partie vu le jour au cours des 20 dernières années.

[46] Ces considérations sont étrangères à la question — tranchée dans le *Renvoi sur la prostitution* — de savoir si la disposition qui interdit la communication constitue une limitation justifiée de la liberté d'expression. Qualifier différemment l'expression à laquelle il aurait été porté atteinte en l'espèce ne fait pas naître une nouvelle question de droit, et ni une preuve actualisée, ni l'évolution des mentalités et des points de vue n'équivalent à une modification de la situation ou de la preuve qui change radicalement la donne.

[47] Passons à la question de savoir si, en l'espèce, notre Cour doit rompre ou non avec une décision antérieure concernant l'application de l'al. 2*b*). Il nous faut essentiellement mettre en balance deux éléments : la justesse et la certitude (*Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489, par. 27). Dans le présent dossier, toutefois, il n'est pas nécessaire de déterminer si notre Cour peut rompre avec la conclusion qu'elle a tirée sur l'application de l'al. 2*b*) dans le *Renvoi sur la prostitution* puisqu'il est possible de trancher sur le fondement du seul art. 7.

(2) Déférence envers les conclusions tirées en première instance sur des faits sociaux ou législatifs

[48] La Cour d'appel se dit d'avis que les conclusions de la juge sur des faits sociaux ou législatifs — qui intéressent la société en général et qui sont établis au moyen d'une preuve complexe relevant des sciences sociales — ne commandent pas la déférence. Je ne puis malheureusement souscrire à son opinion. Comme le dit notre Cour dans *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, une cour d'appel doit se garder de modifier les conclusions de fait tirées en première instance, sauf erreur manifeste et dominante.

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

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

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

[52] Second, social and legislative facts may be intertwined with adjudicative facts — that is, the facts of the case at hand — and with issues of credibility of experts. To posit a different standard of review for adjudicative facts and the credibility of

[49] Le juge saisi d'éléments de preuve portant sur des faits sociaux ou législatifs a l'obligation de les examiner et de les soupeser en vue de tirer les conclusions de fait nécessaires pour trancher le litige. Il lui incombe de constituer le dossier sur lequel reposeront les appels subséquents. Sauf erreur d'appréciation susceptible de contrôle, la juridiction d'appel doit se garder de modifier les conclusions de première instance sur des faits sociaux ou législatifs. Ce partage des tâches est fondamental dans notre système de justice. Le juge du procès se prononce sur les faits, puis les juridictions d'appel contrôlent sa décision pour déterminer si elle est fondée en droit ou si elle est entachée d'une erreur de fait manifeste et dominante. La règle vaut pour les faits sociaux ou législatifs tout autant que pour les conclusions sur les faits qui sont à l'origine du litige.

[50] Deux raisons importantes d'ordre pratique militent contre la mise au rancart de la norme de contrôle habituelle seulement parce que des faits sociaux ou législatifs sont en cause.

[51] En premier lieu, la juridiction d'appel devrait alors reprendre le travail parfois long et fastidieux qui consiste à examiner tous les éléments et à concilier les divergences entre les experts, les études et les résultats de recherches. Une nouvelle formation de juges devrait passer des heures, voire des semaines, à prendre connaissance de la preuve et à l'analyser. Et les avocats des parties devraient examiner la preuve avec ces juges une fois de plus afin que ces derniers puissent tirer leurs propres conclusions. Il en résulterait une augmentation du coût et de la durée de la procédure judiciaire. Lorsqu'il s'agit de rechercher une erreur éventuelle — ce qui est le propre d'un appel —, il est plus sensé de demander aux avocats de signaler toute erreur qui entacherait les conclusions tirées de la preuve en première instance, de sorte que la juridiction d'appel n'ait qu'à décider si l'erreur vicie les conclusions.

[52] En second lieu, les faits sociaux ou législatifs peuvent s'entremêler avec les faits en litige — les faits de l'espèce — et avec les questions liées à la crédibilité des experts. Appliquer une norme de contrôle aux faits en litige ainsi qu'à la crédibilité

affiants and expert witnesses on the one hand, and social and legislative facts on the other (as proposed by the Court of Appeal), is to ask the impossible of courts of appeal. Untangling the different sources of those conclusions and applying different standards of review to them would immensely complicate the appellate task.

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

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

des déposants et des témoins experts et en appliquer une autre aux faits sociaux ou législatifs (comme le propose la Cour d'appel) revient à demander l'impossible aux juridictions d'appel. Démêler les différentes sources de ces conclusions et les soumettre à des normes de contrôle différentes compliqueraient immensément la tâche de la juridiction d'appel.

[53] Le procureur général du Canada souligne que, dans l'arrêt *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, notre Cour affirme que les conclusions relatives aux faits législatifs commandent un degré de déférence moins élevé. Or, le recours à des éléments de preuve relevant des sciences sociales dans les affaires portant sur l'application de la *Charte* a beaucoup évolué depuis cet arrêt. Dans les années qui ont suivi, notre Cour a dit préférer que de tels éléments de preuve soient présentés par des témoins experts (*R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571, par. 26-28; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458, par. 68). L'appréciation du témoignage d'un expert relève au premier chef du juge du procès (*R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, par. 62-96), surtout depuis le rapport établi en Ontario par le juge Goudge qui met en évidence le rôle du juge du procès dans la prévention des erreurs judiciaires imputables aux témoignages d'experts déficients (*Commission d'enquête sur la médecine légale pédiatrique en Ontario : Rapport*, vol. 3, *Politique et recommandations* (2008)). La distinction entre les faits en litige et les faits législatifs ne peut plus justifier des degrés différents de déférence.

[54] La présente affaire constitue un bon exemple. La juge de première instance tire ses propres conclusions concernant l'effet des dispositions contestées sur le droit à la sécurité de la personne garanti à l'art. 7 à partir du témoignage des demanderesses, des déposants et des experts, ainsi que de la preuve documentaire constituée d'études, de rapports de comités d'experts et de documents parlementaires. La Cour d'appel concède qu'elle doit déférer aux conclusions de la juge sur les faits en litige ainsi que sur la crédibilité des déposants

of applying different standards of review when the evidence is intertwined would be daunting.

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

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

B. *Section 7 Analysis*

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

et des experts, mais elle refuse de faire preuve de déférence à l'endroit de ses conclusions sur des faits sociaux ou législatifs. Appliquer des normes de contrôle différentes à des éléments de preuve entremêlés représenterait une tâche colossale.

[55] On laisse entendre qu'il n'y a pas lieu de déférer aux conclusions sur des faits sociaux ou législatifs, car une juridiction d'appel est aussi bien placée qu'un juge de première instance pour les apprécier. Si tel était le cas, un fait en litige établi uniquement au moyen d'un affidavit aurait donc droit à un degré de déférence moindre. Or, notre Cour précise qu'à défaut d'un libellé exprès en ce sens, aucune norme de contrôle intermédiaire ne s'applique aux conclusions de fait (*H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401). De plus, ce n'est pas de nature à apaiser la crainte d'un dédoublement de l'examen et d'un entremêlement de tels éléments de preuve avec d'autres. C'est méconnaître également la fonction d'une juridiction d'appel, qui ne consiste pas à examiner la preuve globalement, mais à s'en tenir aux conclusions que le juge de première instance a tirées à partir de la preuve.

[56] Pour ces motifs, je suis d'avis qu'il ne convient pas d'appliquer aux faits sociaux ou législatifs une norme de contrôle non déférente. La norme de contrôle applicable aux conclusions de fait — qu'elles portent sur les faits en litige, des faits sociaux ou des faits législatifs — demeure celle de l'erreur manifeste et dominante.

B. *Analyse fondée sur l'art. 7*

[57] Dans l'analyse qui suit, j'examine d'abord si les demanderesses ont démontré que les dispositions en cause restreignent le droit à la sécurité de la personne et mettent ainsi en jeu l'art. 7. Je me penche ensuite sur la thèse des procureurs généraux appelants selon laquelle les dispositions n'ont pas l'effet attentatoire allégué. Je poursuis en me demandant si la limite apportée le cas échéant au droit à la sécurité de la personne est conforme aux principes de justice fondamentale.

(1) Is Security of the Person Engaged?

[58] Section 7 provides that the state cannot deny a person's right to life, liberty or security of the person, except in accordance with the principles of fundamental justice. At this stage, the question is whether the impugned laws negatively impact or limit the applicants' security of the person, thus bringing them within the ambit of, or engaging, s. 7 of the *Charter*.[1]

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

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

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

(1) Le droit à la sécurité de la personne est-il en jeu?

[58] L'article 7 dispose que l'État ne peut porter atteinte au droit de quiconque à la vie, à la liberté et à la sécurité de sa personne qu'en conformité avec les principes de justice fondamentale. Il faut dès lors se demander si les dispositions contestées ont un effet préjudiciable sur le droit à la sécurité des demanderesses ou limitent ce droit, de sorte qu'elles tombent sous le coup de l'art. 7 de la *Charte* ou mettent celui-ci en jeu[1].

[59] En l'espèce, les demanderesses soutiennent que l'interdiction des maisons de débauche, du proxénétisme et de la communication en public à des fins de prostitution augmente les risques auxquels elles s'exposent lorsqu'elles se livrent à la prostitution, une activité qui est en soi légale. La juge de première instance conclut que la preuve va dans ce sens, et la Cour d'appel lui donne raison.

[60] Pour les motifs qui suivent, je suis du même avis. Le législateur ne se contente pas d'encadrer la pratique de la prostitution. Il franchit un pas supplémentaire déterminant qui l'amène à imposer des conditions *dangereuses* à la pratique de la prostitution : les interdictions empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection contre les risques ainsi courus.

1 L'accent est mis sur la sécurité de la personne, non sur la liberté, pour trois raisons. Premièrement, le *Renvoi sur la prostitution* établit que les dispositions relatives à la communication et aux maisons de débauche mettent en jeu le droit à la liberté et il fait autorité sur ce point. Le moyen fondé sur le droit à la sécurité de la personne est nouveau et justifie amplement le réexamen du renvoi par la juge de première instance. Deuxièmement, on ne saurait dire avec certitude que le droit à la liberté des demanderesses est mis en jeu par la disposition relative au proxénétisme; les demanderesses disent en fait craindre l'application de la disposition à leurs employés ou à leurs proches. Enfin, il me semble que les demanderesses prétendent essentiellement dans les faits non pas que l'*inobservation* de la loi porte atteinte à leur droit à la liberté, mais plutôt que son *respect* porte atteinte à leur droit à la sécurité.

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

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

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

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

a) *Articles 197 et 210 : Tenue d'une maison de débauche*

[61] Offrir ses services sexuels contre de l'argent ne constitue pas une infraction. Toutefois, la disposition relative aux maisons de débauche dispose qu'est coupable d'un acte criminel quiconque tient une maison de débauche dans un « local » qui est « tenu ou occupé » ou « employé » à des fins de prostitution (art. 197 et par. 210(1) du *Code*). Sa portée est grande. On entend par « local » ou « endroit » tout lieu défini, même s'il n'est pas enclos et n'est employé que temporairement (par. 197(1) du *Code*; *R. c. Pierce* (1982), 37 O.R. (2d) 721 (C.A.)). De plus, il y a « local » ou « endroit » au sens de cette définition même lorsque le lieu est utilisé par une seule personne (par. 197(1); *R. c. Worthington* (1972), 10 C.C.C. (2d) 311 (C.A. Ont.)).

[62] Dans les faits, l'art. 210 limite à deux les modalités d'exercice d'une activité légale : la prostitution dans la rue et la prostitution « itinérante » (décision de première instance, par. 385). La prostitution pratiquée chez soi, où la prostituée reçoit ses clients chez elle, est interdite. La prostitution itinérante, où la prostituée rejoint le client dans un lieu convenu, telle la résidence de ce dernier, est permise. Il en est de même de la prostitution dans la rue, bien que celle-ci soit considérablement limitée par l'interdiction de communiquer en public (al. 213(1)*c*)).

[63] La juge de première instance conclut, selon la prépondérance des probabilités, que la forme de prostitution la plus sûre est celle qui se pratique de façon autonome dans un même lieu (par. 300). Elle ajoute que travailler à l'intérieur est beaucoup moins dangereux que travailler dans la rue, une conclusion amplement étayée par la preuve. Toujours selon elle, il est moins sûr d'offrir ses services chez autrui de manière itinérante, surtout sous le régime actuel, l'interdiction du proxénétisme empêchant l'embauche d'un chauffeur ou d'un garde de sécurité. Étant donné que la disposition sur les maisons de débauche rend illégale la pratique plus sûre qu'est la prostitution chez soi, la juge opine que l'interdiction augmente sensiblement le risque auquel s'exposent actuellement les prostituées. Je suis de cet avis.

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

[65] I conclude, therefore, that the bawdy-house provision negatively impacts the security of

[64] Premièrement, l'interdiction empêche les prostituées de travailler dans un lieu fixe, situé à l'intérieur, ce qui est plus sûr que de travailler dans la rue ou d'aller à la rencontre des différents clients, d'autant plus que l'interdiction actuelle empêche l'embauche d'un chauffeur ou d'un garde de sécurité. L'interdiction les empêche également de se constituer une clientèle et de prendre des précautions chez elles en embauchant par exemple un réceptionniste, un assistant ou un garde du corps et en installant des dispositifs de surveillance audio, de manière à réduire le risque couru (décision de première instance, par. 421). Deuxièmement, elle empêche les prostituées de faire certaines vérifications sur l'état de santé des clients et de prendre des mesures sanitaires préventives. Enfin, lors de la plaidoirie devant notre Cour, on a fait valoir que l'interdiction de tenir une maison de débauche empêche l'existence d'endroits sûrs où les prostituées peuvent emmener les clients recrutés dans la rue. À Vancouver, par exemple, la « Grandma's House » a été créée pour venir en aide aux prostituées du Downtown Eastside à peu près à la même époque où les craintes allaient croissant quant à la possibilité qu'un tueur en série sévisse dans le quartier (des craintes que les actes imputés au tristement célèbre Robert Pickton ont justifiées). Les prostituées de la rue — qui, selon la juge de première instance, sont de loin les plus vulnérables et font l'objet d'un nombre alarmant d'actes de violence (par. 361) — pouvaient se rendre à la Grandma's House en compagnie de leurs clients. Toutefois, le refuge a fait l'objet d'accusations fondées sur l'art. 210, et même s'il y a eu arrêt des procédures quatre ans après, la Grandma's House a finalement fermé ses portes (affidavit complémentaire du D^r^ John Lowman en date du 6 mai 2009, d.c.d., vol. 20, p. 5744). L'existence d'un établissement sûr comme Grandma's House peut être indispensable à certaines prostituées, en particulier celles qui sont démunies. Pour elles, la possibilité de travailler dans un bordel ou d'embaucher un garde de sécurité peut se révéler illusoire même s'il s'agit d'activités légales.

[65] Je conclus donc que la disposition sur les maisons de débauche a un effet préjudiciable sur

the person of prostitutes and engages s. 7 of the *Charter*.

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

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

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

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

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

le droit à la sécurité des prostituées et met en jeu l'art. 7 de la *Charte*.

b) *Alinéa 212(1)j) : Proxénétisme*

[66] L'alinéa 212(1)*j*) criminalise le proxénétisme, c'est-à-dire le fait de vivre entièrement ou en partie des produits de la prostitution d'une autre personne. Bien qu'il vise le parasitisme (*R. c. Downey*, [1992] 2 R.C.S. 10), sa portée est grande. Suivant son interprétation par les tribunaux, commet un acte criminel quiconque fournit un service à une prostituée parce qu'elle est une prostituée (*R. c. Grilo* (1991), 2 O.R. (3d) 514 (C.A.); *R. c. Barrow* (2001), 54 O.R. (3d) 417 (C.A.)). Dans les faits, il empêche la prostituée d'engager un garde du corps, un chauffeur ou un réceptionniste. La juge de première instance conclut qu'en niant aux prostituées le droit de prendre de telles mesures susceptibles d'accroître leur sécurité, la disposition fait obstacle à la réduction des risques auxquels elles s'exposent et a un effet préjudiciable sur la sécurité de leur personne (par. 361). Elle statue donc que la disposition met en jeu l'art. 7 de la *Charte*.

[67] La preuve appuie amplement sa conclusion. L'embauche d'un chauffeur, d'un réceptionniste ou d'un garde du corps pourrait accroître la sécurité des prostituées (décision de première instance, par. 421), mais la loi y fait obstacle. Je conclus donc que l'al. 212(1)*j*) a un effet préjudiciable sur la sécurité de la personne et met en jeu l'art. 7 de la *Charte*.

c) *Alinéa 213(1)c) : Communication en public*

[68] L'alinéa 213(1)*c*) interdit de communiquer ou de tenter de communiquer avec une personne en vue de se livrer à la prostitution ou d'obtenir les services sexuels d'une prostituée dans un endroit public ou situé à la vue du public. La disposition vise non seulement la communication verbale, mais aussi le fait d'arrêter ou de tenter d'arrêter une personne à ces fins (*R. c. Head* (1987), 59 C.R. (3d) 80 (C.A.C.-B.)).

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

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

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

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

(2) A Closer Look at Causation

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

[69] La juge de première instance conclut que la communication entre les intéressés est [TRADUCTION] « essentielle » à l'accroissement de la sécurité des prostituées de la rue (par. 432). Cette communication, que la loi interdit, permet aux prostituées de jauger leurs clients éventuels afin d'écarter ceux qui sont intoxiqués et qui pourraient être enclins à la violence, ce qui serait de nature à réduire les risques auxquels elles s'exposent (par. 301 et 421). Cette conclusion fondée sur la preuve offerte suffit à mettre en jeu le droit à la sécurité de la personne garanti à l'art. 7.

[70] La juge estime en outre que l'interdiction de la communication a eu pour effet de faire migrer les prostituées vers des lieux isolés et peu familiers où elles ne peuvent compter sur l'appui de leurs amis et de leurs clients habituels, ce qui les a rendues plus vulnérables (par. 331 et 502).

[71] Suivant les éléments admis en preuve au procès, la loi interdit une communication qui permettrait aux prostituées de la rue d'accroître leur sécurité. En interdisant la communication en public à des fins de prostitution, la loi empêche les prostituées d'évaluer leurs clients éventuels, ainsi que de convenir de l'utilisation du condom ou d'un lieu sûr. Elle accroît ainsi sensiblement le risque couru.

[72] Je conclus que la preuve appuie la conclusion de la juge de première instance selon laquelle l'al. 213(1)*c*) a une incidence sur la sécurité de la personne et met en jeu l'art. 7.

(2) Examen approfondi du lien de causalité

[73] Pour les motifs examinés précédemment, la juge de première instance conclut — et je conviens avec elle — que les dispositions contestées ont un effet préjudiciable sur le droit à la sécurité des prostituées et mettent donc en jeu ce droit. Les procureurs généraux appelants soutiennent toutefois que l'art. 7 ne s'applique pas faute d'un lien de causalité suffisant entre les dispositions et les risques auxquels s'exposent les prostituées. D'abord, ils avancent que les juridictions inférieures ont eu tort de soumettre le lien de causalité à une norme

the law, that is the causal source of the harms they face. These arguments cannot succeed.

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

[74] Three possible standards for causation are raised for our consideration: (1) "sufficient causal connection", adopted by the application judge (paras. 287-88); (2) a general "impact" approach, adopted by the Court of Appeal (paras. 108-9); and (3) "active and foreseeable" and "direct" causal connection, urged by the appellant Attorneys General (A.G. of Canada factum, at paras. 64-68; A.G. of Ontario factum, at paras. 12-17).

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

[76] A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link. Understood in this way, a sufficient causal connection standard is consistent with the substance of the standard that the Court of Appeal applied in this case. While I

atténuée. Ils prétendent ensuite que le préjudice couru par les demanderesses tient à leur choix de se livrer à la prostitution et non à la loi. On ne saurait faire droit à ces prétentions.

a) *Nature du lien de causalité requis*

[74] Nous sommes appelés à considérer trois normes de causalité possibles : (1) celle fondée sur un « lien de causalité suffisant » retenue par la juge de première instance (par. 287-288), (2) celle, générale, fondée sur l'« effet » adoptée par la Cour d'appel (par. 108-109) et (3) celle fondée sur un lien de causalité « actif, prévisible et direct » préconisée par les procureurs généraux appelants (mémoire du p.g. du Canada, par. 65; mémoire du p.g. de l'Ontario, par. 14-15).

[75] Je suis d'avis que la norme du « lien de causalité suffisant » est celle qui convient. Sa souplesse permet l'adaptation aux circonstances propres à chaque espèce. Adoptée dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, et appliquée dans plusieurs affaires subséquentes (voir, p. ex., *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3), elle postule l'existence d'« un lien de causalité suffisant entre [l'effet] imputable à l'État et le préjudice subi par [le demandeur] » pour que l'art. 7 entre en jeu (*Blencoe*, par. 60 (je souligne)).

[76] La norme du lien de causalité suffisant n'exige pas que la mesure législative ou autre reprochée à l'État soit l'unique ou la principale cause du préjudice subi par le demandeur, et il y est satisfait par déduction raisonnable, suivant la prépondérance des probabilités (*Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, par. 21). L'exigence d'un lien de causalité suffisant tient compte du contexte et s'attache à l'existence d'un lien réel, et non hypothétique. Considérée sous cet angle, la norme du lien de causalité suffisant correspond essentiellement à celle qu'applique la Cour d'appel en l'espèce. Bien que je ne convienne

do not agree with the Court of Appeal that causation is not the appropriate lens for examining whether legislation — as opposed to the conduct of state actors — engages s. 7 security interests, its "practical and pragmatic" inquiry (para. 108) tracks the process followed in cases such as *Blencoe* and *Khadr*.

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

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

pas avec elle que l'exigence d'un lien de causalité ne permet pas de déterminer si la loi — par opposition aux actes de représentants de l'État — met en jeu le droit à la sécurité de la personne garanti à l'art. 7, la démarche [TRADUCTION] « pratique et pragmatique » (par. 108) qui la sous-tend s'inspire de celle suivie, par exemple, dans *Blencoe* et *Khadr*.

[77] Le procureur général du Canada préconise une norme plus stricte. Il fait valoir que l'atteinte au droit à la sécurité des demanderesses doit être active et prévisible et qu'un [TRADUCTION] « lien nécessaire » est requis (mémoire, par. 62 et 65). Il cite à l'appui les motifs de notre Cour dans *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519 (cités à des fins de comparaison dans l'arrêt *Blencoe*, par. 69), suivant lesquels : « N'eût été le rôle de l'État, il n'y aurait eu aucune atteinte aux droits garantis à M^me^ Rodriguez par l'art. 7. » Il invoque par ailleurs l'arrêt *Suresh*, par. 54 : « À tout le moins, dans les cas où la participation du Canada est un préalable nécessaire à l'atteinte et où cette atteinte est une conséquence parfaitement prévisible de la participation canadienne, le gouvernement ne saurait être libéré de son obligation de respecter les principes de justice fondamentale . . . » Ces énoncés établissent qu'il y a lien de causalité lorsque l'acte de l'État est prévisible et qu'il est la cause nécessaire du préjudice, mais pas qu'il s'agit du seul moyen de démontrer l'existence d'un lien de causalité qui met en jeu l'art. 7 de la *Charte*.

[78] Enfin, sur le plan pratique, l'existence d'un lien de causalité suffisant constitue un critère juste et fonctionnel pour déterminer si l'art. 7 de la *Charte* est en jeu. Elle ouvre la voie à l'application du droit garanti à l'art. 7, et il incombe au demandeur de la démontrer. Une fois ce lien établi, l'analyse ne prend pas fin pour autant, car le demandeur doit prouver l'atteinte à la sécurité de sa personne et la non-conformité de cette atteinte aux principes de justice fondamentale. De simples hypothèses ne sauraient établir le lien de causalité, mais placer la barre trop haut risque de faire obstacle à des demandes fondées. Le lien doit être suffisant eu égard au contexte considéré.

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

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

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

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

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

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

b) *Le lien de causalité est-il rendu inexistant par le choix de se prostituer ou les actes de tiers?*

[79] Le procureur général du Canada et celui de l'Ontario soutiennent que les prostituées font le choix de se livrer à une activité intrinsèquement risquée. Elles peuvent se soustraire à la fois aux risques inhérents à la prostitution et à tout risque supplémentaire causé par la loi en choisissant simplement de ne pas se livrer à cette activité. Selon eux, c'est le choix de la prostitution — et non la loi — qui est la cause véritable du préjudice.

[80] Les procureurs généraux prétendent que le législateur peut réglementer la prostitution selon ce qu'il juge opportun. La personne qui décide d'offrir ses services sexuels contre de l'argent doit accepter les règles établies, et lorsque celles-ci portent atteinte à sa sécurité, elle doit s'en prendre à son choix de se livrer à cette activité, non à la loi.

[81] Ils ajoutent que les demanderesses revendiquent le droit constitutionnel de se livrer à une activité commerciale risquée. Le procureur général de l'Ontario voit d'ailleurs dans l'allégation fondée sur l'art. 7 la [TRADUCTION] « revendication à mots couverts du droit à la sécurité professionnelle » (mémoire, par. 25).

[82] Les procureurs généraux invoquent l'arrêt *Malmo-Levine* dans lequel notre Cour confirme la constitutionnalité de l'interdiction de posséder de la marihuana au motif que sa consommation à des fins récréatives constitue un « choix de mode de vie », un choix que ne protège pas la Constitution (par. 185).

[83] Pour étayer leur thèse, les procureurs généraux font valoir que si notre Cour reconnaît que les dispositions en cause peuvent porter atteinte à la sécurité des demanderesses, de nombreuses autres dispositions qui permettent de se livrer ou non à une activité risquée en réglementant celle-ci partiellement ou indirectement deviendront du coup inconstitutionnelles.

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

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

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

[87] Second, even accepting that there are those who freely choose to engage in prostitution, it must be remembered that prostitution — the exchange of sex for money — is not illegal. The causal question is whether the impugned laws make this lawful activity more dangerous. An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in

[84] Enfin, ils recourent à une variante de la prétention suivant laquelle les dispositions contestées ne sont pas la cause de l'atteinte alléguée à la sécurité des demanderesses, à savoir que le préjudice est imputable à des tiers, en l'occurrence les hommes qui ont recours aux services des prostituées et qui maltraitent celles-ci, ainsi que les proxénètes qui les exploitent.

[85] Pour les motifs qui suivent, je ne puis convenir que ce n'est pas la loi, mais plutôt le choix de se prostituer et les actes de tiers qui sont à l'origine des risques dénoncés en l'espèce.

[86] Premièrement, bien que certaines prostituées puissent correspondre au profil de celle qui choisit librement de se livrer à l'activité économique risquée qu'est la prostitution — ou qui fait ce choix à un moment de sa vie —, de nombreuses prostituées n'ont pas vraiment d'autre solution que la prostitution. M[me] Bedford déclare s'être d'abord prostituée [TRADUCTION] « afin de faire assez d'argent pour au moins [s]e nourrir » (contre-interrogatoire de M[me] Bedford, d.c.d., vol. 2, p. 92). Comme le dit la juge de première instance, les prostituées de la rue forment, à quelques exceptions près, une population particulièrement marginalisée (par. 458 et 472). Que ce soit à cause du désespoir financier, de la toxicomanie, de la maladie mentale ou de la contrainte exercée par un proxénète, elles n'ont souvent guère d'autre choix que de vendre leur corps contre de l'argent. Dans les faits, même si elles peuvent conserver un certain pouvoir minimal de choisir — [TRADUCTION] « un choix limité » selon le procureur général (transcription, p. 22) —, on ne peut dire qu'elles « choisissent » véritablement une activité commerciale risquée (voir *PHS*, par. 97-101).

[87] Deuxièmement, à supposer même que des personnes choisissent librement de se livrer à la prostitution, il faut se rappeler que cette activité — l'échange de services sexuels contre de l'argent — n'est pas illégale. La question qui se pose sur le plan de la causalité est celle de savoir si les dispositions contestées accroissent le risque couru par la personne qui se prostitue. On peut faire une analogie avec la disposition qui interdirait aux cyclistes le

making that activity riskier. The challenged laws relating to prostitution are no different.

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

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

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

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

port du casque. Malgré le choix des cyclistes d'utiliser leurs bicyclettes, il demeurerait que c'est la disposition qui rendrait l'activité plus risquée. Il en va de même des dispositions contestées sur la prostitution.

[88] Il n'est pas non plus exact d'affirmer que la demande formulée en l'espèce revient à revendiquer à mots couverts le droit à la sécurité professionnelle. L'objectif des demanderesses n'est pas que l'État adopte des mesures qui fassent de la prostitution une activité sûre, mais plutôt que notre Cour invalide des dispositions qui accroissent le risque de maladie, de violence et de décès.

[89] Le fait que le comportement des proxénètes et des clients soit la source immédiate des préjudices subis par les prostituées n'y change rien. Les dispositions contestées privent des personnes qui se livrent à une activité risquée, mais légale, des moyens nécessaires à leur protection contre le risque couru. La violence d'un client ne diminue en rien la responsabilité de l'État qui rend une prostituée plus vulnérable à cette violence.

[90] Le respect auquel nous exhorte l'État quant aux décisions qu'il prend pour contrer les problèmes liés à la prostitution n'est pas pertinent à ce stade de l'analyse. Il ne saurait faire obstacle à l'allégation qu'une mesure législative a de graves effets préjudiciables et porte atteinte au droit à la sécurité de la personne garanti à l'art. 7 de la *Charte*. Cette considération vaut lorsqu'il s'agit de savoir s'il y a conformité aux principes de justice fondamentale, et non pour déterminer au préalable s'il y a atteinte au droit à la vie, à la liberté ou à la sécurité de la personne de l'intéressé.

[91] Enfin, reconnaître qu'une disposition gravement préjudiciable peut mettre en jeu le droit à la sécurité de la personne n'emportera pas l'invalidation d'une foule d'autres dispositions criminelles. L'atteinte anodine à ce droit ne met pas en jeu l'art. 7 (*Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 59). Rappelons que le demandeur doit démontrer l'existence d'un lien suffisant entre la disposition contestée et le préjudice subi pour que s'applique l'art. 7. Et même si l'on conclut que

then show that the deprivation of security is not in accordance with the principles of fundamental justice.

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

(3) Principles of Fundamental Justice

(a) *The Applicable Norms*

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

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

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

> . . . it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice . . . . To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated

l'art. 7 s'applique, le demandeur doit démontrer que l'atteinte à sa sécurité n'est pas conforme aux principes de justice fondamentale.

[92] Pour tous ces motifs, je rejette la prétention des procureurs généraux selon laquelle le préjudice allégué n'est pas attribuable aux dispositions contestées, mais bien aux actes de tiers et au choix de se prostituer. J'estime toujours que les dispositions en cause font intervenir l'art. 7 de la *Charte*.

(3) Principes de justice fondamentale

a) *Normes applicables*

[93] J'arrive à la conclusion que les dispositions contestées portent atteinte au droit à la sécurité de la personne des prostituées et qu'elles mettent ainsi en jeu l'art. 7. Reste donc à savoir si, au regard de l'art. 7, cette atteinte est conforme ou non aux principes de justice fondamentale. Dans l'affirmative, il n'y a pas d'atteinte au droit garanti à l'art. 7.

[94] Les principes de justice fondamentale définissent les conditions minimales auxquelles doit satisfaire la loi qui a un effet préjudiciable sur le droit à la vie, à la liberté ou à la sécurité de la personne. Selon le juge Lamer, « [l]'expression "principes de justice fondamentale" constitue non pas un droit, mais un modificatif du droit de ne pas se voir porter atteinte à sa vie, à sa liberté et à la sécurité de sa personne; son rôle est d'établir les paramètres de ce droit » (*Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486 (« *Renvoi sur la MVA* »), p. 512).

[95] Les « principes de justice fondamentale » ont beaucoup évolué depuis l'adoption de la *Charte*. Au départ, on les réduisait aux principes de justice naturelle qui définissent l'équité procédurale. Dans le *Renvoi sur la MVA*, notre Cour en a jugé autrement :

> . . . il serait erroné d'interpréter l'expression « justice fondamentale » comme synonyme de justice naturelle [. . .] Ce faire aurait pour conséquence de dépouiller les intérêts protégés de tout leur sens ou presque et de laisser le « droit » à la vie, à la liberté et à la sécurité de la

state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, *per* Estey J., and *Hunter v. Southam Inc.*, *supra*. [pp. 501-2]

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

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

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

personne dans un état d'atrophie déplorable. Un tel résultat serait incompatible avec le style affirmatif et général dans lequel ces droits sont énoncés et également incompatible avec le point de vue que cette Cour a adopté, en ce qui concerne l'interprétation des droits garantis par la *Charte*, dans l'arrêt *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357 (le juge Estey), et dans l'arrêt *Hunter c. Southam Inc.*, précité. [p. 501-502]

[96] Dans le *Renvoi sur la MVA*, la Cour reconnaît que les principes de justice fondamentale s'entendent des valeurs fondamentales qui sous-tendent notre ordre constitutionnel. L'analyse fondée sur l'art. 7 s'attache à débusquer les dispositions législatives intrinsèquement mauvaises, celles qui privent du droit à la vie, à la liberté ou à la sécurité de la personne au mépris des valeurs fondamentales que sont censés intégrer les principes de justice fondamentale et dont la jurisprudence a défini la teneur au fil des ans. Dans la présente affaire, les valeurs fondamentales qui nous intéressent s'opposent à l'arbitraire, à la portée excessive et à la disproportion totale.

[97] Les notions d'arbitraire, de portée excessive et de disproportion totale ont connu une évolution endogène au fur et à mesure que les tribunaux ont été saisis d'allégations nouvelles fondées sur la *Charte*.

[98] On a qualifié d'« arbitraire » la disposition dont l'effet n'avait aucun lien avec son objet. Dans l'affaire *Morgentaler*, l'accusé contestait les dispositions du *Code criminel* qui exigeaient qu'un avortement soit approuvé par le comité de l'avortement thérapeutique d'un hôpital agréé. L'objet des dispositions était de protéger la santé des femmes. Or, selon les juges majoritaires de la Cour, l'exigence que tout avortement thérapeutique soit pratiqué dans un hôpital agréé ne contribuait pas à la réalisation de cet objectif et causait en fait des délais nuisibles à la santé des femmes. Par conséquent, les dispositions portaient atteinte aux valeurs fondamentales en ce que leur effet allait en fait à l'encontre de leur objectif. Le juge Beetz a alors parlé d'« iniquité manifeste » (*Morgentaler*, p. 120), et la Cour y a vu ensuite un « caractère arbitraire » (voir *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791, par. 133, la juge en chef McLachlin et le juge Major).

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

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

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

[102] In *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, the challenged provisions of the

[99] Dans *Chaoulli*, le demandeur contestait des dispositions québécoises qui interdisaient de souscrire une assurance maladie privée pour l'obtention de services offerts dans le réseau public. Les dispositions en cause avaient pour objet la protection du système de santé public et le maintien de ses ressources. Sur la foi de la preuve concernant la situation dans d'autres pays, les juges majoritaires concluent qu'assurance maladie privée et système de santé public peuvent coexister. Trois d'entre eux jugent l'interdiction « arbitraire » vu l'absence, selon les faits mis en preuve, d'un lien réel entre l'effet de la loi et son objectif.

[100] Plus récemment, dans *PHS*, notre Cour a jugé arbitraire le refus du ministre de prolonger l'exemption dont bénéficiait un centre d'injection supervisée relativement à l'application des dispositions sur la possession de drogue. Ces dispositions avaient pour objet la protection de la santé et de la sécurité publiques, et les services fournis par le centre d'injection supervisée contribuaient en fait à l'atteinte de cet objectif. L'effet du refus de prolonger l'exemption — à savoir empêcher le fonctionnement du centre d'injection supervisée — allait à l'encontre des objectifs des dispositions relatives à la possession de drogue.

[101] Une disposition peut aussi violer nos valeurs fondamentales du fait de ce que les tribunaux appellent la « portée excessive », c'est-à-dire lorsqu'elle va trop loin et empiète sur un comportement sans lien avec son objectif. Dans *R. c. Heywood*, [1994] 3 R.C.S. 761, l'accusé contestait une disposition sur le vagabondage qui interdisait aux délinquants reconnus coupables de l'une des infractions énumérées de « flâner » dans les parcs publics. Les juges majoritaires de la Cour concluent que la portée de la disposition, dont l'objet était de protéger les enfants contre les prédateurs sexuels, est trop grande; la disposition n'a pas de lien avec son objectif dans la mesure où elle s'applique à des délinquants qui ne présentent pas un danger pour les enfants et à des parcs qui ne sont pas susceptibles d'être fréquentés par des enfants.

[102] Dans *R. c. Demers*, 2004 CSC 46, [2004] 2 R.C.S. 489, les dispositions contestées du *Code*

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

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

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

[105] The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. To deprive citizens of life, liberty, or security of the person by laws that violate these

criminel empêchaient l'accusé jugé inapte à subir son procès de bénéficier d'une libération inconditionnelle et l'obligeaient à comparaître périodiquement devant une commission d'examen pendant une période indéfinie. Les dispositions avaient pour objet « de fournir à l'accusé un traitement ou une évaluation continus afin de le rendre éventuellement apte à subir son procès » (par. 41). Selon la Cour, dans la mesure où les dispositions s'appliquaient malgré l'inaptitude permanente de l'accusé — qui ne deviendrait jamais apte à subir son procès —, leur objectif « ne s'appliqu[ait] pas » et leur portée était donc excessive (par. 42-43).

[103] La disposition dont l'effet est totalement disproportionné à l'objectif de l'État viole aussi nos valeurs fondamentales. Dans *Malmo-Levine*, l'accusé contestait l'interdiction de posséder de la marihuana au motif que ses effets étaient totalement disproportionnés à son objectif. La Cour reconnaît qu'une disposition aux effets totalement disproportionnés viole nos normes fondamentales, mais elle conclut que tel n'est pas le cas en l'espèce : « . . . les effets sur les accusés des dispositions actuelles, y compris la possibilité d'emprisonnement, n'excèdent pas la vaste latitude que la Constitution accorde au Parlement » (par. 175).

[104] Dans l'arrêt *PHS*, notre Cour conclut que le refus du ministre de soustraire le centre d'injection supervisée à l'application des dispositions sur la possession de drogue n'est pas conforme aux principes de justice fondamentale parce que le refus de services de santé et l'augmentation du risque de décès et de maladie chez les consommateurs de drogues injectables sont totalement disproportionnés aux objectifs des dispositions sur la possession de drogue, à savoir la santé et la sécurité publiques.

[105] L'enseignement primordial de la jurisprudence veut qu'une disposition aille à l'encontre de nos valeurs fondamentales lorsque les moyens mis en œuvre par l'État pour atteindre son objectif comportent une faille fondamentale en ce qu'ils sont arbitraires ou ont une portée trop générale, ou encore, ont des effets totalement disproportionnés à l'objectif législatif. Il n'est pas conforme

norms is not in accordance with the principles of fundamental justice.

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

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

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

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

aux principes de justice fondamentale de priver un citoyen du droit à la vie, à la liberté ou à la sécurité de sa personne au moyen d'une disposition ainsi irrégulière.

[106] Au fil de l'évolution jurisprudentielle, ces principes n'ont pas toujours été appliqués uniformément. En l'espèce, la Cour d'appel signale la confusion créée par l'[TRADUCTION] « amalgame » du caractère arbitraire, de la portée excessive et de la disproportion totale (par. 143-151). Notre Cour relevait elle-même récemment que l'on confond portée excessive et disproportion totale (*R. c. Khawaja*, 2012 CSC 69, [2012] 3 R.C.S. 555, par. 38-40; voir également *R. c. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57, par. 72). Ainsi, les tribunaux ont employé les mêmes mots — caractère arbitraire, portée excessive et disproportion totale — avec quelques variantes pour explorer les différentes manières dont une disposition législative peut aller à l'encontre de nos valeurs fondamentales.

[107] Bien qu'il y ait un chevauchement important entre le caractère arbitraire, la portée excessive et la disproportion totale, et que plus d'une de ces trois notions puissent bel et bien s'appliquer à une disposition, il demeure que les trois correspondent à des principes distincts qui découlent de ce que Hamish Stewart appelle un [TRADUCTION] « manque de logique fonctionnelle », à savoir que la disposition « n'est pas suffisamment liée à son objectif ou, dans un certain sens, qu'elle va trop loin pour l'atteindre » (*Fundamental Justice : Section 7 of the Canadian Charter of Rights and Freedoms* (2012), p. 151). Peter Hogg explique :

> [TRADUCTION] Les principes liés à la portée excessive, à la disproportion et au caractère arbitraire visent tous au fond à pallier ce que Hamish Stewart appelle un « manque de logique fonctionnelle », en ce sens que le tribunal reconnaît l'objectif législatif, mais examine le moyen choisi pour l'atteindre. Si ce moyen ne permet pas logiquement d'atteindre l'objectif, la disposition est dysfonctionnelle eu égard à son propre objectif.

(« The Brilliant Career of Section 7 of the Charter » (2012), 58 *S.C.L.R.* (2d) 195, p. 209 (renvoi omis))

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

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

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

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

[112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in *Demers* required unfit accused to

[108] La jurisprudence relative au caractère arbitraire, à la portée excessive et à la disproportion totale s'attache à deux failles. La première est l'absence de lien entre l'atteinte aux droits et l'objectif de la disposition — lorsque l'atteinte au droit à la vie, à la liberté ou à la sécurité de la personne n'a aucun lien avec l'objet de la loi. Ce sont alors les principes liés au caractère arbitraire et à la portée excessive (l'absence de lien entre l'objet de la disposition et l'atteinte au droit garanti par l'art. 7) qui sont en cause.

[109] La seconde faille se présente lorsqu'une disposition prive une personne du droit à la vie, à la liberté ou à la sécurité de sa personne d'une manière totalement disproportionnée à son objectif. L'incidence sur le droit garanti à l'art. 7 a un lien avec l'objet, mais elle est si importante qu'elle viole nos normes fondamentales.

[110] Dans ce contexte, il peut être utile de développer les notions de caractère arbitraire, de portée excessive et de disproportion totale.

[111] Déterminer qu'une disposition est arbitraire ou non exige qu'on se demande s'il existe un lien direct entre son objet et l'effet allégué sur l'intéressé, s'il y a un certain rapport entre les deux. Il doit exister un lien rationnel entre l'objet de la mesure qui cause l'atteinte au droit garanti à l'art. 7 et la limite apportée au droit à la vie, à la liberté ou à la sécurité de la personne (Stewart, p. 136). La disposition qui limite ce droit selon des modalités qui n'ont *aucun lien* avec son objet empiète arbitrairement sur ce droit. Ainsi, dans *Chaoulli*, la Cour juge les dispositions arbitraires parce qu'interdire l'assurance maladie privée n'a aucun rapport avec l'objectif de protéger le système de santé public.

[112] Il y a portée excessive lorsqu'une disposition s'applique si largement qu'elle vise *certains* actes qui n'ont aucun lien avec son objet. La disposition est alors *en partie* arbitraire. Essentiellement, la situation en cause est celle où il n'existe aucun lien rationnel entre les objets de la disposition et *certains* de ses effets, mais pas tous. Par exemple, dans *Demers*, le texte législatif en cause exigeait

attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose.

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

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

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

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

[116] In part this debate is semantic. The law has not developed by strict labels, but on a case-by-case

que l'accusé inapte comparaisse périodiquement devant la commission d'examen. Il n'était dissocié de son objet que dans la mesure où il s'appliquait à un accusé inapte en permanence; ses effets étaient liés à l'objet dans le cas de l'accusé temporairement inapte.

[113] L'application de la notion de portée excessive permet au tribunal de reconnaître qu'une disposition est rationnelle sous certains rapports, mais que sa portée est trop grande sous d'autres. Malgré la prise en compte de la portée globale de la disposition, l'examen demeure axé sur l'intéressé et sur la question de savoir si l'effet sur ce dernier a un lien rationnel avec l'objet. Par exemple, lorsqu'une disposition est rédigée de manière générale et vise des comportements qui n'ont aucun lien avec son objet afin de faciliter son application, il n'y a pas non plus de lien entre l'objet de la disposition et son effet sur l'*intéressé*. Faciliter l'application pourrait justifier la portée excessive d'une disposition suivant l'article premier de la *Charte*.

[114] On a fait valoir que la portée excessive ne correspond pas vraiment à un principe distinct de justice fondamentale. Il appert de certains arrêts que la portée excessive empiète à la fois sur le caractère arbitraire et sur la disproportion totale. Dans *Heywood*, le juge Cory affirme par exemple ce qui suit : « Lorsqu'une loi a une portée excessive, il s'ensuit qu'elle est arbitraire ou disproportionnée dans certaines de ses applications » (p. 793).

[115] Dans *R. c. Clay*, 2003 CSC 75, [2003] 3 R.C.S. 735, l'arrêt connexe à *Malmo-Levine*, les juges Gonthier et Binnie expliquent :

> Dans ce contexte, la portée excessive s'attache aux atteintes potentielles à la justice fondamentale lorsque l'effet préjudiciable d'une mesure législative sur les personnes qu'elle touche est [totalement] disproportionné [. . .] à l'intérêt général que le texte de loi tente de protéger. À cet égard, comme l'a souligné le juge Cory [dans *Heywood*], la portée excessive est liée au caractère arbitraire. [Italiques omis; par. 38.]

[116] Le débat est en partie sémantique. Le droit a évolué non par le recours à des étiquettes

basis, as courts identified laws that were inherently bad because they violated our basic values.

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

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

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

[120] Gross disproportionality asks a different question from arbitrariness and overbreadth. It

strictes, mais d'une décision à l'autre, lorsque les tribunaux ont jugé des dispositions intrinsèquement mauvaises parce qu'elles violaient nos valeurs fondamentales.

[117] Avant de passer au point suivant, toutefois, il peut être utile de voir dans la portée excessive un principe distinct de justice fondamentale lié au caractère arbitraire, l'*absence de lien* entre les effets d'une disposition et son objectif étant commune aux deux. La portée excessive permet seulement au tribunal de reconnaître l'absence de lien lorsqu'une disposition va trop loin en faisant tomber sous le coup de son application un comportement qui n'a aucun rapport avec son objectif.

[118] Une question accessoire, qui touche à la fois le caractère arbitraire et la portée excessive, concerne l'ampleur que doit revêtir l'absence de correspondance entre l'objectif de la disposition attentatoire et ses effets. On s'est demandé si une disposition était arbitraire ou avait une portée trop grande lorsque ses effets étaient *incompatibles* avec son objectif ou si, de manière générale, elle était arbitraire ou avait une portée trop grande lorsque ses effets *n'étaient pas nécessaires* à la réalisation de son objectif (voir, p. ex., *Chaoulli*, par. 233-234).

[119] Rappelons qu'il s'agit fondamentalement de déterminer si la disposition en cause est intrinsèquement mauvaise du fait de l'*absence de lien*, en tout ou en partie, entre ses effets et son objet. Satisfaire à cette norme n'est pas chose aisée. Comme dans l'affaire *Morgentaler*, la preuve peut démontrer que l'effet compromet en fait la réalisation de l'objectif et qu'il est donc « incompatible » avec celui-ci. Il peut aussi ressortir de la preuve, comme dans *Chaoulli*, qu'il n'y a tout simplement pas de lien entre l'effet et l'objectif, de sorte que l'effet « n'est pas nécessaire ». Peu importe la manière dont le juge qualifie cette absence de lien, la question demeure au fond de savoir si la preuve établit que la disposition viole des normes fondamentales du fait de l'*absence de lien* entre son effet et son objet. Il faut statuer en fonction du dossier et de la preuve offerte.

[120] La disproportion totale s'attache à d'autres éléments que ceux considérés pour le caractère

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

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

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

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

[123] All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The

arbitraire et la portée excessive. Elle vise la seconde faille fondamentale, à savoir le fait que les effets de la disposition sur la vie, la liberté ou la sécurité de la personne sont si totalement disproportionnés à ses objectifs qu'ils ne peuvent avoir d'assise rationnelle. La règle qui exclut la disproportion totale ne s'applique que dans les cas extrêmes où la gravité de l'atteinte est sans rapport aucun avec l'objectif de la mesure. Pour illustrer cette idée, prenons l'hypothèse d'une loi qui, dans le but d'assurer la propreté des rues, infligerait une peine d'emprisonnement à perpétuité à quiconque cracherait sur le trottoir. Le lien entre les répercussions draconiennes et l'objet doit déborder complètement le cadre des normes reconnues dans notre société libre et démocratique.

[121] L'analyse de la disproportion totale au regard de l'art. 7 de la *Charte ne* tient *pas* compte des avantages de la loi pour la société. Elle met en balance l'effet préjudiciable sur l'intéressé avec l'objet de la loi, et *non* avec l'avantage que la société peut retirer de la loi. Comme le dit notre Cour dans *Malmo-Levine* :

> Dans les faits, le juge Braidwood a procédé à la pondération des effets bénéfiques et des effets préjudiciables de la Loi. En toute déférence, nous estimons qu'une telle démarche relève davantage de l'application de l'article premier. Il s'agit là de préjudices sociaux et économiques qui n'ont généralement pas leur place dans l'analyse fondée sur l'art. 7. [par. 181]

[122] Il peut y avoir disproportion totale indépendamment du nombre de personnes touchées; un effet totalement disproportionné sur une seule personne suffit.

[123] Les trois notions — le caractère arbitraire, la portée excessive et la disproportion totale — supposent la comparaison de l'atteinte aux droits causée par la loi avec l'objectif de la loi, et non avec son efficacité. Autrement dit, elles ne s'intéressent pas à la réalisation de l'objectif législatif ou au pourcentage de la population qui bénéficie de l'application de la loi. Elles ne tiennent pas compte des avantages accessoires pour la population en général. De plus, aucune ne requiert la détermination du

analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

pourcentage de la population qui est touchée par un effet préjudiciable. L'analyse est qualitative et non quantitative. La question à se poser dans le cadre de l'analyse fondée sur l'art. 7 est celle de savoir si une disposition législative intrinsèquement mauvaise prive *qui que ce soit* du droit à la vie, à la liberté ou à la sécurité de sa personne; un effet totalement disproportionné, excessif ou arbitraire sur une seule personne suffit pour établir l'atteinte au droit garanti à l'art. 7.

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

b) *Interaction entre l'art. 7 et l'article premier*

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

[124] Notre Cour a déjà établi des parallèles entre les règles qui interdisent le caractère arbitraire, la portée excessive ou la disproportion totale au regard de l'art. 7 et les éléments de l'analyse, fondée sur l'article premier, de la justification d'une disposition qui porte atteinte à un droit garanti par la *Charte*. Ces parallèles ne doivent pas permettre d'occulter les différences cruciales entre ces deux articles.

[125] Section 7 and s. 1 ask different questions. The question under s. 7 is whether the law's negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose. Under s. 1, the question is different — whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of s. 1, but it plays no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights.

[125] L'article 7 et l'article premier appellent des questions différentes. Pour les besoins de l'art. 7, l'effet préjudiciable sur le droit à la vie, à la liberté ou à la sécurité de la personne est-il conforme aux principes de justice fondamentale? En ce qui concerne le caractère arbitraire, la portée excessive et la disproportion totale, il faut se demander si, de prime d'abord, l'objet de la disposition présente un lien avec ses effets et si l'effet préjudiciable est proportionné à cet objet. Pour les besoins de l'article premier, il faut plutôt se demander si l'effet préjudiciable sur les droits des personnes est proportionné à l'objectif urgent et réel de défense de l'intérêt public. La justification fondée sur l'objectif public prédominant constitue l'axe central de l'application de l'article premier, mais elle ne joue aucun rôle dans l'analyse fondée sur l'art. 7, qui se soucie seulement de savoir si la disposition contestée porte atteinte à un droit individuel.

[126] As a consequence of the different questions they address, s. 7 and s. 1 work in different ways. Under s. 1, the government bears the burden of showing that a law that breaches an individual's

[126] En raison des considérations différentes qui président à leur application, l'art. 7 et l'article premier opèrent différemment. Suivant l'article premier, il incombe à l'État de démontrer que

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

la disposition attentatoire peut être justifiée par l'objectif du législateur. Parce que la question est celle de savoir si l'intérêt public général justifie l'atteinte aux droits individuels, l'objectif doit être urgent et réel. Le volet de l'analyse fondée sur l'article premier qui porte sur l'existence d'un « lien rationnel » consiste à déterminer si, pour le législateur, la disposition représente un moyen rationnel d'atteindre son objectif. Le volet relatif à l'« atteinte minimale » établit si le législateur aurait pu concevoir une disposition moins attentatoire; il s'intéresse aux solutions de rechange raisonnables qui s'offrent au législateur. À l'étape finale de l'analyse fondée sur l'article premier, le tribunal soupèse l'effet préjudiciable de la disposition sur les droits des personnes et son effet bénéfique sur la réalisation de son objectif dans l'intérêt public supérieur. L'effet est apprécié sur les plans qualitatif et quantitatif. À la différence d'un demandeur individuel, l'État est bien placé pour présenter une preuve relevant des sciences humaines ainsi que le témoignage d'experts qui justifient les répercussions d'une disposition sur l'ensemble de la société.

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

[127] En revanche, l'art. 7 oblige le demandeur à démontrer que la disposition porte atteinte à son droit à la vie, à la liberté ou à la sécurité de sa personne d'une manière qui est sans lien avec l'objet de la disposition ou qui est totalement disproportionnée à celui-ci. La détermination de l'objet s'attache à sa nature et non à son efficacité. La détermination de l'effet sur le droit à la vie, à la liberté ou à la sécurité de la personne n'est pas quantitative, mais qualitative. On ne se demande donc pas combien de personnes subissent un effet préjudiciable. Il suffit d'un effet arbitraire, excessif ou totalement disproportionné sur une seule personne pour établir l'atteinte à un droit garanti à l'art. 7. Obliger la personne qui invoque l'art. 7 à démontrer l'efficacité de la loi par opposition à ses conséquences néfastes sur l'ensemble de la société revient à lui imposer le même fardeau que celui qui incombe à l'État pour l'application de l'article premier, ce qui ne saurait être acceptable.

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

[128] En résumé, bien que l'art. 7 et l'article premier fassent intervenir des notions qui s'originent de préoccupations semblables, ils commandent des analyses distinctes.

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

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

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

(i) The Object of the Provision

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

[131] The appellant Attorneys General argue that the object of this provision, considered alone and in conjunction with the other prohibitions, is to

[129] On a affirmé que la disposition qui violait un droit garanti à l'art. 7 avait peu de chances d'être justifiée en vertu de l'article premier de la *Charte* (*Renvoi sur la MVA*, p. 518). L'importance des droits fondamentaux protégés par l'art. 7 appuie cette remarque. Néanmoins, la jurisprudence reconnaît par ailleurs qu'il peut se présenter des situations dans lesquelles l'article premier a un rôle à jouer (voir, p. ex., l'arrêt *Malmo-Levine*, par. 96-98). On ne peut écarter la possibilité que l'État soit en mesure de démontrer que l'atteinte à un droit garanti à l'art. 7 est justifiée en vertu de l'article premier de la *Charte*, selon l'importance de l'objectif législatif et la nature de l'atteinte à un droit garanti par l'art. 7.

(4) Les dispositions législatives contestées respectent-elles les principes de justice fondamentale?

a) *Article 210 : Interdiction des maisons de débauche*

(i) Objet de la disposition

[130] La disposition relative aux maisons de débauche est demeurée pour l'essentiel inchangée depuis qu'elle figure à la partie V du *Code criminel* intitulée « Maisons de désordre, jeux et paris » par suite de la révision de 1953-1954 (ch. 51, art. 182). Dans l'arrêt *Rockert c. La Reine*, [1978] 2 R.C.S. 704, le juge Estey se dit d'avis que la jurisprudence « ne permet plus de douter » que le méfait visé par ces infractions n'est pas le pari, le jeu et la prostitution en soi, mais plutôt le préjudice porté aux intérêts de la collectivité dans laquelle ces activités s'exercent d'une manière notoire et habituelle (p. 712). On peut faire remonter cet objectif à la common law qui est à l'origine des dispositions sur les maisons de débauche (voir, p. ex., E. Coke, *The Third Part of the Institutes of the Laws of England : Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (1817, publié pour la première fois en 1644), p. 205-206).

[131] Les procureurs généraux appelants soutiennent que, seule ou de concert avec les autres, cette interdiction vise à décourager la prostitution. Le

deter prostitution. The record does not support this contention; on the contrary, it is clear from the legislative record that the purpose of the prohibition is to prevent community harms in the nature of nuisance.

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

(ii) Compliance With the Principles of Fundamental Justice

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

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

dossier n'appuie pas leur prétention; au contraire, il ressort du dossier législatif que l'interdiction a pour objet de faire obstacle au préjudice apparenté à la nuisance qui est infligé à la collectivité.

[132] Nul élément de preuve ne justifie la remise en cause de cet objectif. Le principe qui fait obstacle au changement d'objet ne permet pas de conclure maintenant à l'existence d'un nouvel objectif (*R. c. Zundel*, [1992] 2 R.C.S. 731). À première vue, la disposition ne vise que la prostitution pratiquée chez soi, de sorte qu'elle ne saurait viser à décourager la prostitution en général. Il n'y a pas lieu non plus de conclure qu'elle a pour effet, avec les autres dispositions du *Code criminel*, de décourager la prostitution en général, étant donné le caractère parcellaire de l'adoption et de l'évolution des dispositions qui a permis à la prostitution pratiquée chez autrui et à la prostitution comme telle d'échapper à la répression. Je conviens donc avec les juridictions inférieures que l'objectif de la disposition sur les maisons de débauche est de lutter contre les troubles de voisinage et de protéger la santé et la sécurité publiques.

(ii) Conformité aux principes de justice fondamentale

[133] Les juridictions inférieures se demandent si l'interdiction des maisons de débauche a une portée trop grande ou si elle est totalement disproportionnée.

[134] Je conviens avec elles que l'effet préjudiciable de l'interdiction sur le droit à la sécurité des demanderesses est totalement disproportionné à l'objectif. J'estime donc inutile de me prononcer sur sa portée excessive dans le cas de la prostituée qui travaille seule chez elle (C.A., par. 204). La juge de première instance conclut de la preuve que dispenser leurs services dans une maison de débauche accroîtrait la sécurité des prostituées en les faisant bénéficier [TRADUCTION] « de l'avantage sécuritaire de la proximité d'autres personnes, de la familiarisation avec les lieux, d'un personnel chargé de leur sécurité, de la télésurveillance en circuit fermé et de toute autre mesure que permet un lieu permanent

that "complaints about nuisance arising from indoor prostitution establishments are rare" (*ibid.*), she found that the harmful impact of the provision was grossly disproportionate to its purpose.

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

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

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

(i) The Object of the Provision

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

It can be seen that the majority of offences outlined in s. 195 are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section

situé à l'intérieur » (par. 427). Après avoir mis en balance ces éléments avec la preuve selon laquelle « rares sont les plaintes pour nuisance déposées contre un établissement où se pratique la prostitution » (*ibid.*), elle conclut que l'effet préjudiciable de la disposition est totalement disproportionné à son objectif.

[135] La Cour d'appel reconnaît qu'il est difficile de recueillir des données empiriques sur le sujet étant donné que la plupart des études s'intéressent surtout à la prostitution dans la rue. Elle conclut toutefois que la preuve étaye les conclusions de la juge sur la disproportion totale, en particulier en ce qui concerne le nombre élevé de meurtres de prostituées, en très grande majorité des prostituées travaillant dans la rue. Elle convient que travailler à l'intérieur constitue une [TRADUCTION] « précaution élémentaire » que la disposition sur les maisons de débauche rend illégale pour les prostituées (par. 206-207).

[136] À mon avis, cette conclusion n'est pas erronée. Les préjudices relevés par les juridictions inférieures sont totalement disproportionnés à l'objectif de réprimer le désordre public. Le législateur a le pouvoir de réprimer la nuisance, mais pas au prix de la santé, de la sécurité et de la vie des prostituées. La disposition qui empêche une prostituée de la rue de recourir à un refuge sûr comme Grandma's House alors qu'un tueur en série est soupçonné de sévir dans les rues est une disposition qui a perdu de vue son objectif.

b) *Alinéa 212(1)j) : Proxénétisme*

(i) Objet de la disposition

[137] Dans l'arrêt *Downey*, les juges majoritaires de la Cour (sous la plume du juge Cory) concluent que l'al. 212(1)*j*) vise à réprimer le proxénétisme, ainsi que le parasitisme et l'exploitation qui y sont associés :

On peut constater que la majorité des infractions mentionnées à l'art. 195 visent le proxénète qui entraîne ou encourage une personne à s'adonner à la prostitution

195(1)(*j*) [now s. 212(1)(*j*)] is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(*j*) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. [p. 32]

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

(ii) Compliance With the Principles of Fundamental Justice

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

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

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

[142] The question here is whether the law nevertheless goes too far and thus deprives the applicants of their security of the person in a manner unconnected to the law's objective. The law punishes

ou la harcèle à cette fin. L'alinéa 195(1)*j*) [aujourd'hui remplacé par l'al. 212(1)*j*)] vise particulièrement ceux qui ont un intérêt financier dans les revenus d'un prostitué. On estime à juste titre, je crois, que la cible visée par l'al. 195(1)*j*) est la personne qui vit en parasite du revenu d'un prostitué, qu'on appelle communément et fort à propos le souteneur. [p. 32]

[138] Le procureur général du Canada et celui de l'Ontario soutiennent que le véritable objectif de l'al. 212(1)*j*) est de réprimer la commercialisation de la prostitution et de promouvoir les valeurs que sont la dignité et l'égalité. Leur prétention est contraire à l'arrêt *Downey* et n'est pas étayée par le dossier législatif. Elle doit donc être écartée.

(ii) Conformité avec les principes de justice fondamentale

[139] Les juridictions inférieures estiment que la portée de la disposition sur le proxénétisme est excessive en ce que sont ciblés des rapports dénués d'exploitation qui n'ont aucun lien avec l'objet de la disposition. Elles opinent en outre que l'effet préjudiciable de la disposition sur la sécurité des prostituées est totalement disproportionné à l'objectif de les protéger.

[140] Je conviens avec elles que la disposition sur le proxénétisme a une portée excessive.

[141] Les tribunaux n'ont appliqué la disposition qu'à la personne qui offre un service ou un bien à une prostituée parce qu'elle est une prostituée, ce qui exclut, par exemple, l'épicier ou le médecin (*Shaw c. Director of Public Prosecutions*, [1962] A.C. 220 (H.L.)). Ils ont également statué que, dans le cas d'une personne habitant avec une prostituée, l'exploitation devait être prouvée afin qu'un conjoint de fait légitime ne puisse être inquiété (*Grilo*). Leur démarche a pour effet de limiter la portée que l'interdiction pourrait avoir si l'on s'en tenait strictement à son libellé.

[142] La question qui se pose en l'espèce est celle de savoir si la disposition va néanmoins trop loin et porte ainsi atteinte au droit à la sécurité des demanderesses selon des modalités qui sont étrangères

everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is therefore overbroad.

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

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

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

à l'objectif poursuivi. Est sanctionné quiconque vit des produits de la prostitution d'autrui sans que ne soit établie de distinction entre celui qui exploite une prostituée (tel le proxénète contrôlant et violent) et celui qui peut accroître la sécurité d'une prostituée (tel le chauffeur, le gérant ou le garde du corps véritable). La disposition vise également toute personne qui fait affaire avec une prostituée, y compris un comptable ou un réceptionniste. Certains actes sans aucun rapport avec l'objectif de prévenir l'exploitation des prostituées tombent aussi sous le coup de la loi. La disposition sur le proxénétisme a donc une portée excessive.

[143] Les procureurs généraux appelants font valoir que, dans la réalité, la ligne de démarcation entre le proxénète qui exploite une prostituée et le chauffeur, le gérant ou le garde du corps d'une prostituée est floue. Une relation qui n'est empreinte d'aucune exploitation au départ peut le devenir avec le temps. Si le libellé de la disposition était circonscrit davantage — par exemple en considérant que les mots « dans des situations d'exploitation » y sont employés, comme le préconise la Cour d'appel —, un exploiteur pourrait échapper à l'application de la loi du seul fait que sa responsabilité serait difficile à établir. L'exploitation comporte souvent manipulation et intimidation, ce qui rend très difficile l'obtention du témoignage d'une prostituée. Les procureurs généraux font donc valoir que la disposition doit avoir une grande portée afin de réprimer les actes qui sont censés l'être.

[144] Cette considération a davantage sa place dans l'analyse fondée sur l'article premier. Je le répète, une disposition a une portée excessive au regard de l'art. 7 lorsqu'elle s'applique à un comportement qui est sans rapport avec son objet; l'utilité pratique sur le plan de l'application est l'une des considérations que le gouvernement peut invoquer pour justifier la portée excessive d'une disposition suivant l'article premier de la *Charte*.

[145] Vu ma conclusion que la disposition sur le proxénétisme a une portée excessive, il me paraît inutile de déterminer si elle est aussi totalement disproportionnée à son objectif de protéger les prostituées contre l'exploitation.

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

(i) The Object of the Provision

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

> Like Wilson J., I would characterize the legislative objective of s. 195.1(1)(*c*) [now s. 213(1)(*c*)] in the following manner: the provision is meant to address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. My colleague Lamer J. finds that s. 195.1(1)(*c*) is truly directed towards curbing the exposure of prostitution and related violence, drugs and crime to potentially vulnerable young people, and towards eliminating the victimization and economic disadvantage that prostitution, and especially street soliciting, represents for women. I do not share the view that the legislative objective can be characterized so broadly. In prohibiting sales of sexual services in public, the legislation does not attempt, at least in any direct manner, to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution. Rather, in my view, the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view.
>
> The *Criminal Code* provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. [pp. 1134-35]

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

c) *Alinéa 213(1)c) : Communiquer en public à des fins de prostitution*

(i) Objet de la disposition

[146] Dans le *Renvoi sur la prostitution*, le juge en chef Dickson explique l'objet de la disposition sur la communication :

> Comme le juge Wilson, je suis d'avis de qualifier l'objectif législatif de l'al. 195.1(1)*c*) [aujourd'hui remplacé par l'al. 213(1)*c*)] de la façon suivante : la disposition vise la sollicitation dans les endroits publics et, à cette fin, tente de supprimer les diverses formes de nuisances sociales qui découlent de l'étalage en public de la vente de services sexuels. Mon collègue le juge Lamer conclut que l'al. 195.1(1)*c*) vise en réalité à empêcher que de jeunes personnes vraisemblablement vulnérables soient exposées à la prostitution, à la violence, aux drogues et au crime qui l'accompagnent et à éliminer l'oppression et la sujétion économique que la prostitution, et particulièrement la sollicitation de rue, représentent pour les femmes. Je ne partage pas l'opinion que l'objectif législatif puisse être qualifié de façon aussi large. En interdisant la vente de services sexuels dans les endroits publics, la loi ne tente pas, à tout le moins directement, de traiter le problème de l'exploitation, de la dégradation et de la subordination des femmes, qui font partie de la réalité quotidienne de la prostitution. À mon avis, la loi vise plutôt à empêcher que la sollicitation en vue de se livrer à la prostitution se fasse dans les rues et sous les regards du public.
>
> La disposition du *Code criminel* contestée en l'espèce répond clairement aux préoccupations des propriétaires de maison, des commerces et des habitants des secteurs urbains. La sollicitation en public aux fins de la prostitution est intimement associée à l'encombrement des rues ainsi qu'au bruit, au harcèlement verbal de ceux qui n'y participent pas et à divers effets généralement néfastes sur les passants et les spectateurs, particulièrement les enfants. [p. 1134-1135]

[147] Il s'ensuit clairement que la disposition sur la communication vise non pas à éliminer la prostitution dans la rue comme telle, mais bien « à sortir la prostitution de la rue et à la soustraire au regard du public » afin d'empêcher les nuisances susceptibles d'en découler. Le *Renvoi sur la prostitution* contredit la thèse des procureurs généraux selon laquelle

Parliament's overall objective in these provisions is to deter prostitution.

(ii) Compliance With the Principles of Fundamental Justice

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

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

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

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

[152] Compounding this error, the majority of the Court of Appeal inflated the objective of the prohibition on public communication by referring to "drug possession, drug trafficking, public

l'objectif général de la disposition serait de décourager la prostitution.

(ii) Conformité aux principes de justice fondamentale

[148] La juge de première instance conclut que le préjudice causé par l'interdiction de communiquer en public est totalement disproportionné à l'objet de la disposition, à savoir mettre fin à la nuisance que constitue la prostitution dans la rue. Elle s'appuie sur des éléments de preuve qui, à son avis, démontrent que la possibilité de jauger les clients est [TRADUCTION] « essentielle » à la détection de ceux qui sont violents ou ivres (décision de première instance, par. 432).

[149] Les juges majoritaires de la Cour d'appel opinent que, dans son analyse de la proportionnalité, la juge de première instance commet l'erreur d'accorder trop peu d'importance à l'objectif de l'al. 213(1)*c*) et de conclure, à partir de la preuve, que la possibilité d'une communication entre les intéressés est essentielle à la sécurité des prostituées (par. 306 et 310).

[150] À mon avis, le raisonnement des juges majoritaires de la Cour d'appel sur ce point pose problème, en grande partie pour les motifs qu'invoque le juge MacPherson, dissident en partie. Leur analyse est problématique sous quatre rapports.

[151] Premièrement, pour conclure que la juge accorde trop peu d'importance à l'objectif de l'al. 213(1)*c*), les juges majoritaires de la Cour d'appel lui reprochent d'affirmer que la disposition vise [TRADUCTION] « le bruit, l'encombrement des rues et la possibilité que l'exercice de la prostitution gêne ceux qui se trouvent dans les lieux environnants » (C.A., par. 306). Or, la conclusion de la juge s'accorde avec l'objet de l'al. 213(1)*c*) reconnu par le juge en chef Dickson dans le *Renvoi sur la prostitution* et auquel les juges majoritaires souscrivent par ailleurs dans leurs motifs (par. 286).

[152] Pour ajouter à cette erreur, les juges majoritaires accroissent la portée de l'objectif de l'interdiction de la communication en public en mentionnant [TRADUCTION] « la possession de drogue, le

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

trafic de stupéfiants, l'intoxication publique et le crime organisé » (par. 307). Pourtant, dans le *Renvoi sur la prostitution*, le juge en chef Dickson *écarte* explicitement des objectifs de l'al. 213(1)*c*) le fait d'empêcher que de jeunes personnes vulnérables soient exposées « à la prostitution, à la violence, aux drogues et au crime » qui accompagnent la prostitution. Tout au plus, l'effet de cette disposition sur ces autres aspects ne constitue qu'un avantage accessoire, de sorte qu'il ne devrait pas être pris en compte lorsque, dans le cadre de l'analyse de la proportionnalité, on soupèse l'objectif réel de la disposition et son effet préjudiciable sur le droit à la vie, à la liberté et à la sécurité de la personne.

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

[153] Les trois autres failles du raisonnement de la majorité touchent l'autre plateau de la balance, soit l'effet de la disposition.

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

[154] Premièrement, les juges majoritaires de la Cour d'appel substituent à tort leur appréciation de la preuve à celle de la juge de première instance. Ils concluent que cette dernière se fonde sur [TRADUCTION] « des preuves anecdotiques [. . .] éclairées par son propre bon sens » (par. 311) pour conclure que la communication des intéressés est essentielle à la sécurité accrue des prostituées. Leur erreur est imputable à celle, mentionnée précédemment, de déférer trop peu aux conclusions de la juge sur des faits sociaux ou législatifs. Au nom des juges minoritaires, le juge MacPherson rétorque à juste titre que la preuve sur ce point est constituée à la fois de témoignages de prostituées et de témoignages d'experts, et qu'elle étaye solidement la conclusion tirée en première instance (par. 348-350).

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

[155] Deuxièmement, les juges majoritaires font fi des conséquences que la disposition a eues sur les prostituées en les faisant migrer vers des lieux isolés et moins sûrs. La juge de première instance met cette migration en évidence (par. 331) et cite les éléments de preuve tirés du rapport du Sous-comité de l'examen des lois sur le racolage du Comité permanent de la justice et des droits de la personne de la Chambre des communes (*Le défi du changement : Étude des lois pénales en matière de prostitution au Canada* (2006)) sur les effets de l'application de

conclude that face-to-face communication enhances safety may be explained in part by their failure to consider the impact of the provision on displacement.

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

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

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

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

[159] In sum, the Court of Appeal wrongly attributed errors in reasoning to the application judge and made a number of errors in considering gross disproportionality. I would restore the application

l'al. 213(1)*c*). La conclusion des juges majoritaires suivant laquelle la juge ne disposait pas d'éléments suffisants pour conclure que la communication entre les intéressés accroît la sécurité des prostituées peut s'expliquer en partie par leur omission de tenir compte de l'effet de la disposition sur la migration des prostituées.

[156] À cela s'ajoute le fait incontesté que l'interdiction de communiquer à des fins de prostitution empêche les prostituées de la rue de négocier des conditions susceptibles de réduire sensiblement le risque auquel elles s'exposent, telle l'utilisation du condom ou d'un lieu sûr.

[157] Enfin, les juges majoritaires de la Cour d'appel s'appuient sur leur propre appréciation spéculative des répercussions de l'al. 213(1)*c*) pour écarter les conclusions tirées en première instance :

> [TRADUCTION] Bien qu'il soit juste de dire qu'une prostituée de la rue pourrait éviter les incidents malheureux en négociant à l'avance des modalités comme le paiement, les services à rendre et l'utilisation d'un condom, il est également possible que le client jugé acceptable à ce stade préalable devienne ensuite violent lorsque la prestation est en cours. Il est également possible que la prostituée décide d'aller de l'avant malgré le danger pressenti, soit parce que son jugement est altéré par la drogue ou l'alcool, soit parce qu'elle a tellement besoin d'argent qu'elle se sent obligée de courir le risque. [par. 312]

[158] Même si on peut assurément concevoir, comme l'indique cet extrait, qu'une prostituée de la rue ne refuse pas un client même lorsque la communication révèle l'existence d'un risque, il est également concevable que le risque ne puisse être totalement prévisible. Pour autant, la conclusion de la juge selon laquelle la communication entre les intéressés est essentielle à la réduction du risque demeure valable. L'appréciation est qualitative, non quantitative. À supposer que l'évaluation préalable ait pu empêcher une seule femme de monter à bord de la voiture de Robert Pickton, la gravité des effets préjudiciables est démontrée.

[159] En somme, la Cour d'appel relève à tort des erreurs dans le raisonnement de la juge de première instance et elle en commet plusieurs au chapitre de la proportionnalité. Je suis d'avis de rétablir la

judge's conclusion that s. 213(1)(*c*) is grossly disproportionate. The provision's negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

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

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

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

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

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

conclusion de la juge selon laquelle l'al. 213(1)*c*) est totalement disproportionné. L'effet préjudiciable de cette disposition sur le droit à la sécurité et à la vie des prostituées de la rue est totalement disproportionné au risque de nuisance causée par la prostitution de la rue.

C. *Les interdictions de communiquer en public portent-elles atteinte à une liberté garantie à l'al. 2b) de la Charte?*

[160] Comme je conclus que les dispositions contestées violent le droit garanti à l'art. 7, point n'est besoin de se prononcer à cet égard.

D. *Les atteintes sont-elles justifiées suivant l'article premier de la Charte?*

[161] Les procureurs généraux appelants ne prétendent pas sérieusement que si elles sont jugées contraires à l'art. 7, les dispositions en cause peuvent être justifiées en vertu de l'article premier de la *Charte*. Seul le procureur général du Canada aborde le sujet dans son mémoire, et ce, brièvement. Il m'apparaît donc inutile de me livrer à une analyse exhaustive au regard de l'article premier pour chacune des dispositions attaquées. Par contre, certaines des thèses qu'ils défendent en fonction de l'art. 7 de la *Charte* sont reprises à juste titre à cette étape de l'analyse.

[162] En particulier, les procureurs généraux tentent de justifier la disposition sur le proxénétisme par la nécessité d'un libellé général afin que tombent sous le coup de son application toutes les relations empreintes d'exploitation, lesquelles peuvent être difficiles à cerner. Or, la disposition vise non seulement le chauffeur ou le garde du corps, qui peut être en fait un proxénète, mais aussi la personne qui entretient avec la prostituée des rapports manifestement dénués d'exploitation (p. ex. un réceptionniste ou un comptable). La disposition n'équivaut donc pas à une atteinte minimale. Pour les besoins du dernier volet de l'analyse fondée sur l'article premier, son effet bénéfique — protéger les prostituées contre l'exploitation — ne l'emporte pas non plus sur l'effet préjudiciable qui empêche les prostituées de prendre des mesures pour accroître leur sécurité et, peut-être, leur sauver la vie.

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

V. Result and Remedy

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

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

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

[167] On the one hand, immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated.

[163] Les procureurs généraux n'invoquent pas d'éléments distincts de ceux examinés au regard de l'art. 7. Je conclus donc que les dispositions contestées ne sont pas sauvegardées par application de l'article premier de la *Charte*.

V. Dispositif et réparation

[164] Je suis d'avis de rejeter les pourvois et d'accueillir le pourvoi incident. L'article 210, en ce qui concerne la prostitution, et les al. 212(1)*j*) et 213(1)*c*) sont déclarés incompatibles avec la *Charte canadienne des droits et libertés* et sont par conséquent invalidés. Le mot « prostitution » est supprimé de la définition de « maison de débauche » figurant au par. 197(1) du *Code criminel* pour les besoins de l'art. 210 uniquement.

[165] Je conclus que, considérée isolément, chacune des dispositions contestées comporte des failles constitutionnelles qui portent atteinte à la *Charte*. Il ne s'ensuit pas que le législateur ne peut décider des lieux et des modalités de la prostitution. L'interdiction de tenir une maison de débauche, celle de s'adonner au proxénétisme et celle de communiquer aux fins de prostitution s'entremêlent. Chacune a une incidence sur l'autre. Atténuer l'une d'elles — par exemple en permettant aux prostituées de retenir les services de préposés à leur sécurité — peut influer sur la constitutionnalité de l'autre, comme celle des nuisances associées à la tenue d'une maison de débauche. L'encadrement de la prostitution est un sujet complexe et délicat. Il appartiendra au législateur, s'il le juge opportun, de concevoir une nouvelle approche qui intègre les différents éléments du régime actuel.

[166] La question se pose alors de savoir s'il doit y avoir invalidation avec effet suspensif et, dans l'affirmative, quelle doit être la durée de cet effet.

[167] L'invalidité avec effet immédiat ferait en sorte que la prostitution échappe à toute réglementation le temps que le législateur trouve une solution au problème épineux et délicat de l'encadrement de la prostitution. La question revêt un intérêt public considérable, et peu de pays s'abstiennent de toute

Whether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in *Schachter v. Canada*, [1992] 2 S.C.R. 679) may be subject to debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.

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

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

Appeals dismissed and cross-appeal allowed.

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

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

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

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

Solicitors for the interveners the Pivot Legal Society, the Downtown Eastside Sex Workers United Against Violence Society and the PACE Society: Pivot Legal Society, Vancouver; Arvay Finlay,

réglementation en la matière. Il peut y avoir controverse quant à savoir si l'invalidité avec effet immédiat présenterait un danger pour le public ou compromettrait la primauté du droit (les facteurs favorables à la suspension invoqués dans *Schachter c. Canada*, [1992] 2 R.C.S. 679). Cependant, il est clair que passer carrément de la situation où la prostitution est réglementée à la situation où elle ne le serait pas du tout susciterait de vives inquiétudes chez de nombreux Canadiens.

[168] Par contre, laisser s'appliquer dans leur forme actuelle l'interdiction des maisons de débauche, celle du proxénétisme et celle de la communication en public aux fins de prostitution exposerait les prostituées à un risque accru durant la suspension, un risque qui porte atteinte à leur droit constitutionnel à la sécurité de la personne.

[169] Il n'est pas facile de choisir entre l'invalidation avec effet suspensif ou immédiat. L'une et l'autre des mesures comportent des inconvénients. Toutefois, au vu de l'ensemble des intérêts en jeu, je conclus à la nécessité de suspendre l'effet de la déclaration d'invalidité pendant un an.

Pourvois rejetés et pourvoi incident accueilli.

Procureur de l'appelant/intimé au pourvoi incident le procureur général du Canada : Procureur général du Canada, Toronto.

Procureur de l'appelant/intimé au pourvoi incident le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs des intimées/appelantes au pourvoi incident : Osgoode Hall Law School of York University, Toronto; Sack Goldblatt Mitchell, Toronto.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Procureurs des intervenantes Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society et PACE Society : Pivot Legal Society, Vancouver; Arvay Finlay, Vancouver;

Vancouver; Janes Freedman Kyle Law Corporation, Vancouver; Ratcliff & Company, North Vancouver; Harper Grey, Vancouver.

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

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

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

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

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

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

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

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

Janes Freedman Kyle Law Corporation, Vancouver; Ratcliff & Company, North Vancouver; Harper Grey, Vancouver.

Procureurs de l'intervenant le Secrétariat du Programme commun des Nations Unies sur le VIH/sida : McCarthy Tétrault, Vancouver.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Hunter Litigation Chambers, Vancouver.

Procureur de l'intervenante l'Alliance évangélique du Canada : Alliance évangélique du Canada, Ottawa.

Procureurs des intervenants le Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS et HIV & AIDS Legal Clinic Ontario : Cooper & Sandler, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.

Procureurs des intervenants l'Association canadienne des centres contre les agressions à caractère sexuel, l'Association des femmes autochtones du Canada, l'Association canadienne des Sociétés Elizabeth Fry, l'Action ontarienne contre la violence faite aux femmes, la Concertation des luttes contre l'exploitation sexuelle, le Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel et Vancouver Rape Relief Society : University of British Columbia, Vancouver; Fay Faraday, Toronto.

Procureurs des intervenantes l'Alliance des chrétiens en droit, la Ligue catholique des droits de l'homme et REAL Women of Canada : Bennett Jones, Toronto.

Procureurs de l'intervenant David Asper Centre for Constitutional Rights : Arvay Finlay, Vancouver; David Asper Centre for Constitutional Rights, Toronto.

Procureurs de l'intervenant l'Institut Simone de Beauvoir : Desrosiers, Joncas, Massicotte, Montréal.

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

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

Procureurs de l'intervenante AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution : Foy Allison Law Group, West Vancouver.

Procureur de l'intervenante Aboriginal Legal Services of Toronto Inc. : Aboriginal Legal Services of Toronto Inc., Toronto.

Roll Again: New Developments Concerning Gaming†

Patrick J. Monahan and A. Gerold Goldlist***

Until recently, the gaming provisions in Part VII of the *Criminal Code of Canada*[1] had attracted relatively limited attention from the courts. However, with the explosive growth of legalized gaming in Canada in the past decade — particularly lotteries, commercial casinos[2] and video-lottery terminals[3] managed or licensed by provincial governments[4] — the

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** Partner, Davies, Ward and Beck, Toronto. The authors have acted as legal counsel to Ontario Casino Corporation (the provincial Crown agent responsible for conducting, managing and providing for the operation of commercial casinos in Ontario). We are grateful to David Ward and Michael Disney for their helpful comments on an earlier draft of this article and wish to acknowledge the important contribution made by Mr Elie Roth, student-at-law, Davies, Ward and Beck, to the research and writing of this article.

1. R.S.C. 1985, c. C-46 (hereinafter referred to as the "Code"). Unless otherwise noted, all statutory references are to the Code.
2. A commercial casino is a casino conducted and managed by a province, pursuant to s. 207(1)(*a*) of the Code. The first commercial casino in Canada was the Crystal Casino in Winnipeg, Manitoba, which was opened in 1989. Since that time, 18 other commercial casinos have been opened in five provinces. These casinos have been hugely profitable. For example, the four commercial casinos operating in Ontario had a net Win of over $1.6 billion in the most recent fiscal year. (Win is the total amount wagered less payouts to players.) The net Win in other provinces with provincially run casinos was as follows: the Nova Scotia Casino Win totalled $74 million; Manitoba casinos had a total Win of $89.4 million; Quebec casinos had a total Win of $563.9 million; and Saskatchewan casinos had a total Win of $41.7 million. The total casino Win of the commercial casinos in all five provinces is currently approximately $2.4 billion.
3. Video-lottery terminals ("VLTs") are currently operated by eight provinces, the exceptions being Ontario and British Columbia. The government of Ontario had announced a plan to introduce VLTs, but cancelled the initiative in early 1998.
4. As is described below, provincially managed gaming is permitted under a different

scope and application of these gaming provisions have increasingly been tested before the courts.

Of particular interest are two recent decisions of the Supreme Court of British Columbia dealing with the application of s. 207(1)(*a*) of the Code, which provides for gaming conducted and managed by a provincial government ("Provincial Government Gaming") and s. 207(1)(*b*) of the Code, which provides for gaming conducted and managed by a charitable or religious organization under a provincial licence ("Charitable Gaming"). In the first case, *Nanaimo Community Bingo Assn. v. British Columbia (Attorney General)*,[5] the British Columbia Supreme Court ruled that Charitable Gaming that had been approved by the province, and which was expected to contribute significant amounts to the provincial Consolidated Revenue Fund, failed to satisfy the requirements of s. 207(1)(*b*) of the Code. As a result, the method of distribution of the profits from the Charitable Gaming scheme was declared invalid. The second case, *Great Canadian Casino Co. v. Surrey (City)*,[6] which dealt with Provincial Government Gaming, upheld the validity of an arrangement where VLTs owned by the British Columbia Lottery Corporation were operated by a private-sector operator within a charity casino. However, the court cautioned that the arrangement came "dangerously close to a delegation of the provincial government's power to conduct and manage gaming" and, had that occurred, the lottery scheme would have been in violation of the requirements of s. 207(1)(*a*) of the Code.

Both cases break important new ground in the interpretation of s. 207(1)(*a*) and (*b*) of the Code. Indeed, the reasoning in these cases, if followed by subsequent courts, will have significant implications for gaming activities currently being conducted in a number of provinces. As it can be expected that the

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provision of the Code than is provincially licensed gaming, with different rules and requirements applicable to each activity.

5. (1998), 77 A.C.W.S. (3d) 669 (hereafter referred to as "*Nanaimo*").
6. (1998), 45 M.P.L.R. (2d) 240 (B.C.S.C.) (hereafter referred to as "*Surrey*"). See also the supplementary reasons dealing with the availability of injunctive relief: *Great Canadian Casino Co. v. Surrey (City)* (1998), 45 M.P.L.R. (2d) 261, 19 C.P.C. (4th) 52 (B.C.S.C.).

scope and nature of legalized gaming will continue to expand in future years, the reasoning in these cases bears close scrutiny and analysis.

The growth of legalized gaming has not been without considerable political controversy in recent years. Our concern in this article, however, is not with the politics of the gaming industry but, rather, with the legal framework within which it occurs. In particular, we focus on whether, and to what extent, there is a continuing role for criminal sanctions as a means of regulating gaming activity in Canada today.

This article is divided into two parts. In the first part, we review the history and evolution of the gaming provisions in Part VII of the Code, including the manner in which those provisions have generally been interpreted by the courts in the past. We outline the principal differences between the requirements respecting Provincial Government Gaming under s. 207(1)(*a*), and those respecting Charitable Gaming under s. 207(1)(*b*). We note that previous cases interpreting the "conduct and manage" requirement — which is common to both sections — have focused on which party is the "operating mind" of the gaming activity in question. We also point out that courts in the past have tended to take a somewhat more relaxed approach in scrutinizing gaming conducted under s. 207(1)(*a*) as compared with the approach under s. 207(1)(*b*).

In the second part of this article, we review the two most recent and significant British Columbia cases in light of this background. In many respects, the reasoning in these two cases is consistent with the previous jurisprudence on s. 207. In particular, the analysis in these two cases confirms that there is a distinction between "conducting and managing" a lottery scheme, on the one hand, and "operating" a scheme on the other. It has been found to be permissible for a province or a charitable or religious organization to retain a private sector operator to assist in the day-to-day operation of the scheme, as long as the party responsible for conducting and managing remains the operating mind of the gaming activities. After reviewing the reasoning in the cases, we offer our own analysis as to the kinds of considerations that ought to be considered

by courts as they apply the "conduct and manage" requirement in the separate contexts of s. 207(1)(*a*) and (*b*) of the Code.

These recent cases also suggest that there are significant limits on the manner in which compensation of private operators can be structured for purposes of gaming conducted by charitable or religious organizations under s. 207(1)(*b*). For example, in these cases, the courts assumed that where a private sector operator is compensated on the basis of a formula that is linked to the overall profits or proceeds of the scheme, the operator is sharing in the gaming proceeds with the charitable or religious organization, contrary to the requirements of s. 207(1)(*b*). In our opinion, this view of the distribution of proceeds from gaming activities is not warranted based on the wording of s. 207(1)(*b*) and fails to take into account commercial realities. We offer our own suggested framework for analyzing the validity of different methods for distributing the proceeds from gaming activities.

History and Evolution of Code Gaming Provisions

(1) The History of Gaming Regulation in Canada

Canadian statutes prohibiting common gaming houses and lotteries date back to the 19th century, when Canada adopted restrictions that had previously been enacted in England. English law dating back to the 15th and 16th centuries had attempted to make a distinction between "lawful gaming", in which gaming was pursued in a limited fashion as an "innocent and moderate recreation", as compared with gaming pursued as a "constant trade or calling to gain a living or make unlawful advantage thereby".[7] It was through the "immoderate" practice of gaming that many mischiefs were said to arise, including the corrupting of young people, the promotion of idleness, cheating and deceitfulness, and the "utter ruin of the

7. See the preamble to a 1664 English statute entitled "An Act against deceitful, disorderly and excessive gaming", 16 Car. II., c. 7 (U.K.), cited in G. Herbert Stutfield, *The Law Relating to Betting, Time-Bargains and Gaming*, 2nd ed. (London, Waterlow & Sons Limited, 1886), pp. 46-47.

estates and fortunes" of the nobility, gentry and others.[8] English law regarded common gaming houses as necessarily tending to promote immoderate and excessive gaming, "not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons".[9] Thus English law had classified gaming houses as nuisances and prohibited them, a restriction that was adopted in criminal statutes enacted by the Canadian Parliament in the early years following Confederation.[10] Other Canadian statutes enacted during this period prohibited the playing of card and dice games on public conveyances such as trains and steamships[11] and made it an offence to advertise or promote lotteries.[12]

These Canadian enactments were consolidated in 1892 in the first *Criminal Code of Canada*[13] under the heading "Offences against Religion, Morals and Public Convenience". Keeping a common gaming house was an indictable offence with a penalty of imprisonment for up to one year, while playing or looking on while other persons played in a common gaming house was a summary conviction offence with a penalty of a fine of up to $100. A common gaming house was defined broadly as including any place used for the purpose of betting between persons on any event, contingency, horse race, fight, game or sport. Advertising or promoting lotteries was also prohibited, with the only exceptions being raffles for small prizes at bazaars held for any charitable or religious object.[14]

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8. *Ibid.*, at p. 47.
9. See *Hawkins Pleas of the Crown*, Book I, c. 75, cited in Stutfield, *ibid.*, at p. 135.
10. See *An Act for suppressing Gaming Houses and to punish the keepers thereof* (U.K.), 38 Vict., c. 41 (1875); *An Act Respecting Gaming Houses* (U.K.), 49 Vict., c. 158 (1886). For an account of the historical development of gaming regulation in Canada, see *Reports of the Joint Committee of the Senate and House of Commons on Capital Punishment, Corporal Punishment and Lotteries*, 22nd Parl., 3rd Sess. (Ottawa: Queen's Printer, 1956) (hereafter referred to as "*Joint Committee Report*").
11. *An Act respecting Gambling in Public Conveyances* (U.K.), 49 Vict., c. 160 (1886).
12. *An Act respecting Lotteries, Betting and Pool Selling* (U.K.), 49 Vict., c. 159 (1886).
13. (U.K.), 55-56 Vict., c. 29.
14. This exception was extremely narrow in that only prizes with a value of less than

These broad restrictions on gaming and lotteries were carried forward in successive revisions of the Code through the first half of the 20th century. However, in 1956 a Joint Committee of the Senate and House of Commons (the "Committee"), after holding public hearings, issued a report calling for significant liberalization of the Code restrictions with respect to lotteries. The Committee found that there was widespread violation of the existing restrictions on lotteries by charitable or religious organizations.[15] Law enforcement agencies had found it impractical to attempt to enforce the law. The Commissioner of the RCMP informed the Committee that "there is lack of support for the present prohibitory laws and . . . they cannot be enforced in the face of adverse public opinion".[16] The Committee concluded that the widespread evasion of existing laws was a serious problem in that it brought law enforcement and law in general into disrespect, and led to the growth of fraudulent lottery schemes.

In recommending reform, the Committee drew a parallel with the evolution of laws respecting the sale and consumption of alcoholic beverages. Prohibition of the sale of alcoholic beverages had proven to be unworkable and led to many serious abuses: it was replaced by a system of licensing and control in which the public interest was protected and the laws effectively enforced. The Committee recommended the same approach be applied in the reform of the existing Code restrictions on lotteries. They proposed a new licensing system under which charitable or religious organizations could be licensed by provincial or municipal authorities to conduct lotteries, pro-

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$50 were permitted, and the prize must previously have been offered for sale to the public. See s. 179(8)(*b*) of the 1892 Code. Note, however, that from 1938 to 1969, a place used occasionally by charitable or religious organizations for playing games for which a direct fee was charged to the players and the proceeds of which were to be used for any charitable or religious object was excluded from the definition of "common gaming house" in the Code: see S.C. 1938, c. 44, s. 12.

15. See *Joint Committee Report*, *supra*, footnote 10, at pp. 64-65. The Committee noted that lotteries run by churches, service clubs and other reputable voluntary organizations were common and received widespread support from the community. Religious and charitable organizations also commonly operated large bingo games with substantial prizes. All of these activities were contrary to the existing restrictions in the Code.

16. *Joint Committee Report*, *ibid.*, at p. 65.

vided that the value of prizes offered by any one organization not exceed $5,000 in a given year.[17] The Committee believed that such a licensing scheme would ensure control over the conduct and management of lotteries and prevent individuals from misappropriating the proceeds from charitable lotteries. However, the Committee rejected a proposal to permit government-run lotteries. In the Committee's view, the proper role of the state was to control and regulate gambling activity carried out by private citizens, not to provide facilities for gaming to the public.[18]

Despite the obvious need for reform in this area, for over a decade no action was taken on the Committee's recommendations and the existing broad prohibitions on gaming and lotteries were maintained in the Code. It was not until 1969 that major changes were made to liberalize the criminal restrictions on gaming.[19] The 1969 amendments to the Code went further than the 1956 Committee's recommendations. Under the new framework, lotteries conducted and managed by charitable or religious organizations were permitted as long as the organizations were licensed by the province or municipality and any proceeds were used for charitable or religious purposes.[20] The amendments also permitted lotteries conducted and managed by the federal or provincial governments, with no restrictions on the utilization of the proceeds from such lotteries.[21] These amendments permitted both senior levels of government to begin operating large-scale and highly profitable lotteries in the 1970s.[22]

The pre-1969 approach, which sought to prohibit most forms of gaming and lottery schemes, was replaced in 1969 by a system that provides for certain forms of permissible gam-

17. See *Joint Committee Report, ibid.*, at pp. 71-73. The Committee justified the $5,000 prize restriction on the basis that this would permit the award of an automobile, "a most popular type of prize for the larger type of raffle": see the *Joint Committee Report* at p. 73.
18. See *Joint Committee Report, ibid.*, at pp. 68-69.
19. See *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. C-38.
20. The amendments did not incorporate the prize limit of $5,000 that had been recommended by the 1956 Committee.
21. See what was then s. 190 of the Code.
22. For example, a significant portion of the costs of the 1976 Olympic games staged in Montreal was financed by the proceeds from a lottery conducted by the federal government.

ing, provided that there are adequate safeguards to protect the public interest. The 1969 amendments continue to provide the basic framework for the criminal regulation of gaming in Canada today.[23] The operating assumption is that it is impractical to attempt to prohibit gaming entirely, since such activities are socially acceptable and pose no inherent threat to the public interest.

(2) Existing Code Gaming Provisions

Sections 206 and 207 of the Code are the principal contemporary provisions regulating gaming activities. Section 206 makes it an offence to engage in a broad range of gaming activities, including lotteries, games of chance and dice games. A violation of s. 206 is punishable by imprisonment for up to two years. However, a province or a religious or charitable organization may conduct and manage any "lottery scheme" if the applicable requirements of s. 207 are satisfied. The term "lottery scheme" is defined in s. 207(4) of the Code to mean any of the broad range of gaming activities described in s. 206 with certain exceptions. These exceptions include three-card monte, punch board or coin table and bookmaking or betting on a single sport event or athletic contest. These activities continue to be illegal whether or not conducted and managed by a province or a religious or charitable organization.[24] In addition, s. 207(4) makes a distinction with respect to dice games and gaming operated on or through a computer, video device or slot machine. Only a provincial government under s. 207(1)(*a*) (and not a religious or charitable organization) can conduct and manage the gaming activities described in s. 207(4), which include dice games, VLTs and slot machines.

23. In 1985 the federal government agreed to vacate the field of state-run lotteries. Prior to 1985, what was then s. 190 of the Code had permitted the government of Canada to conduct and manage a lottery scheme in accordance with federal regulations. However, in a June 3, 1985 agreement signed by the federal government and all ten provinces, the federal government agreed to amend the Code so as to remove the legal authority for the federal government to conduct lottery schemes.
24. Note that, prior to March 15, 1999, dice games were also not permitted even if conducted and managed by a province; however, an amendment effective that date now permits dice games to be conducted and managed by a province, although not by a religious or charitable organization: see S.C. 1999, s. 6(1) and (2) (amending s. 207(4)(*a*) and (*c*) of the Code).

Sections 207(1)(*a*) and (*b*) provide as follows:

> 207. (1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful
>
> (a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province;
>
> (b) for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose;

Section 207(1)(*a*) establishes two requirements in order for Provincial Government Gaming to be exempted from the criminal prohibitions in s. 206. First, the lottery scheme must be "conducted and managed" by the government of a province, either alone or in conjunction with the government of another province. Second, the lottery scheme must be conducted and managed in accordance with a statute enacted by the legislature.[25]

The requirements of s. 207(1)(*b*), dealing with Charitable Gaming, differ from those in s. 207(1)(*a*) in the following five respects:

(1) whereas under s. 207(1)(*a*) the lottery scheme must be conducted and managed by the province, under s. 207(1)(*b*) it must be conducted and managed by a charitable or religious organization;
(2) a lottery scheme conducted and managed under s. 207(1)(*b*) cannot include gaming operated on or through computers, video devices or slot machines;
(3) the charitable or religious organization must have

25. While s. 207(1)(*a*) of the Code contemplates the enactment of provincial law authorizing lottery schemes, it does not establish the constitutional basis for such provincial law. Rather, the province enacts legislation authorizing and regulating lottery schemes on the basis of its own legislative authority pursuant to s. 92(7), (9) and (13) of the *Constitution Act, 1867*. See *R. v. Furtney*, [1991] 3 S.C.R. 89 at p. 103, 66 C.C.C. (3d) 498, 8 C.R. (4th) 121.

received a gaming licence from the provincial government, or from some other person authorized by the provincial government to issue gaming licences;

(4) as provided in s. 207(2), the gaming licences issued to charities and religious organizations may contain terms and conditions "relating to the conduct, management or operation of or participation in the lottery scheme to which the licence relates"; and

(5) the proceeds from a lottery scheme must be used for a charitable or religious object or purpose, whereas under s. 207(1)(*a*) there is no limitation on the purpose to which the proceeds can be applied.[26]

It is evident that Parliament has adopted a more restrictive approach to lottery schemes conducted and managed by a charitable or religious organization than the approach to those conducted and managed by provincial governments. Where a lottery is conducted and managed by a provincial government in accordance with a provincial statute, the assumption is that the provincial government will take the necessary steps to provide for the protection of the public interest. Such an assumption does not necessarily apply in the context of lottery activities conducted and managed by charitable or religious organizations under provincial licence. In fact, the 1956 Joint Committee had noted that a significant problem was posed by professional operators who attempted to "hide behind" a char-

26. See *British Columbia Charitable Gaming Funding Society (Re)* (1998), 82 A.C.W.S. (3d) 1124 (B.C.S.C.), supp. reasons January 18, 1999 (hereafter *"Gaming Funding Society"*) where the court distinguished between proceeds derived from activities under s. 207(1)(*a*) as compared to s. 207(1)(*b*); while there is no restriction as to where proceeds derived under the former section can go, proceeds derived under the latter section must go entirely to charitable or religious organizations. As the Code does not define charitable or religious organizations or purposes, these terms must be construed in accordance with common law principles. Canadian courts have held that a charitable purpose is one that falls within certain categories set out by Lord Macnaghten in *Income Tax Special Purposes Commissioners v. Pemsel*, [1891] A.C. 531 (H.L.): see, for example, *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.* (1999), 169 D.L.R. (4th) 34, 99 D.T.C. 5034, dismissing an appeal from a judgment of the Federal Court of Appeal, [1996] 2 C.T.C. 88, 96 D.T.C. 6232.

itable organization and then appropriate for themselves all the proceeds of the activity:[27]

> [I]t is difficult to protect the public from fraudulent lottery schemes where all or the major portions of the proceeds are taken by promoters operating under the guise of charities . . . Lotteries had been promoted by professional operators, hidden by some spurious charitable organization or purpose, all the proceeds of which were taken by the promoters. Some lotteries, organized by reputable organizations for worthy purposes, had been entrusted to the management of professional promoters who had retained most of the proceeds. There was evidence that professional operators had conspired to manipulate and cheat at bingo games and thereby gain valuable prizes. It is difficult to control these frauds under the existing laws.

These concerns over lottery schemes conducted under licence by charities and religious organizations are of continuing relevance. In fact, it was precisely the type of scenario envisaged by the Joint Committee — in which a professional private operator operated a lottery scheme under the guise of a charitable organization and retained most of the proceeds — which gave rise to the recent *Keystone*[28] case which, as we note in the next section, is the leading contemporary case on the interpretation of s. 207(1)(*b*) of the Code. In *Keystone* the court noted that it cannot automatically be assumed that charitable or religious organizations have the resources or the expertise to deal effectively with private professional gaming operators. As we elaborate in more detail below, this may well justify and necessitate a more rigorous approach by the courts in applying the provisions of s. 207(1)(*b*), which deals with gaming conducted by charities and religious organizations, as compared with s. 207(1)(*a*), which involves gaming conducted and managed by provincial governments under provincial statute.

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27. See *Joint Committee Report, supra*, footnote 10, at pp. 65-66.
28. *Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation* (1990), 76 D.L.R. (4th) 423, [1991] 3 W.W.R. 629, 69 Man. R. (2d) 63 (C.A.), leave to appeal to S.C.C. refused 79 D.L.R. (4th) vii, 16 W.A.C. 160*n* (hereafter referred to as "*Keystone*").

(3) Previous Case Law on Section 207

(a) Section 207(1)(b) (Charitable Gaming)

Except for in the leading *Keystone* decision of the Manitoba Court of Appeal, s. 207(1)(*b*) of the Code had received relatively limited attention from the courts prior to the *Nanaimo* and *Surrey* cases.

In *Keystone*, the owner of Keystone Bingo Centre Inc., John Klayh, planned to operate a commercial bingo operation and to avoid the criminal consequences that would normally attach to such activity. Klayh's plan was to organize a group of charities under a single organization, with that organization then applying for a bingo licence from the provincial regulatory authority. At the same time, the charities would enter into a lease with Keystone to operate the bingo games on Keystone's premises. Keystone agreed to provide the charities with a fully renovated and equipped bingo hall, all bingo paper and break-open tickets required for events conducted at the premises and the personnel required in order to conduct and manage the events, and to maintain and operate a canteen or concession facility. In return, the charities agreed to pay rent to Keystone in amounts that included Keystone's annual direct operating expenses plus 15%; repayment of the cost of the leasehold improvements amortized over a period of two years; repayment of the costs of the equipment used in the operation amortized over a period of seven years; and the cost of break-open tickets sold plus 20%. In addition, all concession income, except for a credit of $1,000 to the charities, went to Keystone.[29]

Klayh believed that this scheme was shielded from criminal consequences by s. 190(1)(*c*) (now s. 207(1)(*b*) in somewhat different wording) of the Code which provided, in part, as follows:

> Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful
>
> . . . . .
>
> (c) for a charitable or religious organization, under the authority of

29. *Ibid.*, at p. 426.

> a licence issued by the Lieutenant Governor in Council of a province . . . to *conduct and manage* a lottery scheme in that province and for that purpose for any person under the authority of such licence to do anything described in any of paragraphs 189(1)(*a*) to (*g*) . . . [Emphasis added.]

The charities obtained the necessary licence and the bingo hall opened in December of 1982. The business was an overwhelming success and, over the next 17 months, Keystone had net income well in excess of $500,000, while the charities received a total of over $1,000,000.

However, in early 1984, pursuant to a change in government policy, the Manitoba Lotteries Foundation was established to license all bingo operations by charitable organizations on their own premises, in public premises or on premises of other charitable organizations only. This effectively terminated Keystone's business. Keystone argued that the actions of the government amounted to a statutory taking of its goodwill which required that compensation be paid to it.

The court found that Keystone's business failed to satisfy the requirements of s. 190(1)(*c*) of the Code; the business was therefore illegal and Keystone was not entitled to any compensation from the province. The court reasoned as follows:[30]

> Keystone carefully constructed an elaborate scheme to put itself in the position of a landlord simply renting out its premises. That scheme cannot conceal the reality that Keystone was conducting and managing a lottery scheme . . . or conceal the reality that the remuneration package went far beyond the typical landlord and tenant relationship and provided Keystone with a very real participation in the profits of the bingo hall operation.
>
> In our view, Keystone did not come within the exception found in s. 190(1)(*c*) in the words: ". . . and for that purpose for any person under the authority of such licence to do any thing described in any of paragraphs 189(1)(*a*) to *(g)* . . ." Those words can only relate to those persons who are directly associated with, and in a sense part of, the charitable or religious organization for whom the exemption was designed.

The court further noted that Keystone was the "operating mind of the whole scheme"; therefore, the scheme was not being

30. *Ibid.*, at p. 429.

conducted and managed by the charitable organization, as was required by s. 190(1)(*c*).

In addition to the "conduct and manage" requirement, the court held that there was a separate, independent ground for concluding that the lottery scheme did not fall within the relieving provisions of the Code. According to the Court of Appeal, the proceeds from the scheme were not being used exclusively for charitable or religious purposes, as was required by the relevant section of the Code. The court cited the 1932 Supreme Court of Canada decision in *Bampton v. The King*, where Duff J. (as he then was) had said: "The section is aimed, I think, at the participation by the owner of the place where the game is carried on, in the profits or other proceeds accruing to members from the game itself."[31] The Court of Appeal was of the view that the amounts being paid to Keystone amounted to a sharing of the profits of the scheme with Keystone and, on this basis, the scheme could not qualify for the exemption for charitable or religious organizations.

Finally, the Court of Appeal noted that, since s. 190 of the Code was federal legislation, "not even the legislature of Manitoba could give Keystone the colour of right to act in the manner which it did". Keystone's argument to the effect that the province had acquiesced in or consented to the operation of the lottery scheme was accordingly rejected.

The facts of *Keystone* illustrate the potential dangers associated with gaming conducted and managed by charities and religious organizations under s. 207(1)(*b*). Because charities and religious organizations are typically staffed by volunteers, they may well lack the resources to be able to deal effectively with private sector operators intent on manipulating the provisions of the Code to their private advantage. *Keystone* points out the importance, in this context at least, of the courts scrutinizing carefully any arrangements entered into between charities or religious groups and private operators to ensure that the groups are the true "operating mind" of the activities in question.[32]

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31. [1932] S.C.R. 626 at p. 633, [1932] 4 D.L.R. 209.
32. See also our discussion in the text accompanying footnote 61, *infra*, of the difficulties encountered with roving "Monte Carlo" casinos conducted on behalf of

(b) Section 207(1)(a) (Provincial Government Gaming)

There has been little prior judicial consideration of the provisions of s. 207(1)(*a*) of the Code, dealing with Provincial Government Gaming. However, the limited case law that has considered this provision has tended to assume that gaming conducted and managed by a provincial government is necessarily in the public interest and therefore it is unnecessary to engage in the kind of detailed analysis of the business arrangements respecting the activity that might be appropriate under s. 207(1)(*b*).

For example, in *Legoyeau Holdings Ltd. v. Windsor (City)*,[33] Legoyeau sought to halt the expropriation of its premises in the City of Windsor, expropriation that was being undertaken to facilitate the building of the permanent casino in Windsor by Ontario Casino Corporation. One of the grounds for Legoyeau's application was that gaming is illegal under the Code and that the municipality was seeking to expropriate lands to carry out an illegal purpose. Both the Divisional Court and the Court of Appeal dismissed Legoyeau's application.

On the question whether gaming carried on in the Windsor Casino would be illegal, the Court of Appeal stated that the gaming activity was being conducted and managed by the province, and therefore the defence in s. 207(1)(*a*) applied:[34]

> Dealing with the first and second grounds together, s. 207(1)(*a*) of the Criminal Code provides that it is not illegal for the government of a province to conduct and manage "a lottery scheme" in that province. Ontario proposes to do just that. It is now operating on a temporary basis in what was the Windsor Art Gallery. What is proposed is to build a permanent casino on the expropriated land. What is proposed is entirely legal. Being legal, there is no impediment to the city using its power to expropriate for that purpose.

The Court of Appeal considered this conclusion to be plain and obvious, and did not believe it necessary to engage in any kind of detailed analysis of the legislative or regulatory scheme, or

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charities and religious groups in the Province of Ontario, which prompted the government in 1997 to revisit the licensing scheme for Charitable Gaming.

33. (1994), 52 L.C.R. 241 (Ont. C.A.).

34. *Per* "the court" (Goodman, Abella and Austin JJ.A.), *ibid.*, at p. 245.

of the exact manner in which the casino would be operated, in order to justify this result.

In *R. v. Andriopoulos*[35] the Ontario Court of Justice (General Division) and the Court of Appeal discussed the general purpose underlying s. 207. In *Andriopoulos*, the defendant had been charged with offences under ss. 201 and 202 of the Code. In defending himself, he alleged that changes in social attitudes indicated that gambling is no longer considered harmful to the public and, thus, Parliament's criminal law power can no longer support the prohibition of the activities referred to in ss. 201 and 202. He argued that the decriminalization of gaming activities through s. 207 of the Code reflected this change in attitudes. In rejecting the defendant's argument, Campbell J. of the Ontario Court (General Division) distinguished between the gaming permitted pursuant to s. 207 and the activities carried on by the defendant:[36]

> Parliament prohibits uncontrolled gambling that lacks the licensing, regulatory and law enforcement safeguards imposed by the province.
>
> Parliament permits gambling so long as its well-known criminal associations and side effects are deterred by provincial regulation, licensing and management. Ontario permits the same thing.

Later in his judgment, Campbell J. characterized the gaming permitted by s. 207 as "licensed and regulated" and distinguished this activity from "unregulated gambling":[37]

> There is a world of difference between licensed regulated gambling and gambling conducted without any legal control.
>
> There is a world of difference between regulated gambling under a governmental good-housekeeping seal of approval with a policeman watching over your shoulder, and unregulated gambling in some illicit hangout under conditions associated from the earliest times with criminal activity and criminal side effects.

The Court of Appeal relied upon the same theory as to the purpose of s. 207 of the Code in dismissing the defendant's appeal from Justice Campbell's decision. The Court of Appeal

35. [1994] O.J. 2314 (C.A.), affg [1993] O.J. No. 3427 (Ont. Ct. (Gen. Div.)).
36. See paras. 7 and 8 of the trial judgment, *ibid.*
37. At paras. 11 and 12 of the trial judgment, *ibid.*

made the following comments on the defendant's argument to the effect that social attitudes towards gaming had changed:[38]

> The essential fallacy of [the defendant's] proposition is in equating a lottery, licensed, conducted and managed by a province, to all forms of gaming and gambling. Simple gambling between individuals is not prohibited, unless it involves enumerated games such as three-card monte. The business of organized gaming is the subject matter of the prohibitions, presumably because it invites cheating and attracts other forms of criminal activity. There is no evidence that public perceptions of commercial gaming have changed or that it is any less criminal in nature than it has ever been.
>
> Section 207 defines the reach of the crime by stating that it does not extend to lotteries licensed under authority of the province under prescribed conditions. *The clear intent is not to condone gambling but to decriminalize it in circumstances where regulations will minimize the potential for public harm.*

In our view, both the General Division and Court of Appeal judgments in *Andriopoulos* suggest that the purpose of s. 207 is to permit gambling where there is sufficient control of the activity by the province so as to ensure that the public interest is protected. Moreover, both judgments suggest that where gaming is conducted and managed by the province pursuant to a statute enacted by the provincial legislature, the courts are entitled to assume that there is sufficient protection for the public and the activity is in compliance with the requirements of the Code.

A similar broad approach to the interpretation of s. 207(1)(*a*) was taken in *Alberta Shuffleboards (1986) Ltd. v. Alberta*,[39] which considered the validity of a legislative scheme providing for the operation of VLTs in the Province of Alberta. The province had provided for the operation of VLTs pursuant to the *Interprovincial Lottery Act*.[40] Sections 3 and 4 of the *Interprovincial Lottery Act* provided as follows:

> 3. The Minister may issue a license to any person authorizing that person, as agent of the Government of Alberta, to conduct, manage and

38. At paras. 4 and 5 of the Court of Appeal judgment, *supra*, footnote 35 (emphasis added).

39. (1992), 132 A.R. 126 (Q.B.).

40. R.S.A. 1980, c. I-8. This statute has since been repealed: see *Gaming and Liquor Act*, S.A. 1996, c. G-O.5, s. 136 (proclaimed July 15, 1996).

> operate a lottery scheme within Alberta and to carry out the terms of any agreement under this Act.
>
> 4. A license issued under this Act shall contain any terms and conditions the Minister considers appropriate.

As of April 1, 1992, the Minister had issued a licence to Edmonton Northlands Ltd. and Calgary Exhibition and Stampede Ltd., jointly carrying on business as Western Canada Lottery Alberta Division ("Alberta Lotteries") to conduct, manage and operate a video-lottery scheme known as "Video Lottery". A number of private operators of coin-operated amusement businesses in the Province of Alberta sought an injunction restraining the government from proceeding with the video-lottery scheme. In dismissing the application, Lefsrud J. of the Alberta Court of Queen's Bench noted that the arrangements to license Alberta Lotteries to conduct, manage and operate the lottery scheme were perfectly lawful:[41]

> Further supporting the conclusion that there is no serious issue to be tried between the applicants and the respondents are the provisions contained in s. 207(1)(*a*) of the Criminal Code and s. 3 of the Interprovincial Lottery Act.
>
> These particular statutes now permit a province or its duly authorized agents to engage in what was formerly an illegal activity, and to set the rules and regulations under which those activities may be conducted.
>
> I have already referred to s. 3 of the Interprovincial Lottery Act which clearly points out that the Minister is unfettered in issuing a licence to any person authorizing that person as agent of the Crown to conduct, manage and operate a lottery scheme within Alberta and to carry out the terms of any agreement under the Act. In addition, it also provides that a licence issued thereunder shall contain any terms and conditions the Minister considers appropriate.
>
> Regardless of what terminology is used to describe such appointments by the Minister, they are in fact lawful and not open to challenge. Accordingly, as already indicated, no serious issue to be tried exists.
>
> It follows, therefore, that the Crown has the power to enter into agreements and to issue licences . . . the Crown has proceeded well within the limits prescribed by the enabling statutes.

The court found that it was plain and obvious that the lottery

41. *Supra*, footnote 39, at pp. 130-31.

scheme was legally valid, and dismissed the application for an injunction on the basis that there was no serious issue to be tried.

What is significant about the decision in *Alberta Shuffleboards* is that it appears to give a province a wide degree of latitude in structuring arrangements so as to comply with the requirements of s. 207(1)(*a*). The approach used by Alberta was to designate a private company as a Crown agent and to license the agent to conduct, manage and operate a video-lottery scheme on the Crown's behalf. The court characterized Alberta Lotteries as an "independent contractor" that was a Crown agent because it was engaged as such by the government. While the legislation provided for the possibility of imposing terms and conditions on Crown agents as part of the licence, there was no obligation on the Minister to include any conditions or restrictions.

The scheme adopted by Alberta did not require extensive controls and oversight by the provincial government or by some other public body. Instead, simply by issuing a licence to a private, independent contractor and designating the licensee as a Crown agent, the requirements of s. 207(1)(*a*) were satisfied. In fact, the court, in the passage quoted above, described the Minister as having "unfettered" power to issue a licence "to any person" to conduct and manage lottery schemes on behalf of the Crown. What is interesting is that the judge in *Alberta Shuffleboards* regarded the Alberta approach under s. 207(1)(*a*) as being so obviously lawful that he did not even consider there to be a serious issue for trial.[42]

(4) Practical Issues

A number of issues of practical significance emerge from the previous case law on s. 207(1)(*a*) and (*b*).

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42. The approach of the court in this case is consistent with the traditional analysis of Crown agency in situations where a person is designated an agent of the Crown pursuant to statute. The statutory designation of Crown agency is regarded by the courts as conclusive, regardless of whether the person so designated is subject to *de facto* or *de jure* control of the Crown: see *R. v. Eldorado Nuclear Ltd.-Eldorado Nucleaire Limitee*, [1983] 2 S.C.R. 551 at pp. 574-75, 4 D.L.R. (4th) 193, 8 C.C.C. (3d) 449.

First, the *Keystone* case suggests that the "conduct and manage" language in s. 207(1)(*b*) requires that the party responsible for conducting and managing the gaming activity must be its operating mind. To what degree, however, can the party responsible for conducting and managing involve other parties — such as private sector gaming operators — in the physical operation of the gaming activity? This issue is of considerable practical importance since charitable and religious organizations in provinces such as Ontario and British Columbia have retained companies with private sector gaming expertise to operate casinos or slot machines under their overall direction and management. *Keystone* requires that the charitable or religious organization must be the "operating mind" of the lottery scheme in order to be regarded as "conducting and managing" it. This raises the question of the extent to which a private sector operator can contribute its expertise and knowledge to the lottery scheme in question without causing the scheme to fall outside the exempting provisions of the Code.

A second general question arises from the comments in the *Keystone* case relating to the sharing of proceeds from gaming activities. As noted, s. 207(1)(*b*) states that the proceeds from the lottery scheme must be used for a charitable or religious object or purpose in order to fall within the relieving provisions of the section. The court in *Keystone* interpreted this provision as preventing private sector operators from sharing in the profits of any gaming activities they operate on behalf of charities or religious groups. This raises the question of whether charitable or religious groups are able to structure compensation for private operators in accordance with normal commercial practice in the gaming and hospitality industry, where compensation is usually based on a formula linked to overall revenues or profits.

A third question is the extent to which the jurisprudence that has been developed in the context of s. 207(1)(*b*) ought to be applied to gaming activities conducted and managed by a provincial government under s. 207(1)(*a*). As we have previously noted, it is reasonable for the courts to interpret the restrictions in s. 207(1)(*b*) as evidencing the intent of Parliament that any arrangements between unsophisticated

charities and religious organizations on the one hand and sophisticated private operators on the other be subjected to careful scrutiny so as to ensure that the requirements of s. 207(1)(*b*) are being met. However, in the case of gaming activities conducted or managed by a province, the provincial government has the necessary expertise and resources to ensure that the public interest is sufficiently protected. Moreover, the decision on the kinds of gaming activities that will be permitted, the manner in which those activities will be carried out, as well as the safeguards needed to protect the public interest, will all have been determined by the provincial government. This suggests that it may well be appropriate for the courts to adopt a somewhat more deferential attitude in assessing whether business and operating arrangements that are put in place by a provincial government in accordance with provincial law meet the requirements of the Code.

Each of these general questions was addressed, directly or indirectly, by the two British Columbia Supreme Court decisions handed down earlier this year, in some rather interesting and significant ways. We now turn to an analysis of these cases.

The Nanaimo and Surrey Cases

(1) Background: Expansion of Gaming in British Columbia

In early 1997, the British Columbia government expanded gaming in the province, both in terms of large-scale bingo operations and casino gaming. Licences for bingo halls and for casinos were issued to charities and religious organizations pursuant to s. 207(1)(*b*), with the gaming activities being operated by private sector operators on behalf of the licensees.[43]

It was also contemplated that these licensed facilities would

43. For a more detailed discussion, see Gaming Project Working Group, *Report on Gaming Legislation and Regulation in British Columbia* (British Columbia Ministry of Employment and Investment, January, 1999), c. 4 (hereafter "B.C. White Paper"). See also Gordon Houston, "Recent Cases on the Use of Proceeds and the Conduct and Management of a Lottery Scheme: The British Columbia Perspective" (North American Gaming Regulators' Association, Spring Conference 1998), pp. 5-6.

include activities that could only be authorized pursuant to s. 207(1)(*a*) of the Code, such as electronic and linked bingo or slot machines. As we have already discussed, under s. 207(4) of the Code only a provincial government is permitted to conduct and manage dice games or gaming operated on or through a computer, video device or slot machine. In order to comply with these requirements, the British Columbia Lottery Corporation (the "BCLC"), a provincial Crown agent, was authorized to "enter into agreements with a person regarding any lottery conducted or managed on behalf of the government".[44] Pursuant to legislative authorization, the BCLC entered into lottery operations agreements with the private sector operators of the charitable and religious licensed gaming facilities, providing for the operation of electronic and linked bingo and for slot machines at the licensed premises. Thus, from a strictly legal point of view, there were two separate operations being conducted at each gaming establishment, one on behalf of charitable and religious groups pursuant to s. 207(1)(*b*), and the other on behalf of the BCLC pursuant to s. 207(1)(*a*). From the perspective of the consumer, however, each casino was a single operation comprised of table games and/or bingo and slot machines.

The various parties to these arrangements (including the BCLC, the charities and religious groups, and the private operators) had agreed on the manner in which the proceeds from the gaming activities in question would be distributed. A trust fund was established (the "Trust Fund") into which would be paid the "net win" from paper bingo and from casino table games (the activities operated on behalf of the charitable and religious organizations), as well as one-third of the "net win" from slot machines, electronic bingo and linked bingo (the activities operated on behalf of the BCLC). (Commissions to the private operators were deducted prior to the payment of the proceeds into the Trust Fund.[45]) The agreements also provided

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44. See the *Lottery Corporation Act*, R.S.B.C. 1996, c. 279, s. 4(*d*).

45. The operator was to receive a commission of 40% of the winnings from casino gaming activities operated on behalf of charities and religious organizations, and between 30 and 40% of the paper bingo winnings operated on behalf of these organizations. The commission payable for the operation of slot machines and elec-

for the manner in which the money would be paid out of the Trust Fund to charities and religious groups and to the Consolidated Revenue Fund ("CRF") of the province. It was contemplated that, once a "mature market" was achieved, approximately one-third of net proceeds would be distributed to charities and approximately two-thirds to the CRF.

In announcing these gaming initiatives, the B.C. government also announced that it would not approve VLTs or major commercial casinos, both of which had been approved in most other provinces.

(2) The Nanaimo Case

The arrangements with respect to the government's newly approved gaming initiatives led to the litigation in *Nanaimo*. In particular, the provisions providing for payments to the provincial CRF, as well as the manner in which the operators' commissions were calculated, were challenged on the basis that they were inconsistent with the requirement in s. 207(1)(*b*) that gaming proceeds from these activities be used for a charitable object or purpose.

Mr Justice Owen-Flood began his judgment in *Nanaimo* by limiting the scope of his analysis to s. 207(1)(*b*) of the Code, stating that: "I will not review the procedure by which the British Columbia Government exercises its rights to manage and conduct lottery schemes . . . pursuant to s. 207(1)(*a*) of the Criminal Code as that section is not in issue."[46] Owen-Flood J. then found that the provincial regulation authorizing the licensed gaming activities was inconsistent with s. 207(1)(*b*) of the Code, in two different respects.[47]

The regulation set out a formula for payments to charities and religious groups and guaranteed them payments of at least

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tronic video was set out in lottery operations agreements with the BCLC, which we have not reviewed.

46. *Nanaimo*, *supra*, footnote 5, at para. 11.

47. His Lordship also found that there was no legislative authorization for the manner in which the proceeds from charitable and religious gaming were to be distributed and on this basis would have ruled the scheme to be unlawful. However, owing to the differences between the B.C. legislation and that found in other provinces, this aspect of his analysis will not be discussed.

$118 million annually (the amount they had received from gaming in the past). However, once gaming proceeds reached the level where the charities would receive the guaranteed amount, two-thirds of the excess proceeds (after deducting commissions to operators) would be paid to the CRF. According to calculations accepted by the trial judge, total winnings were forecast to be $800 million, of which the charities would receive $172 million, the operators $284 million and the CRF $344 million. Owen-Flood J. found that the requirement for payment of money out of the Trust Fund to the CRF was inconsistent with s. 207(1)(*b*), since the Code required that the proceeds from charitable gaming be used for charitable purposes.

Owen-Flood J. also found that the payment of commissions to the bingo and casino operators of between 30 and 40% of the winnings was invalid as the commissions were not based on a "reasonable charge made, for operating the gaming in question, by the profit corporation".[48] Owen-Flood J. objected to the fact that the regulation provided for the payment of "fixed percentages to the for-profit bingo management companies". His Lordship characterized this as an attempt to transfer gaming proceeds to these companies "over and above the entitlement of these bingo operators to proper remuneration for their management services".[49]

In relation to the first point, counsel for the province had argued that the moneys flowing into the CRF were being devoted to a charitable purpose, because the revenue enhancements would be used to fund health care and education. Owen-Flood J. rightly rejected this argument, noting that government funding of health care and education was not a matter of charity but one of duty. Therefore, the province was effectively expropriating a portion of the proceeds from charitable gaming for general government purposes, which was clearly not permitted by s. 207(1)(*b*) of the Code.

Owen-Flood J.'s reasoning on the second point is, in our

48. *Nanaimo*, *supra*, footnote 5, para. 32. We note in passing the fact that on each occasion where His Lordship made reference to the operators, he emphasized the fact that they were "for profit" entities.

49. *Ibid.*, at para. 44.

respectful view, more problematic. His Lordship suggests that any arrangement to compensate a private sector operator on the basis of a formula that is linked to profits or proceeds amounts to a sharing of the proceeds from the lottery scheme. His Lordship reached this conclusion on the basis of the statement by the Manitoba Court of Appeal in *Keystone* that the arrangements for operator compensation in that case offended the requirements of s. 207(1)(*b*). As is discussed in more detail in the next section, we regard this aspect of his Lordship's reasoning to be open to some question.

Owen-Flood J. did not call into question the arrangement to have private-sector operators physically carry out gaming activities on behalf of charitable or religious organizations. Section 207(1)(*b*) requires that the licensed gaming activities be "conducted and managed" by religious and charitable organizations. Although the trial judge struck down the regulation in its entirety, he did so solely on the basis that the impugned portions of the regulation dealing with the distribution of gaming proceeds "are so inextricably bound up with what remains that it cannot be said that what remains can independently survive".[50] By implication, therefore, a charity or religious group may still be "conducting and managing" a lottery scheme even though the activity is being operated by a private sector operator.

In *Nanaimo*, Owen-Flood J. stated that his reasoning was applicable only in the context of s. 207(1)(*b*) and should not be regarded as applicable to lottery schemes conducted and managed by a province under s. 207(1)(*a*). However, in the subsequent *Surrey* case, certain aspects of the court's analysis of a lottery scheme operating under s. 207(1)(*a*) were similar to the reasoning employed in *Nanaimo*.

(3) The Surrey Case

The *Surrey* case raised the issue whether slot machines located within a charitable casino were being operated in compliance with s. 207(1)(*a*) of the Code.[51]

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50. *Ibid.*, at para. 59.

51. The case raised a number of other issues that were specific to the legislative frame-

Slot machines cannot be operated pursuant to a licence issued to a charitable or religious organization under s. 207(1)(*b*). Therefore, slot machines in charity casinos in B.C. were operated by the casino operator under an agreement with the BCLC, a provincial Crown agent, under s. 207(1)(*a*) of the Code. Mr Justice Leggatt in the *Surrey* case described the legal issue raised by these facts as follows:[52]

> [I]f the province has essentially delegated its power to "conduct and manage" a lottery scheme to the Surrey Casino, it has done so illegally and without jurisdiction. The question is then, is the operation of slot machines at the Surrey Casino conducted and managed by the Lottery Corporation as an agent of the Provincial government or by the Casino itself?

The operator of the casino, the Great Canadian Casino Company Ltd. ("GCCC"), entered into a "Lottery Operations Agreement" with the BCLC. Under this agreement, the BCLC owned all the slot machines used at the casino. Slot machines were linked to a Casinolink system, located at the BCLC headquarters, which monitored the operations of the machines and controlled the prize payout through an EPROM chip installed in each machine. Only BCLC personnel had access to the EPROM chip and any unauthorized attempt to interfere with the chip would result in its automatic deactivation. The location and hours of operation of the machines were determined by the BCLC. All technical assistance and maintenance of the machines was performed by BCLC personnel and at least one BCLC service technician was present during all operational hours of the casino.

Under the Lottery Operations Agreement, the responsibilities of the GCCC, as operator, included the following:[53]

- deposit and withdrawal of money required for and generated by customer use of the slot machines; and
- controlling the opening of a machine for access to drop buckets and hoppers, emptying drop buckets and filling hoppers, freeing jammed coins, tokens or bills, validating payouts that exceed monies paid by the machine, acting as cashiers and change attendants in respect of

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work established in British Columbia that will not be discussed here.

52. *Surrey*, *supra*, footnote 6, at para. 56.

53. *Ibid.*, at paras. 61-62.

> the machines, depositing slot machine revenues in the designated account, performing security and surveillance of the machines, and performing general janitorial services.

In return for its services, the GCCC received 28% of the slot machine Win at the casino. (The GCCC also received 43% of the table Win (as operator of the table games on behalf of the charitable and religious organizations), plus all revenues associated with any ancillary activities such as food, beverage and other retail services.)

The City of Surrey, which was opposed to the introduction of slot machines at the casino, attacked these arrangements on the basis that the province had improperly delegated its responsibility to "conduct and manage" a lottery scheme. Relying on the *Keystone* case, the city argued that the GCCC participated fully in the substantial profits derived from the slot machines. Further, the city argued that the GCCC supplied the business plan, management skills, premises and operational executive and staff to operate the slot machines.

Mr Justice Leggatt agreed with the city that, as in *Keystone*, the GCCC had a "very real participation in the profits of the [casino] operation". The Lottery Operations Agreement was, in his Lordship's words, "not simply an agreement for the rental of space for the Lottery Corporation to operate slot machines"; moreover, this "profit-sharing scheme . . . comes dangerously close to a delegation of the provincial government's power to control and manage gaming in British Columbia".[54]

However, since the slot machines were being operated pursuant to s. 207(1)(*a*) of the Code (which, unlike s. 207(1)(*b*), does not prevent the party conducting and managing the lottery scheme from sharing the profits), the fact of profit sharing was not sufficient, in itself, to invalidate the scheme. It was necessary to demonstrate that the province had improperly delegated its responsibility to conduct and manage the scheme in order for it to fall outside of the relieving provisions in s. 207(1)(*a*). On this issue, Leggatt J. held that the mere sharing of profits does not automatically mean that the province has

54. *Ibid.*, at para. 65.

delegated its responsibility to "conduct and manage" the lottery scheme. Rather, that issue turns on the "indicia of control and management" and, in particular, on whether the province continued to act as the "operating mind" of the lottery scheme.

On this issue, Mr Justice Leggatt concluded as follows:[55]

> In the case at bar, the Surrey Casino is not 'its own master' with respect to the operation of slot machines, nor is the Casino the "operating mind" of those machines. The installation, technical support, monitoring, and setting of games and payouts are all controlled by the Lottery Corporation. Casino employees assist in the operation of the machines, but the Lottery Corporation manages and controls the slot machine scheme.
>
> In the circumstances of this case, the operation of s. 4(d) of the *Lottery Corporation Act* does not constitute an unlawful delegation of the Province's power to control and manage a lottery scheme in British Columbia.

(4) Analysis and Commentary

The *Nanaimo* and *Surrey* cases clarify certain aspects of the interpretation of s. 207(1)(*a*) and (*b*) of the Code. At the same time, the cases proceed on the basis of certain assumptions about these provisions that may well be open to some question.

Perhaps the most problematic aspect of the two judgments is that they appear to treat s. 207(1)(*a*) and (*b*) of the Code as defining the limits of provincial legislative power in relation to gaming. On this theory, any inconsistency between the requirements of s. 207 and the particular gaming schemes under consideration must necessarily lead to the conclusion that the schemes are invalid.[56]

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55. *Ibid.*, at para. 68. Following Mr. Justice Leggatt's decision in *Surrey*, the BCLC assumed control over the conduct and management of the casino table games, slot machines and electronic and linked bingo formerly conducted and managed by the charities. In addition, it implemented a new operating model for the provision of services by GCCC: see Ministry of Employment and Investment, News Release 31, "Farnworth Guarantees Higher Charity Gaming Revenues, Reorganizes System, Starts Talks for New Act" (April 9, 1998), cited in B.C. White Paper, *supra*, footnote 43, at Appendix 3, p. 14. Mr. Justice Leggatt's findings with respect to the "conduct and manage" issue are presently under appeal: see *British Columbia Lottery Corp. v. Surrey (City)*, [1998] B.C.J. No. 2959, 84 A.C.W.S (3d) 1033 (B.C.C.A.) (granting the City of Surrey leave to cross-appeal the findings on the "conduct and manage" issue.)

56. The same misapprehension is reflected in *Arkay Casino Management and*

As the Supreme Court of Canada stated in *Furtney*, this assumption is incorrect; s. 207 does not represent a delegation of legislative power from Parliament to the provinces. Instead, provincial laws in relation to gaming are firmly anchored in a number of provincial heads of authority in s. 92 of the *Constitution Act, 1867*. Provincial laws setting out the manner in which gaming activities within a province ought to be conducted are thus properly within provincial jurisdiction and valid, without regard to the requirements of s. 206 or 207 of the Code.

Of course, in the event that there is an inconsistency between a valid provincial law and a valid federal law, the provincial law is rendered inoperative under the doctrine of federal paramountcy. On this basis, it might be argued that where there is an inconsistency between provincial gaming legislation and the requirements of the Code, the former is rendered inoperative.[57] But the doctrine of paramountcy only comes into play in circumstances where there is an "express contradiction" between the two laws, so that compliance with one would involve breach of the other.[58] This suggests that provincial laws in relation to gaming should be rendered inoperative only in circumstances where the activity contemplated or authorized by the provincial legislation would amount to a criminal offence.

The judgments in *Nanaimo* or *Surrey* do not approach the

Equipment (1985) Ltd. v. Alberta (Attorney General) (1998), 81 A.C.W.S. (3d) 956 (Alta. Q.B.) (hereafter referred to as "*Arkay Casino*"). Here, Brooker J. of the Alberta Court of Queen's Bench characterizes the issue as being whether a gaming licence issued pursuant to a provincial statute "is ultra vires by virtue of its conflict with s. 207(1)(b) of the *Criminal Code of Canada*" (at para. 1). Although the court went on to uphold the validity of the licence because it found there was no conflict with the Code, in our view the issue is more properly framed as one of paramountcy, rather than whether the provincial law or gaming licence is *ultra vires*.

57. The complication with this argument in the present context is that s. 207 of the Code appears to reverse the normal doctrine of paramountcy by, in effect, providing that gaming conducted in accordance with provincial law takes paramountcy over s. 206 of the Code. However, s. 207 also requires that gaming be conducted and managed by the provincial government, rather than a third party; this requirement cannot be overridden or negatived by provincial legislation.

58. See *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 18 B.L.R. 138.

issue in these terms. Instead, they assume that s. 207 of the Code defines the limits of provincial legislation in relation to gaming. In our view, the court ought to have addressed the question whether the individuals undertaking the gaming activity in question would have been liable to conviction for an indictable offence punishable by imprisonment of up to two years.[59] Only if the answer to this question is in the affirmative should a court hold that the provincial scheme is inoperative. The answer to this question, in turn, depends upon the meaning of the "conduct and manage" requirement that is contained in both s. 207(1)(*a*) and (*b*) of the Code.

(a) The "Conduct and Manage" Requirement

The *Surrey* case provides important guidance on the meaning of the "conduct and manage" requirement in s. 207(1)(*a*) and (*b*). First, the case suggests that there is a distinction between "conducting and managing" a lottery scheme, on the one hand, and physically operating it, on the other.[60] In this case, a private sector operator was retained to operate the lottery scheme on behalf of the province. The court held that such arrangements are acceptable as long as the province remained the "operating mind" of the activity.

However, somewhat surprisingly in our view, the court in

59. This is the penalty prescribed by s. 207(3) of the Code.

60. The distinction between "conducting and managing" and "operating" a lottery scheme is also supported by the wording of s. 207(1)(*g*), which provides that it is lawful for any person to do anything required for the "conduct, management or operation" of a lottery scheme that is otherwise lawful. The reference to things necessary for the "operation" of the scheme, as distinct from its conduct and management, indicates that Parliament contemplated the possibility that the persons operating a scheme may not be the same as those persons conducting and managing the scheme. In *R. v. Warwaruk* (1998), 132 Man. R. (2d) 61 (Q.B.), the Manitoba Court of Queen's Bench convicted the accused Warwaruk of keeping a common gaming house due to the significant degree of control he was found to have exercised over the gaming activity in question, notwithstanding the court's finding that the gaming operations were "carried out under the auspices of the MLC [the Manitoba Lotteries Corporation, a provincial Crown agent] and were not unlawful" (at para. 49). The decision made no reference to s. 207(1)(*g*) of the Code. In our view, the court erred in convicting Warwaruk; since the gaming activities were found to have been lawfully conducted and managed by a Crown agent, the deeming provision in s. 207(1)(*g*) should have rendered it lawful for Warwaruk to do anything required for the conduct, management or operation of the scheme.

Surrey failed to consider a number of important distinctions between Provincial Government Gaming and Charitable Gaming, distinctions which, in our view, are significant when applying the requirements of s. 207(1)(*a*) rather than s. 207(1)(*b*). As our earlier discussion of the *Keystone* case indicated, there are legitimate grounds for the courts to closely scrutinize arrangements that might be entered into between charitable or religious groups and private casino operators. Certain charitable or religious groups may lack the resources or the expertise needed to ensure that the business arrangements are structured in a manner so as to protect their own interests, as well as the interests of the public more generally. Moreover, the large numbers of licensees operating gaming activities of this kind makes the task of regulating such activities extremely difficult. Arguably, therefore, the criminal law as set out in s. 207(1)(*b*) has a different role to play in ensuring the protection of the public interest in this context.

For example, so-called Monte Carlo casinos proliferated in Ontario prior to April 1998. These were temporary casinos operated for a maximum duration of three days at any one location, with the proceeds from the casinos intended to go to charities and religious groups. They were introduced in 1993 and by 1996 there were approximately 15,000 Monte Carlo gaming days held under 4,845 licences in the province, at more than 300 locations in Toronto alone.[61]

Numerous problems were identified with the Monte Carlo casinos. The temporary nature of these sites made it difficult to install the surveillance equipment and security measures necessary to adequately regulate gaming activities. Monte Carlo casino sites were often located in residential areas, within close proximity to schools, and no controls were implemented to prevent access to minors. Because these events were often held in public facilities, such as restaurants and neighbourhood bars, it was possible for people to enter them unintentionally. Moreover, it became difficult to identify compulsive gamblers, given the large number of Monte Carlo sites and the frequency

61. Ontario, Management Board of Cabinet, Statement of Chris Hodgson, Chair (April 9, 1998), at p. 1.

with which such sites changed.[62] In 1996, Monte Carlo operations consumed 90% of gaming revenues generated, leaving charities with a mere 10% of the proceeds.[63]

The circumstances surrounding Provincial Government Gaming are quite different. First, this type of gaming must be authorized by a statute enacted by the legislature, and any gaming activities that are undertaken must satisfy the requirements of the statute. Second, the nature, extent and location of the gaming activities will be determined by the provincial government rather than by any third party. In the event that the province decides to engage a private operator to assist in the initiative, the government will possess the expertise and the resources needed to negotiate on an equal footing and to ensure that the public interest is protected. Detailed legal agreements will be put in place regulating the manner in which the gaming is to be conducted, setting out the manner in which the proceeds from the gaming are to be allocated, and providing for the compensation to be paid to the operator. The province will also make provision for potential problems associated with legalized gaming such as gambling by minors, or compulsive or problem gambling.

In our view, it is difficult to imagine that the courts ought to substitute their view for that of the province on any of these issues. Indeed, were a court to attempt to second-guess a provincial government respecting the manner in which gaming in that jurisdiction ought to be conducted, the judiciary would essentially be engaged in a political rather than a legal exercise and would be far removed from deciding whether a criminal offence was being committed. In *Surrey*, for example, the court concluded that the business arrangements that the

62. *Request for Proposal: Charity Gaming Club Project*, issued February 18, 1997 by the Gaming Control Commission of Ontario, at pp. 1-2.

63. *Ibid.*, at p. 2. As a result of these problems, in 1996 the province decided to eliminate the Monte Carlo casinos and replace them with a limited number of permanent charity casinos. In his 1996 Ontario Budget Speech, Finance Minister Ernie Eves stressed (at p. 25) that:

> [N]umerous new products and activities . . . have made control and regulation difficult . . . It is anticipated that the establishment of a tightly regulated, government-managed VLT network, along with other measures announced in this Budget, will counter illegal gaming activity, and impose some needed discipline and control into Ontario's gaming marketplace.

province had negotiated with the private operator constituted a sharing of the gaming proceeds, and it suggested that this arrangement came dangerously close to an improper delegation of the province's responsibility to conduct and manage gaming in the province. Although the court did not make this explicit, the clear implication in the court's analysis was that the province failed to strike the best possible business deal with the private operator; in essence, the court was suggesting that the province was paying the private operator more than necessary to obtain the services being provided.[64]

We see no basis upon which a court should substitute its opinion for that of the provincial government on such a question. In any event, before even entertaining such a conclusion, the court should have heard evidence as to the manner in which casino operators are compensated in other jurisdictions in North America, and compared that evidence to the particular method of operator compensation before it. The courts in *Surrey* and *Nanaimo* had no such evidence before them. Moreover, even if such evidence were provided, on what basis would a court be qualified to assess whether the particular business arrangements that had been agreed upon in a particular province were unduly generous as compared with those in place elsewhere? In fact, as we suggest in our discussion of the distribution of proceeds in the next section, we believe that the courts in both *Nanaimo* and *Surrey* failed to distinguish between a sharing of the profits of a lottery scheme on the one hand, and a compensation arrangement in which payments to an operator are calculated based on the profits or proceeds from the scheme on the other.

In short, in our view it is difficult to conceive how the criminal prohibitions on gaming in ss. 206 and 207 have any significant role to play in the context of gaming conducted and managed by a province in the manner outlined above.[65] It is

64. This conclusion was made explicitly by the court in *Nanaimo*, where Mr Justice Owen-Flood held that the private sector operators were being compensated "without regard to what constitutes a reasonable charge made, for operating the gaming in question, by the profit corporation": see *supra*, footnote 5, para. 32.

65. It should be observed that even if the analysis offered here were accepted by a court, there would still be considerable scope for the application of the criminal prohibitions in s. 206 in other contexts. For example, the Province of Ontario esti-

unclear to us that there would be any identifiable public policy interest served by subjecting persons involved in such gaming to criminal liability. At the very least, we would suggest that a court should proceed with great caution before it applies doctrines and case law that have been developed in the context of s. 207(1)(*b*) to gaming conducted under s. 207(1)(*a*).[66]

The court in *Surrey* did suggest that the "indicia" sufficient to satisfy the "conduct and manage" requirement in s. 207(1)(*a*) and (*b*) will vary from case to case. This leaves open the possibility that the kinds of considerations relevant in assessing the legality of Charitable Gaming might be applied somewhat differently in relation to Provincial Government Gaming.

It is clear, in any event, that a key consideration in determining who is "conducting and managing" a gaming activity is the identification of the "operating mind" of the lottery scheme. Based on the *Surrey* and *Nanaimo* cases, as well as on the previous jurisprudence on s. 207, we would suggest that

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mates that in 1996 there were 15,000 to 16,000 illegal VLTs or slot machines being operated in the province. This represents more than twice the number of slot machines located at all four of the provincially managed casinos in the province: see M. Philp, "Video Lotteries coming to bars: Attitude to gaming undergoes change", *The Globe and Mail* (May 8, 1996), p. A8.

66. Of some relevance in this regard are the so-called "regulated industries" cases, developed in the context of a now-repealed federal statute, the *Combines Investigation Act*, R.S.C. 1985, c. C-34 (the "CIA"). The issue in these cases was whether actions that were expressly authorized by a valid provincial statute could amount to criminal conduct for purposes of the CIA. For example, in *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, 137 D.L.R. (3d) 1, [1982] 5 W.W.R. 289, it was alleged that certain rulings and orders of the Law Society of British Columbia were null and void because they offended the CIA. The Supreme Court of Canada rejected this argument, holding that the CIA did not apply to the Law Society as long as it was acting within its statutory mandate. Mr Justice Estey noted that before a person can be convicted of a criminal offence, it is necessary to demonstrate that the conduct giving rise to the charge is contrary to the public interest. Estey J. was of the view that "[C]ompliance with the edicts of a validly enacted provincial measure can hardly amount to something contrary to the public interest" (at p. 354). Therefore, the Law Society could not be said to be acting contrary to the CIA in carrying out its statutorily authorized mandate. (The other leading cases in this area, relied upon by Estey J., are *R. v. Canadian Breweries*, [1960] O.R. 601, 126 C.C.C. 133, 33 C.R. 1 and *Ontario Boys' Wear Ltd. v. The Advisory Committee*, [1944] S.C.R. 349, 82 C.C.C. 129, [1944] 4 D.L.R. 273.)

the following kinds of factors or considerations are relevant to a determination of the "operating mind" of a gaming activity:

1. *Who designed or originated the lottery scheme in question?* In *Keystone*, the private operator (rather than the charitable licensees) was the party who originally conceived of and designed the scheme for the commercial bingo operations. In our view, the fact that it was the private operator rather than the charities or religious groups that developed the scheme in the first place is a significant indicator of who was the "operating mind" of the activity. We acknowledge that neither *Nanaimo* nor *Surrey* focused on this aspect of the matter but, in our view, this is a consideration that ought to be taken into account by courts in determining which party is the "operating mind" of the gaming activity.

2. *Does the party responsible for conducting and managing the scheme retain decision-making authority and power with respect to the operations of the gaming activities, including the hours of operation, security, the mix of games, access to the casino complex, the number of tables, etc.?* In *Surrey*, the court relied on the fact that the province retained overall control over the location and hours of operation of the slot machines. This suggests that it is important to maintain similar overall control over the operations of other gaming activities carried on as part of a lottery scheme.

3. *Does the party responsible for conducting and managing the activity maintain decision-making authority with respect to budgets, operating policies, material contractual arrangements and material expenditures?* There was no discussion in *Nanaimo* and *Surrey* of the method whereby such matters as budgets, operating policies or contractual arrangements were settled. However, given the obvious significance of these activities, it would be important for the party conducting and managing the scheme to have overall control over these matters.

4. *Is there sufficient monitoring and oversight exercised by the party conducting and managing the scheme over the activ-*

ities of the operator to ensure compliance with all relevant requirements? In *Surrey*, the court had relied on the fact that the province conducted compliance audits on an ongoing basis to ensure that the casino operator was complying with the province's management and control procedures and directives. A similar monitoring function is obviously important in respect of any gaming activities operated on behalf of a province or a charitable or religious organization.

5. *Does the party responsible for conducting and managing the scheme determine the prize payout (or any policies or procedures directly relevant to the determination of prize payouts)?* The court in *Surrey* appeared to place particular emphasis on the fact that the province, rather than the operator, determined the prize payouts on slot machines. Although this was not discussed in *Surrey*, the same reasoning would indicate that the party responsible for conducting and managing the scheme should be responsible for setting any operational policies that will directly impact on prize payouts.

6. *Are all proceeds from the gaming activity deposited into bank accounts owned or controlled by the party responsible for conducting and managing the scheme?* In neither *Nanaimo* nor *Surrey* was there any discussion of the manner in which the net proceeds from the gaming activity were handled on a day-to-day basis. However, in the same way that determining payout levels is important to conducting and managing the scheme, so too, in our view, is control over the proceeds from the gaming activity. The most effective means to maintain such control is to require that all proceeds from gaming activity be deposited on a regular (*i.e.,* daily) basis into bank accounts that are owned and controlled by the party conducting and managing the scheme.

7. *Does the party responsible for conducting and managing the scheme own or have a proprietary interest in the gaming equipment being used?* In *Surrey*, the court pointed out that the slot machines were owned by the province. Further, there is earlier case law that indicates that a proprietary interest in the gaming equipment was a relevant factor to take into account in

determining which party is conducting and managing a lottery scheme.[67]

8. *Does the party responsible for conducting and managing the scheme own or have a proprietary interest in the premises where the gaming is to be conducted?* In *Surrey* it appears that the premises where the slot machines were located were leased or owned by the operator, rather than the province. In our view, if the province had had a proprietary or leasehold interest in the premises where the gaming was being conducted, its ability to control access to the machines would have been enhanced, thereby bolstering its argument that it was complying with the "conduct and manage" requirement.

9. *If a private operator has been retained to operate the gaming on a day-to-day basis, has the operator been appointed the agent of the party responsible for conducting and managing the scheme?* In *Nanaimo*, the government had sought to argue that the private operator was the agent of the government and, therefore, any funds received by it were received on behalf of the government. The agency relationship was said to arise from the fact that the private operator had entered into a contract with the BCLC, itself a Crown agent. The trial judge rejected this argument on the basis that the existence of a contract between a Crown agent and a third party does not transform the latter into a Crown agent.[68] This leaves open the possibility that a province could appoint a private operator as its agent and, on this basis, ensure that any activities performed by the operator are attributed to the province.

The recent B.C. White Paper appears to take a significantly more restrictive view of the role that can be played by a private sector operator or service provider in the context of s. 207(1). The B.C. White Paper advances the view that all decision-making in relation to the design and implementation of the gaming, in all its essential aspects, must be performed by the provincial government rather than the service provider. It is suggested that the role of the service provider should only

67. See *R. v. Miller* (1951), 99 C.C.C. 79, 11 C.R. 324, [1951] O.W.N. 230 (Co. Ct.).
68. See *Nanaimo*, *supra*, footnote 5, at paras. 54 to 55.

extend to functions involving either no exercise of discretion, or only the exercise of limited discretion which is subject to the control of the provincial government.[69] The role of the service provider must be limited to "operational services . . . performed to detailed specifications and monitored by the provincial government or licensed charity".[70] (We note that it is unclear to us whether the B.C. White Paper states these conclusions as legal requirements flowing from the jurisprudence under s. 207(1), or merely as policy recommendations.[71])

In our view, this restrictive view of the role of a service provider is not warranted by the wording of s. 207(1). Indeed, it appears directly inconsistent with the French version of s. 207(1), which refers to the role of the provincial government or licensed charities under subsec. (1)(*a*) and (*b*) respectively as being to "mettre sur pied et exploiter une loterie dans un province". The French version of s. 207(1)(*g*) (the English version of which refers to the "operation" of a lottery) uses the terms "administrer ou gérer la loterie". The term "administrer" is defined as "to manage or run" while the term "gérer" is defined as "to administer or manage".[72] In short, both of these terms are consistent with interpreting the "operation" of a lottery by a private operator as involving significant discretion, as long as the manner in which that discretion is exercised is subject to the oversight and control of the province or licensed charity.[73]

We also note that the restrictive view of the role of a service provider is inconsistent with the approach that the courts have taken in determining whether certain entities are agents of the

69. See B.C. White Paper, *supra*, footnote 43, c. 3, p. 62.
70. *Ibid.*, c. 3, p. 98.
71. We note, for example, that the B.C.White Paper also recommends that private sector service providers be designated by statute as Crown agents: see *ibid.*, c. 3, p. 61 and s. 44(3) of the proposed *Gaming Control Act*. As noted above (*supra*, footnote 42), the statutory designation of a private operator as a Crown agent would be sufficient to ensure that all activities of the operator were legally attributed to the government and, therefore, there would be no need to consider the extent of the discretion afforded the operator for purposes of s. 207(1).
72. See *Collins-Robert French-English Dictionary* (Toronto: Collins Publishers, 1984), pp. 11 and 315.
73. The significance of the French wording of s. 207(1) is discussed in the B.C. White Paper, c. 3, pp. 46-47.

Crown. This case law has held that even where a entity has been granted significant discretion, it will nevertheless be held to be an agent of the Crown as long as the exercise of that discretion is subject to the oversight and control of the government.[74] We see no basis upon which a more stringent test should be applied in the context of s. 207(1) of the Code. Indeed, if the government has sufficient *de jure* control over a private sector operator such that the operator would be held to be a Crown agent at common law, it follows that the acts of the operator are legally attributed to the government and it is the province (rather than the private operator) that is legally operating the gaming in question.[75] In our view, therefore, a private operator may be permitted to exercise significant discretion in operating gaming activities as long as that discretion is subject to the oversight and control of the provincial Crown or licensed charity under s. 207(1)(*a*) or (*b*), in accordance with the various factors we have previously outlined.

In the event that the courts were to follow the direction of the B.C. White Paper and take a more restricted view of the role that can be played by a private sector operator in the context of s. 207(1), then there may well be a need in those cir-

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74. For example, in the leading case of *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.), a company had contracted with the Crown to construct and operate a factory to produce tanks and gun carriages. According to Lord Wright, who delivered the judgment of the Privy Council, the company was given "full control over the management and operation of the plant and in the employment of labour of every description and in the purchase of all necessary materials and all other matters necessary or incidental to the performance of the contract" (at p. 167). However, the Privy Council held that the company was nevertheless an agent of the Crown since, in exercising this discretion, the company was "subject to such supervision, direction and control as the Government by its Minister should desire to exercise" (*idem, loc cit.*). See also *Eldorado Nuclear*, *supra*, footnote 42, at p. 573, where Dickson J. states: "Where a person, human or corporate, exercises substantial discretion, *independent of ministerial control*, the common law denies Crown agency status." (emphasis added).

75. We do not mean to suggest that a private operator must be a Crown agent in order to satisfy the requirements of s. 207(1)(*a*) since, as we have previously noted, s. 207 makes a distinction between "conducting and managing" a lottery and "operating" a lottery. In our view, the "operation" of a lottery must have some meaning independent of "conducting and managing" it. However, where there is sufficient control by the government over a private operator such that the latter would meet the common law "control" test for a Crown agent, this would conclusively resolve any questions as to whether the province is "conducting and managing" the gaming activity for purposes of s. 207(1).

cumstances for Parliament to consider appropriate amendments to the Code to ensure that, with respect to Provincial Government Gaming, a province has the flexibility to conduct and manage its gaming activities in accordance with modern business practice and realities without in any way compromising the public interest.

(b) Distribution of Proceeds

Both *Nanaimo* and *Surrey* contained commentary on the significance, for purposes of s. 207(1)(*a*) and (*b*), of any sharing of the profits of a lottery scheme with an operator. Since s. 207(1)(*b*) requires all proceeds from gaming activities to be utilized for charitable or religious purposes, this issue is clearly a determining factor in terms of the legality of a scheme conducted and managed under that section. Section 207(1)(*a*) does not dictate the manner in which a province is to distribute the proceeds derived from a scheme conducted and managed under that section.[76] However, in *Surrey*, the court suggested that where the province shares profits with an operator, this raises the possibility that the province has improperly delegated its responsibility to conduct and manage the lottery scheme.

What was not seriously examined in either instance was the logically prior question of what constitutes a sharing of profits

76. This point was illustrated in *Gaming Funding Society*, *supra*, footnote 26 (the litigation that followed the *Nanaimo* decision), where the court had to determine how to distribute the proceeds held in trust that had been derived from gaming activities that had been found to be illegal. The court distinguished between proceeds derived from Provincial Government Gaming as compared with those from Charitable Gaming, finding that there was no difficulty in providing for sharing gaming proceeds from Provincial Government Gaming with a private sector operator under s. 207(1)(*a*). Therefore, the court found that proceeds from Provincial Government Gaming should be distributed in accordance with a distribution formula in a trust agreement, whereas moneys derived from Charitable Gaming should be returned to the charities that had contributed it to the trust. (Query, however, why the moneys should not be returned to players since, on the reasoning of *Nanaimo*, the proceeds had been derived from an illegal lottery scheme, which would seem to make the entire trust agreement illegal and void; moreover, the court in the *Gaming Funding Society* case dealt only with moneys that had not yet been distributed, and did not make any order with respect to moneys that had already been paid out according to a distribution formula that was apparently illegal.)

with an operator of a lottery scheme. Instead, both the *Nanaimo* and the *Surrey* cases appear to automatically assume that whenever an operator is compensated based on a percentage of revenues or profits, the operator is sharing in the profits of the scheme. There is no analysis explaining the basis for such a characterization, other than the claim that such a method of compensation is "improper" because it is not based on "the value of the service the operator provides".[77] However, in neither case does the court attempt to actually value the services provided and to measure that value against the compensation payable. Instead, the court apparently assumes that whenever an operator is compensated on the basis of a formula linked to the revenues or profits of the lottery scheme, such compensation is necessarily unrelated to the value of the services being provided and amounts to a sharing of profits.

In our view, there is no basis for automatically concluding that a compensation formula linked to profits is tantamount to a sharing of profits of a lottery scheme. Linking compensation for services to results achieved is common in the commercial marketplace, particularly in the hospitality and service industries. Compensation is structured in this way because it is recognized that the achievement of superior results (or conversely, the achievement of inferior results) is not merely the product of chance but is, instead, significantly determined by the quality of the services provided. In this sense, structuring compensation on the basis of results is directly linked to the value of the services being provided, in the sense that services that produce better results are more valuable than those that produce inferior results.

We note, in passing, that structuring compensation in this fashion is commonplace in the commercial marketplace because it is in the interests not only of service providers but also of the consumers of those services. The service providers are given the opportunity to enhance their compensation, while consumers of the services stand to gain from the enhanced performance that is rendered. Therefore, both service providers and consumers have a reason to want to link compensation payable to performance and results achieved, rather than fix-

77. *Nanaimo*, *supra*, footnote 5, at para. 32.

ing compensation in advance without regard to the results that will be obtained. From the consumer's viewpoint, the compensation paid to the operator is merely viewed as one of the costs of conducting business (*i.e.,* an operating expense).

Thus, with due respect to the courts in *Nanaimo* and *Surrey*, we regard it as erroneous to automatically conclude that structuring compensation for casino operators based on the results achieved by those operators means that the operators are being compensated "regardless of the value of the service the operator provides".[78] In fact, we would suggest that precisely the opposite is more accurate: it is *because* the operator is being compensated on the basis of results that the compensation is directly tied to the value of the services being provided. Conversely, were the operator to be compensated without regard to the results achieved (by, for example, providing for payment of a fixed fee without regard to the results achieved by the lottery scheme), such compensation would be less closely tied to the value of the services provided.

In our view, where compensation arrangements are negotiated between well informed and well advised parties that are at arm's length and of relatively equal bargaining strength, these arrangements should be presumed to be appropriate and reasonable. There is no reason why a provincial government, which has the capacity and resources to negotiate on an equal footing with an operator of a lottery scheme, would agree to an arrangement that would overcompensate the operator for its services and reduce the return to the province. The provincial government is unlike a charitable organization, which might not be in a position to judge for itself what are reasonable terms for the operation of a lottery scheme. The amounts paid

78. Compare to *Arkay Casino*, *supra*, footnote 56, where the Alberta Court of Queen's Bench upheld a casino licence agreement that required that "fixed fees or charges" be paid to casino operators. The licence further stated that the operator fees could not exceed 50% of net casino proceeds. The court accepted the reasoning in *Nanaimo*, but found that the provisions before it were distinguishable on the basis that there was "a clear and direct link between monies paid to the facilities licensee (such as Arkay) and the services provided" (para. 33). The court reached this conclusion on the basis of the requirement that there be "fixed fees" paid to the operator. The court found that the reference to 50% of net casino proceeds was a cap on the amounts that could be paid to operators and did not amount to a sharing in the profits of the casino.

to the operator should therefore be regarded as simply a normal business expense, not a sharing of profits. Compensation arrangements should be regarded as tantamount to a sharing of profits only where there is evidence before the court indicating that such arrangements are clearly or manifestly commercially unreasonable. For example, it might be possible to demonstrate that a particular set of compensation arrangements deviated significantly from comparable compensation practices common in the industry. Absent such evidence, in our view a court ought not to regard such compensation arrangements as suspicious or questionable. We would point out, of course, that in neither of the cases under discussion was there any evidence indicating that the operator compensation was clearly or manifestly unreasonable in light of industry standards.

We would contrast these arrangements respecting operator compensation with those provided for in respect of the net proceeds of Casino Rama, a commercial casino conducted and managed by the Ontario Casino Corporation on the Rama Indian Reserve near Orillia, Ontario. The net proceeds from the operation of Casino Rama, after deduction of business expenses (including operator compensation) and a 20% provincial share, are to be distributed for the benefit of Indian bands in Ontario. (The constitutional validity of these arrangements was recently confirmed by the Ontario Court of Appeal in *Ardoch Algonquin First Nation v. Ontario*.[79]) This scheme, unlike the arrangements considered in *Nanaimo* or *Surrey*, is a true profit-sharing scheme. However, the casino is operated pursuant to s. 207(1)(*a*), which does not regulate the manner in which net proceeds are distributed as long the distribution occurs in accordance with provincial law. This requirement was met in the case of Casino Rama[80] and, accordingly, the method for the distribution of net proceeds was in compliance with the requirements of the Code.

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79. (1997), 33 O.R. (3d) 735, *sub nom. Lovelace v. Ontario*, 148 D.L.R. (4th) 126, 100 O.A.C. 344 (C.A.), leave to appeal to S.C.C. granted February 12, 1998.
80. See s. 15(1)5 of the *Ontario Casino Corporation Act, 1993*, S.O. 1993, c. 25.

Conclusion

There is, perhaps, a broader significance to these recent gaming decisions, apart from the clarifications that are offered as to the scope and interpretation of the gaming provisions of the Code. In the past, virtually all of the litigation arising under the Code's gaming provisions involved criminal prosecutions of private individuals operating gaming activities without any form of government approval. On the relatively infrequent occasions where provincially authorized gaming activities have come before the courts, the judiciary was prepared to assume, based on the mere fact of governmental authorization, that such activities were in compliance with the Code. This flowed from the judiciary's assumption that the underlying purpose of s. 207(1) was to permit gaming activities where there were sufficient safeguards, in the form of provincial government control and approval, to ensure that the public interest was being protected.

As legalized gaming activities have expanded, the legal contexts in which these issues are arising appear to have changed. For example, the recent B.C. cases that we have discussed in this article arose not from criminal prosecutions, but as a result of opposition to a change in provincial government policy respecting gaming. Moreover, the judiciary's attitudes in these recent cases has been much more sceptical towards gaming activities that have been approved by the provincial government. The trial judge in *Nanaimo* described the provincial regulation authorizing charitable gaming as contemplating a "massive and unparalleled expansion of charitable gaming in British Columbia and then [enabling] the government to take the largest piece of this greatly enlarged pie". The trial judge also described the regulation as "something of a two-faced Janus" whose main justification was that "the government needs more money".[81]

In our view, such statements come dangerously close to the courts substituting their views for those of the government as to the nature and extent of gaming activities that should be per-

81. See *Nanaimo, supra*, footnote 5, at para. 60.

mitted in a province. It goes without saying that this judgment is a political rather than a legal determination, one that the courts are ill equipped to make. It also represents a significant departure from previous court decisions under s. 207, which have adopted a generally deferential attitude in considering the validity of gaming activities licensed or conducted by a province. Whether these cases represent a short-lived judicial reaction to recent public concerns over the expansion of legalized gaming or the precursor of a significantly narrower approach on the part of courts to the interpretation of s. 207 will have to await future court decisions.

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, R.S.O. 1990, c. C.34, by Order-in-Council 210/2024 respecting permitting international play in an online provincial lottery scheme

AND IN THE MATTER OF AN APPLICATION by Flutter Entertainment plc to intervene in the said Reference

COA-24-CV-0185

COURT OF APPEAL FOR ONTARIO

PROCEEDINGS COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF THE PROPOSED INTERVENER, FLUTTER ENTERTAINMENT PLC

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