BOOK OF AUTHORITIES

No.	Narrative
1.	Trial Brief dated 31 October 2022
2.	*Public Service Labour Relations Act*, S.B.C. 1973 (Second Session), c. 144
3.	Hansard, October 15, 1973
4.	Higgins' Committee Report dated March 14, 1977
5.	*Rizzo and Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2
6.	*Reference Re Residential Tenancies Act 1979 (Ontario),* [1981] 1 S.C.R.714
7.	*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
8.	*Telus Communications v Wellman*, 2019 SCC 19
9.	*Vancouver Shipyards Ltd*., 2022 B.C.L.R.B. 144
10.	*Re Insurance Corporation of British Columbia*, [1974] BCLRBD 63
11.	*British Columbia (Public Service Commission)*, [1974] B.C.L.R.B.D. 163
12.	*Re Public Service Commission*, [1976] B.C.L.R.B.D. 24
13.	*British Columbia (Government Employee Relations Bureau*, [1977] B.C.L.R.B.D. 9
14.	*Re British Columbia*, [1987] BCLRBD 55
15.	*Vancouver Island Housing Association for the Physically Disabled (Nigel House)*, [2011] B.C.L.R.B.D. 112
16.	*Re British Columbia*, [1989] B.C.L.R.B.D. 224
17.	*Re British Columbia*, [1990] B.C.L.R.B.D. 52
18.	*Re British Columbia*, [2014] B.C.L.R.B.D. 79

19.	*Re British Columbia*, [2014] B.C.L.R.B.D. 92
20.	*Ontario v. G.,* 2020 SCC 38
21.	*Mounted Police Association of Ontario v. Canada Attorney General)*, [2015] 1 S.C.R. 3
22.	*Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, [2016] B.C.J. 717
23.	MPAO S. 238.14
24.	*AMPMQ v. Treasury Board,* 2019 L.N.F.P.S.L.R.E.B. 55
25.	*Canadian Assn. of Crown Counsel (Re)*, [2019] A.L.R.B. 111
26.	*Alberta Crown Attorney Association v. Alberta*, [2021] A.J. 1594
27.	*R. v. Cawthorne,* 2016 SCC 32
28.	*Canada (Attorney General) v. J.T.I.-Macdonald Corp.*, 2007 SCC 30
29.	*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 32
30.	*Sherman Estate v. Donovan,* 2021 SCC 25
31.	*British Columbia (Workers Compensation Appeal Tribunal) v. Fraser Health Authority, 2016* SCC 25
32.	*Mediation Report of Stephen Owen*
33.	*Charter* values in *Vancouver Shipyards Co. Ltd.*, 2022 B.C. LRB 146

No. S-198773
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRITISH COLUMBIA GOVERNMENT LAWYERS ASSOCIATION on its own behalf and on behalf of all its members, and SANDRA WILKINSON, GARETH MORLEY, MELANIE MURRAY, MARGO FOSTER, MICAH WEINTRAUB, and STEPHANIE JACKSON

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT

Trial Brief of the Defendant

Harris & Company LLP
1400 - 550 Burrard Street
Vancouver, BC V6C 2B5
Tel: 604. 891 2211 / 778. 328 2506
Email: djordan@harrisco.com / ntoye@harrisco.com

Donald J. Jordan, KC and Nicole C. M. Toye
Lawyer for the Defendant

Moore Edgar Lyster LLP
3rd Floor 195 Alexander Street
Vancouver, BC V6A 1B8
Tel: 604. 689 4457 / 416. 979 4230
Email: rle@mooreedgarlyster.com
kmercer@goldblattpartners.com

Richard L. Edgar and Kirsten Mercer
Lawyer for the Plaintiffs

Date and Time of Hearing: 22/Nov/2022 at 2:00 p.m.
Place of Hearing: Vancouver, British Columbia
Time Estimate: 30 minutes
Trial Brief prepared by: Lawyer for the Defendant

Vancouver
31-Oct-22
REGISTRY

No. S-198773
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRITISH COLUMBIA GOVERNMENT LAWYERS ASSOCIATION on its own behalf and on behalf of all its members, and SANDRA WILKINSON, GARETH MORLEY, MELANIE MURRAY, MARGO FOSTER, MICAH WEINTRAUB, and STEPHANIE JACKSON

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT

Trial Brief

Filed by: His Majesty the King in Right of the Province of British Columbia (the "filing party")

Preliminary Note – The parties have reserved five (5) days with trial scheduling commencing on February 6, 2023 and have agreed to proceed by way of summary trial application on those scheduled trial dates. Because this matter is still within the regular trial process a Trial Management Conference is still required.

This trial brief assumes the matter is proceeding as a summary trial application.

The trial of this action is scheduled for five (5) days and is scheduled to begin on 06/Feb/2023. The total time needed respecting items 2, 4, 5, 9 and 11, as applicable is 8 hours and 10 minutes.

☑ The filing party expects the trial to complete within the scheduled time.

1. Summary of Issues and Positions

The following are the issues in dispute and the filing party's position on each:

Issue in dispute	Filing party's position
1. Does the Defendant's proposal to extend full collective bargaining rights to the Civil Lawyers through the licensed professional bargaining unit established under the *Public Sector Labour Relations Act* with the Public Employers' Association serving as the bargaining agent for the Civil Lawyers, provide the Civil Lawyers with a meaningful process of collective bargaining in accordance with section 2(d) of the *Canadian Charter of Rights and Freedoms*?	1. Yes
2. If the Defendant has infringed the Plaintiff's rights under section 2(d) of the *Charter*, is such infringement justified under section 1 of the *Charter?*	2. Yes
3. If the infringement is not justified under section 1 of the *Charter*, what is the appropriate remedy?	3. The Court should declare that the Defendant's proposal constitutes an unjustified infringement of the *Charter*.
4. In the alternative, is the exclusion of practicing lawyers and articling students from the definition of "employee" in section 1(1) of the *Public Service Labour Relations Act* contrary to s.2(b) of the *Charter*?	4. Yes
5. If so, is the infringement justified under section 1 of the *Charter*?	5. Yes
6. If an infringement is not justified under section 1 of the *Charter*, what is the appropriate remedy?	6. The Court should suspend the application of the subsection (b) of the definition of "employee" in section 1(1) of the *Public Service Labour Relations Act* and allow for a reasonable period for the Defendant to amend the legislation.

2. Witnesses To Be Called

The following are the names and addresses of the witnesses the filing party intends to call at trial, the issue(s) each will address, an estimate of the time each will need for giving direct evidence, and the filing party's opinion on whether, if the court so orders or the parties all consent, the witness' direct evidence could conveniently be given by affidavit:

Name	Address	Issue	Time in hours needed	Direct evidence by affidavit (Y/N)
TBD pending review of affidavits filed by the Plaintiff				Y

3. Expert Reports

The following are the expert reports that will be offered as evidence at trial:

Name of expert	Area of expertise	Date of report
TBD pending review of the expert report to be delivered by the Plaintiff		

4. Witnesses To Be Cross-Examined

The following are the names of the witnesses the filing party anticipates cross-examining at trial, and an estimate of the time the filing party will need for each:

Name	Time in hours needed
Gareth Morley	If required, the parties have reserved dates in January 2022 for out of court cross-examination on affidavits.
Dr. David J. Doorey	If required, the parties have reserved dates in January 2022 for out of court cross-examination on affidavits.

5. Objection to Admissibility

The filing party intends to object to the admissibility of all or a part of the following expert reports:

Name of expert	Area of expertise	Date of report	Basis of objection	Time in hours needed
TBD pending delivery of expert report				

6. Documents and Exhibits

1. The parties ☐ have agreed on ☐ have not agreed on ☑ have not yet discussed a common book of documents.

2. The parties ☐ have reached ☐ have not reached ☑ have not yet discussed an agreement governing the use and admissibility of documents.

7. Admissions

The filing party will admit the following facts at trial:

1. Only those facts expressly admitted in the Response to Civil Claim.

8. Authorities

The filing party ☑ expects ☐ does not expect that there will be a joint brief of authorities.

9. Time Required for Submissions

The Defendant anticipates that its legal submissions on the summary trial application inclusive of opening and closing statements will require 8 hours.

10. Orders that may affect the conduct of the trial

The following orders may affect the conduct of trial:

Date of order	Nature of order
N/A	

11. Orders or directions to be applied for at the Trial Management Conference

The following orders or directions will be applied for at the Trial Management Conference:

Nature of order or direction	Time in hours needed for application
An order permitting the parties to utilize the scheduled trial dates for a summary trial application, rather than a conventional trial	5 minutes
A further Trial Management Conference is not required	5 minutes

12. Settlement

1. Settlement discussions or mediation sessions ☐ have ☑ have not taken place.

2. A mediation ☐ is ☑ is not scheduled before the date set for trial.

3. The court at the Trial Management Conference ☐ will ☑ will not be asked to assist the parties' efforts to settle.

13. Trial to be heard with or without jury

The trial of this action is be to heard by the Court

☑ without a jury.

☐ with a jury.

Dated: 31 October 2022



Signature of lawyer for Defendant
Donald J. Jordan, KC and Nicole C. M. Toye

CHAPTER 144

Public Service Labour Relations Act

[*Assented to 7th November, 1973.*]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Interpretation.

1. (1) In this Act, unless the context otherwise requires,

"agency of the Crown" means any board, commission, association, or other body, whether incorporated or unincorporated, all the members of which, or all the members of the board of management or board of directors of which,

(i) are appointed by an Act or by the Lieutenant-Governor in Council; or

(ii) if not so appointed are, in the discharge of their duties, public officers or servants of the Crown, or, for the proper discharge of their duties are, directly or indirectly, responsible to the Crown;

"bargaining agent" means

(i) a union that has been certified by the board as an agent to bargain collectively for a bargaining unit; or

(ii) the agent designated under section 3 to bargain on behalf of the Government;

"bargaining unit" means a unit of employees appropriate for collective bargaining referred to in section 4;

"board" means the Labour Relations Board continued under the *Labour Code of British Columbia Act;*

"collective agreement" means a duly executed agreement in writing between the bargaining agent for the Government and a bargaining agent for a bargaining unit containing provisions respecting the terms and conditions of employment of employees, including provisions respecting rates of wages or salary, hours of work, or other working conditions of employees;

"collective bargaining" or "bargain collectively" means

(i) negotiating in good faith with a view to concluding a collective agreement, or a renewal or revision of a collective agreement;

(ii) the reduction to writing of the terms of agreement arrived at respecting matters required to be inserted in a collective agreement by this Act, and other matters agreed to by the parties;

(iii) the execution of the agreement by or on behalf of the parties; and

(iv) negotiating from time to time for the purpose of settlement of disputes and grievances of employees included in the agreement, or represented by an employees' bargaining agent;

"Crown" means Her Majesty in right of the Province, and includes an agency of the Crown;

"Crown corporation" means an agency of the Crown that is a corporation the employees of which

(i) are not employed or appointed under the *Public Service Act;* or

(ii) are not declared by an Act to be public servants within the meaning of the *Public Service Act;*

"day" means a calendar day;

"employee" means a member of the public service, as the expression "public service" is defined in the *Public Service Act,* or a person employed by, or holding office at the pleasure of, the Crown, but does not include

(i) a deputy minister, associate deputy minister, or assistant deputy minister;

(ii) a person qualified under the *Legal Professions Act,* or an enrolled student under such Act, who is engaged and working in the practice of such profession;

(iii) a registrar, district registrar, deputy registrar, or assistant deputy registrar of a registry of any court;

(iv) a sheriff, deputy sheriff, or sheriff's officer;

(v) the chief official court reporter and deputy chief official court reporters;

(vi) a person employed as a personnel officer;

(vii) a person employed as a mediation officer under this Act or the *Labour Code of British Columbia Act;*

(viii) a person employed for a period of less than sixty days;

(ix) a person whose compensation for the performance of the regular duties of his position or office consists of fees of office, or is related to the revenue of the office in which he is employed; and

(x) a person employed by, or in the service of,

(A) a Crown corporation; or

(B) the Queen's Printer under the *Public Printing Act,* other than clerical or administrative employees; or

(C) the British Columbia Energy Commission under the *Energy Act;* or

(D) the Insurance Corporation of British Columbia under the *Insurance Corporation of British Columbia Act;* or

(E) the British Columbia Development Corporation under the *Development Corporation of British Columbia Act;*

"Government" means the Crown acting for the Province;

"lockout" includes

(i) the closing of a place of employment; or

(ii) the suspension of work; or

(iii) a refusal by the Government to continue to employ a number of its employees;

done to compel its employees, or to aid another employer to compel his employees, to agree to terms and conditions of employment;

"minister" means that member of the Executive Council charged by order of the Lieutenant-Governor in Council with the administration of this Act, and includes a person designated in writing by the minister;

"occupational group" means a group of employees in a bargaining unit with a similar occupation, trade, profession, or activity as determined under section 11;

"party" means the bargaining agent for the Government, or the bargaining agent for a bargaining unit of the employees;

"strike" includes

(i) a cessation of work; or

(ii) a refusal to work; or

(iii) a refusal to continue to work;

by employees in combination, or in concert, or in accordance with a common understanding, for the purpose of compelling the Government to agree to terms and conditions of employment or compelling another employer to agree to terms or conditions of employment of his employees; and "to strike" has a similar meaning;

"technological change" means

(i) the introduction by the Government into its work, undertaking, or business of equipment or material of a different nature or kind than that previously used by the Government in that work, undertaking, or business; or

(ii) a change in the manner, method, or procedure in which the Government carries on its work, undertaking, or business that is directly related to the introduction of that equipment or material,

that significantly decreases the number of employees; but does not include normal lay-offs resulting from a decrease in the amount of work to be done;

"union" means a local or provincial organization or association of employees, or a local or provincial branch of a national or international organization or association of employees within the Province, that has, as one of its purposes, the regulation in the Province of relations between the Government and its employees through collective bargaining, and includes a council of unions and an association of unions.

(2) No person shall cease to be an employee within the meaning of this Act by reason only of his ceasing to work as a result of a strike which is not contrary to this Act or by reason only of a lockout or dismissal which is contrary to this Act.

Effect of Labour Code of British Columbia Act.

2. (1) Unless inconsistent with this Act, and for the purposes of this Act, the board has all the powers of the Labour Relations Board under the *Labour*

Code of British Columbia Act and a union under this Act shall be deemed to be a trade-union within the meaning of the *Labour Code of British Columbia Act*.

(2) The board may make orders requiring the Government's bargaining agent and an employees' bargaining agent to bargain collectively.

(3) The board may make such examination of records and other inquiries as it considers necessary, including the holding of such hearings as it considers advisable to determine any matter before it, and may prescribe the nature of the evidence that an applicant shall furnish with or in support of an application under this Act, and the manner in which the application shall be made.

Bargaining agent for Government.

3. The bargaining agent for the Government is the Public Service Commission acting on behalf of, and under the direction of, the Treasury Board which for this purpose may include one additional member of the Executive Council designated by the Lieutenant-Governor in Council, and the bargaining agent has full power and authority to bargain collectively with bargaining agents for the employees and to execute, on behalf of the Government, collective agreements that may be concluded under this Act.

Bargaining units.

4. For the purpose of collective bargaining, every employee shall be included in one of the following bargaining units:

(a) A nurses' bargaining unit including all employees licensed or registered under the *Registered Psychiatric Nurses Act* or the *Registered Nurses Act*, including those employees who are eligible for licence or registration:

(b) A licensed professional bargaining unit including all employees in a professional classification in the Public Service Classification structure who are members of an association that has statutory authority to license a person to practise that profession, other than those persons described in clause (a):

(c) A public service bargaining unit including all employees other than those persons described in clause (a) or (b).

Certification.

5. Where a union makes application to the board to be certified as a bargaining agent for employees in a bargaining unit described in section 4, the following provisions apply:

(a) Where the board is satisfied that the union applying for certification as an employees' bargaining agent includes as members in good standing a majority of the employees in a bargaining unit on the date that the board receives the application, the board shall certify the union as the employees' bargaining agent:

(b) Where the board determines that the union applying for certification as a bargaining agent includes as members in good

standing more than thirty-five per cent and less than fifty-one per cent of the employees in the appropriate bargaining unit on the date the board receives the application, the board shall order that a vote be taken of the employees in the appropriate bargaining unit to determine whether or not the majority of those employees elect the union as bargaining agent:

(c) Where, under clause (b), the board orders a vote to determine whether employees in a bargaining unit elect the union applying for certification to be the bargaining agent,

(i) the board shall certify the union as the employees' bargaining agent if a majority of the employees in the bargaining unit who cast ballots vote to elect the union as bargaining agent; and

(ii) the board shall not certify the union as the employees' bargaining agent if a majority of the employees in the bargaining unit who cast ballots fail to elect the union as bargaining agent:

(d) The total number of employees in a bargaining unit shall be the number employed on the first day of April or the first day of October, whichever date immediately precedes the date upon which the board receives an application for certification from a union.

Unfair labour practices.

6. (1) No person acting on behalf of the Government shall

(a) interfere with the formation or administration of a union, or the representation of employees by such a union; or

(b) in any way discriminate against any employee who is engaged in the lawful activities of a union.

(2) No officer or member of a union shall coerce or intimidate an employee for the purpose of persuading that employee to become a member of a union.

Change of certification.

7. (1) Where

(a) no collective agreement is in force, and twelve months have elapsed since the date of certification of a bargaining agent for a bargaining unit; or

(b) a collective agreement is in force, and the application is made during the seventh and eighth months that the agreement is in force, or within such greater period as the board otherwise allows,

the board may receive an application for certification from another union as bargaining agent for the employees in a bargaining unit.

(2) Where the board receives an application for change of certification of a bargaining agent under subsection (1), the board shall determine whether the union applying for certification represents a majority of the employees in the bargaining unit.

(3) Where the board determines that the union applying for certification represents a majority of the employees in the bargaining unit, the board shall certify the union as the bargaining agent for those employees; but otherwise shall dismiss the application.

Religious conscience.

8. Where

(a) a collective agreement requires membership in a union as a condition of employment or continued employment; and

(b) an employee included in, or affected by, the collective agreement satisfies the board that, by reason of his religious beliefs he is opposed to joining, or belonging to, a union,

the board may, by order, exempt the employee from compliance with that provision of the collective agreement; and, in that case, shall order that the employee make a written assignment of wages to the union in an amount equivalent to the union dues payable from time to time by the employees to the union and that such assignment shall not be revoked without the consent of the board; but, for the purposes of sections 5, 7, and 17, the employee shall be deemed not to be an employee.

Collective bargaining.

9. (1) Where an employees' bargaining agent has been certified and no collective agreement respecting a bargaining unit is in force,

(a) the bargaining agent for the employees may, by written notice, require the Government to commence collective bargaining; or

(b) the bargaining agent for the Government may, by written notice, require the bargaining agent for the employees to commence collective bargaining in respect of the employees in the bargaining unit.

(2) Where a bargaining agent has given notice under subsection (1), the employees' bargaining agent and the Government's bargaining agent shall, without delay, but in any case within fourteen clear days after the notice was given, or within such further period as the parties may agree, meet and commence to bargain collectively with one another and shall make every reasonable effort to conclude a collective agreement.

Renewal or revision of collective agreement.

10. (1) Subject to subsection (2), where a collective agreement is in force, not more than ninety days and not less than sixty days next preceding the date of expiry or termination of the collective agreement, a party to the agreement may, by written notice, require the other party to commence collective bargaining with a view to the renewal or revision of the collective agreement or the conclusion of a new collective agreement.

(2) Where a collective agreement provides for a period of notice to commence collective bargaining that is longer or shorter than the period required under subsection (1), that provision of the collective agreement has effect and shall be deemed to be notice under this Act.

(3) Where a party to the collective agreement has given notice under subsection (1), the parties shall, without delay, but in any case within

fourteen clear days after the notice was given, or within such further period as the parties may agree, meet and commence to bargain collectively with one another and shall make every reasonable effort to conclude a renewal or revision of the collective agreement or a new collective agreement.

(4) Where no notice is given under subsection (1) by either party sixty days or more prior to the date of expiry or termination of the collective agreement, both parties shall be deemed to have been given notice under this section on a date sixty days prior to the date of expiry or termination, and thereupon subsection (3) applies.

Form of collective agreements.

11. (1) There shall be two collective agreements applying to each bargaining unit as follows:

(a) A master agreement including all the terms and conditions of employment that are common to all employees in the bargaining unit; and

(b) A subsidiary agreement for each occupational group, including the terms and conditions of employment that apply only to employees in a specific occupational group in the bargaining unit.

(2) Specific occupational groups under clause (b) of subsection (1) shall be determined by negotiation between the parties.

Exclusions from collective agreement.

12. (1) A collective agreement concluded under section 9 or 10 may exclude from its application certain classes of employees, including, without limiting the generality of the foregoing, employees who are in managerial or confidential positions.

(2) Employees or classes of employees to be excluded from the collective agreement shall be determined by negotiation between the parties.

Content of collective agreement.

13. Every collective agreement shall include all matters affecting wages or salary, hours of work, and other working conditions, except

(a) the principle of merit and its application in the appointment and promotion of employees, subject to section 34 of the *Public Service Act;*

(b) all matters included under the *Public Service Superannuation Act;*

(c) the organization, establishment, and administration of the departments and branches of the Government except the effect of reductions in establishment of employees which shall be negotiated by the parties;

(d) the application of the system of classification of positions or job evaluation under the *Public Service Act* and regulations; and

(e) the procedures and methods of training or retraining employees, other than those affected by section 18, and other than training programmes administered within a branch or department that apply to one occupational group only.

Union security.

14. (1) Every collective agreement shall include the following provisions respecting those persons in the bargaining unit who are employees on the date the union is certified as bargaining agent for that bargaining unit:

(a) The Government shall deduct from the monthly wages or salary of each employee in the bargaining unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular monthly dues payable to the union by a member of the union:

(b) The Government shall remit monthly to the union the amounts so deducted under clause (a):

(c) The Government shall inform the union monthly, or otherwise as may be provided in the collective agreement, of the names of the employees from whose monthly wages or salary deductions have been made in the preceding month and the amount so deducted.

(2) Nothing in this Act shall be construed as requiring a person who is an employee prior to the date the union is certified as the bargaining agent to become a member of that union; but it shall be a condition of employment that a person who becomes an employee after a bargaining agent has been certified in respect of the appropriate bargaining unit of that employee become and remain a member of the union certified as bargaining agent for that bargaining unit upon completion of thirty days as an employee.

(3) Any arrangement for deduction of dues between the Government and a union shall continue until

(a) a collective agreement is entered into by the parties; or

(b) that union fails to be certified, or is decertified, as the bargaining agent,

whichever first occurs.

Grievances.

15. (1) Every collective agreement shall include a provision

(a) respecting the dismissal, discipline, or suspension of an employee bound by the collective agreement; and

(b) for final and conclusive settlement without stoppage of work, by arbitration, or by such other method as may be agreed upon by the parties, of all differences between the parties respecting its interpretation, application, operation, or any alleged violation thereof, including a question as to whether or not a matter is subject to arbitration.

(2) Where a collective agreement does not contain the provision required by subsection (1), the board shall, by order, prescribe a provision for the purpose, and the provision so prescribed shall be deemed to be a term of the collective agreement and binding on the parties and all other persons bound by the agreement.

Grievance procedure for other persons.

16. A person employed under the *Public Service Act* who is not

(a) included in a bargaining unit; or

(b) included in a collective agreement

is entitled to the benefit of the grievance procedure provided in the *Public Service Act*.

Settlement of disputes.

17. (1) Where the parties are unable to agree on any matter

(a) required by this Act to be included in a collective agreement; or

(b) that either party requires to be included in a collective agreement; or

(c) that is required to be negotiated under section 11 or 12,

the chairman of the board shall, upon the written request of either party, appoint a mediator to confer with the parties and assist them in reaching a collective agreement.

(2) The mediator shall, within ten days of the date of his appointment, or within such longer period as may be agreed upon by both parties, submit a report to the chairman of the board setting out the matters upon which the parties have agreed and those matters upon which the parties are unable to agree.

(3) Where, under subsection (2), the chairman of the board is notified by the mediator that the parties are unable to agree upon a matter in dispute, he shall request each party to advise him immediately whether or not the party agrees to have that matter submitted to arbitration for a final and binding decision.

(4) Where the parties jointly agree that the matter in dispute be referred to arbitrators under subsection (3), the arbitrators shall consist of three persons to be appointed as follows:

(a) One person to be nominated by the employees' bargaining agent:

(b) One person to be nominated by the Government's bargaining agent:

(c) A chairman to be jointly nominated by the Government's bargaining agent and the employees' bargaining agent.

(5) Where

(a) either party fails to nominate a person under clause (a) or (b) of subsection (4); or

(b) the parties fail to agree on a joint nomination of a chairman under clause (c) of subsection (4),

the chairman of the board shall nominate a person under clause (a) or (b) or a chairman under clause (c), as the case may be.

(6) The decision of the arbitrators on a matter in dispute under this section is final and binding on the parties.

(7) Where neither party makes a written request for a mediator under subsection (1) or where either party notifies the chairman of the board under subsection (3) that the party does not agree to have the matter in dispute submitted to arbitrators for a final and binding decision, the employees' bargaining agent may conduct a vote, by secret ballot, as to whether or not the employees will strike.

(8) Where the matter in dispute arises in respect of the master collective agreement under clause (a) of subsection (1) of section 11, the vote shall be taken of all members of the union certified as the bargaining agent of one of the bargaining units described under section 4.

(9) Where the matter in dispute arises in respect of the subsidiary collective agreement under clause (b) of subsection (1) of section 11, the vote shall be taken of all those members of the union certified as the bargaining agent within the occupational group referred to therein.

(10) Where a majority of the members of the union have voted under subsection (7) in favour of a strike,

(a) no person shall declare or authorize a strike and no employee shall strike, except during the three months immediately following the date on which the vote was taken; and

(b) no employee shall strike unless and until

(i) the Government's bargaining agent has been notified in writing by the bargaining agent for the employees that the employees have voted in favour of strike and three days have elapsed after the notice was received; and

(ii) where a mediator has been appointed under subsection (1), the employees' bargaining agent has been notified by the chairman of the board that the mediator has made his report to the chairman of the board.

(11) The Government shall have a discretion as to whether or not employees in a bargaining unit will be locked out.

(12) The Government shall not lock out any employee unless and until

(a) the employees' bargaining agent has been notified in writing by the Government that the Government will lock out the employees and three days have elapsed after the notice was received; and

(b) where a mediator has been appointed under subsection (1), the Government's bargaining agent has been notified by the chairman of the board that the mediator has made his report to the chairman of the board.

Notice of future technological change.

18. (1) Where the Government intends to make a technological change, it shall give notice in writing to the employees' bargaining agent of the technological change, and the Government's bargaining agent and the employees' bargaining agent shall, within fourteen days of the date of the notice, commence collective bargaining for the purpose of reaching agreement as to the effects of the technological change and in what way, if any, the collective agreement should be amended.

(2) Where, under subsection (1), an agreement is not reached prior to the full implementation of the technological change, the employees' bargaining agent may apply to the board to have the collective agreement declared to be terminated.

(3) Where the board determines, upon application under subsection (2) and after such investigations as it considers necessary, that a technological change has occurred, the board shall declare the collective agreement terminated.

No notice of future technological change.

19. (1) Where no notice is received under section 18 and an employees' bargaining agent, or any employee, by written notice to the board, alleges that the Government intends to make a technological change, the board shall

(a) make such investigations as it considers necessary for the purpose of determining whether or not the alleged change would constitute a technological change; and

(b) make an order, which shall be final and binding on the parties and all persons affected, as to whether or not the alleged changes, when fully implemented, would constitute a technological change.

(2) Where the board determines that the alleged change would constitute a technological change, the board shall notify the Government in writing of its decision, and the Government shall, within fourteen days of the date of the notice, commence collective bargaining with the employees' bargaining agent for the purpose of reaching agreement as to the effects of the technological change and in what way, if any, the collective agreement should be amended.

(3) Where, under subsection (2), an agreement is not reached prior to the full implementation of the technological change, the employees' bargaining agent may apply to the board to have the collective agreement declared to be terminated.

(4) Where the board determines, upon application under subsection (3) and after such investigations as it considers necessary, that a technological change has occurred, the board shall declare the collective agreement terminated.

No notice of current technological change.

20. (1) Where no notice has been received under section 18 and the employees' bargaining agent, or any employee, by written notice to the board, alleges that a technological change has occurred or is occurring, the board shall

(a) make such investigations as it considers necessary for the purpose of determining whether or not a technological change has occurred or is occurring, and

(b) make an order, which shall be final and binding on the parties and all persons affected, as to whether or not a technological change has occurred or is occurring.

(2) Where the board determines that a technological change has occurred or is occurring, the board shall notify the parties in writing of its decision and the parties shall, within fourteen days of the date of the notice, commence collective bargaining for the purpose of revising the collective agreement.

(3) Where, under subsection (2), no agreement is reached within fourteen days, the employees' bargaining agent may apply to the board to have the collective agreement declared to be terminated.

Report.

21. The minister shall lay before the Legislative Assembly, within thirty days after the commencement of the first session in each year, a report of his administration of this Act during the preceding year.

Regulations.

22. For the purpose of carrying out the provisions of this Act according to their intent, subject to the approval of the Lieutenant-Governor in Council, the board may make such regulations and orders as are ancillary thereto and not inconsistent therewith; and every regulation shall be deemed to be part of this Act and has the force of law.

Offences and penalties.

23. Every person who commits an offence against this Act, or the regulations, or refuses or neglects to observe or carry out an order made under this Act, is liable, on summary conviction,

(a) if an individual, to a fine not exceeding one thousand dollars; or

(b) if the Government or a union, to a fine not exceeding ten thousand dollars.

Mailed notices.

24. For the purpose of this Act and of any proceeding taken hereunder, a notice or other communication given by prepaid registered mail shall be presumed, unless the contrary is proved, to have been received by the addressee in the ordinary course of mail.

Copies to be filed.

25. Each of the parties to a collective agreement or amendment to a collective agreement shall, forthwith, upon its execution, file one copy with the minister and the Minister of Labour.

Other Acts.

26. Unless otherwise provided in this Act, the *Labour Code of British Columbia Act* applies, but, where a provision of this Act is contrary to, in conflict with, or inconsistent with the provisions of that or any other Act, the provisions of this Act prevail.

Agreements made prior to this Act.

27. Any memorandum of understanding or agreement that was not negotiated under this Act is terminated on the date upon which this Act or any provision thereof comes into force.

Commencement.

28. (1) This Act, excepting this section and the title, comes into force on a date to be fixed by the Lieutenant-Governor by his Proclamation, and he may fix different dates for the coming into force of the several provisions.

(2) This section and the title come into force on Royal Assent.

Printed by K. M. MacDonald, Printer to the Queen's Most Excellent Majesty in right of the Province of British Columbia
1973

MONDAY, OCTOBER 15, 1973

The House met at 2 p.m.

Prayers.

HON. A.B. MACDONALD (Attorney General): Mr. Speaker, I'd like to advise the House with regret of the death of former Chief Justice Herbert William Davey, who's been on the Supreme Court of British Columbia since 1953, then on the Court of Appeal for a long period of time, and was our Chief Justice of the province from 1967 until he became a supernumerary judge in 1972 and continued his service to the province. He was an outstanding legal scholor whose trenchant opinions were in the best traditions of the common law.

I want to advise the House that, in speaking with his widow today, she expressed a wish for complete privacy. I would hope that the public would not send flowers and notes and letters, in accordance with the wishes she expressed to me.

HON. E. HALL (Provincial Secretary): Mr. Speaker, visiting Victoria today attending an important meeting of western Ministers and seated on the floor of the House are two Ministers from our sister province whom I'd like the House to welcome. They are the Hon. Horst A. Schmid, Minister of Culture, Youth and Recreation for the Province of Alberta, and the Hon. Laurent L. Desjardins, Minister of Tourism, Recreation & Cultural Affairs for the Province of Manitoba.

HON. W.L. HARTLEY (Minister of Public Works): Mr. Speaker, today is certainly a red letter day. It's not often we have Ministers from other provinces coming here, and it's even less often that those of us who have the privilege of representing rural ridings have visitors. This afternoon we have a group of 22 students from the Princeton Secondary School, accompanied by their two teachers, Mr. Nittering, and Mrs. Kernaghan. I would ask you to welcome them.

MRS. D. WEBSTER (Vancouver South): Mr. Speaker, I would also like to have the assembly here welcome a group of students from Thompson Secondary School in the Vancouver South district, with their teacher Mr. Bob Ellis.

Introduction of bills.

AN ACT TO AMEND THE SUCCESSION DUTY ACT

Hon. Mr. Barrett presents a message from His Honour the Lieutenant-Governor: a bill intituled *An Act to Amend the Succession Duty Act.*

Bill 69 read a first time and ordered to be placed on orders of the day for second reading at the next sitting of the House after today.

PUBLIC SERVICE LABOUR RELATIONS ACT

Hon. Mr. Hall presents a message from His Honour the Lieutenant-Governor: a bill intituled *Public Service Labour Relations Act.*

Bill 75 read a first time and ordered to be placed on orders of the day for second reading at the next sitting of the House after today.

Oral questions.

B.C. RAILWAY STRIKE

MR. J.R. CHABOT (Columbia River): Mr. Speaker, a question to the Premier and President of the B.C. Railway. Contract negotiations have broken down again between the B.C. Rail and management. I understand that there are no further plans for discussion or talks between labour and management. Picket lines are in place, disrupting service to the customers of the B.C. Rail. I wonder what plans the government has to get the two parties together for resumption of negotations and the resumption of service to the customers of B.C. Rail?

HON. D. BARRETT (Premier): Mr. Speaker, there is a strike on the B.C. Rail by the shop crafts, involving 380 people. The Maintance of Way union involving 450 people have accepted the contract offer, and the UTU, involving 500 people, have accepted a contract offer to be ratified by the membership. We have asked the associate deputy Minister of Labour, Mr. Kinnaird, to travel to Vancouver and attempt to bring the two parties together. This strike was just declared this morning, and we have made the initial move through the associate deputy Minister.

FATALITY ON HOPE-PRINCETON HIGHWAY

MR. G.S. WALLACE (Oak Bay): Mr. Speaker, it's nice to see the Minister of Highways back in his seat this week. I was meaning to ask this question last week regarding the Hope-Princeton Highway at a point where a Victoria resident fell to his death last week, and I believe there have been 17 deaths at that point in the past 10 years. I wonder if the Minister could tell us to what degree the department will make that corner safe?

particular Member by explaining to me why the Attorney General's department always produces an abomination of this kind to end each session with a whimpering

MR. F.X. RICHTER (Leader of the Opposition): I think generally in principle the official opposition goes along with this bill excepting in one particular section. I feel it would be more appropriate if we spoke to that in the committee stage.

HON. MR. MACDONALD: Which one?

MR. RICHTER: section 5.

HON. MR. MACDONALD: Mr. Speaker, I would like to close this debate, not with a bang, but a whimper. I move second reading of Bill 120, *Statute Law Amendment Act, 1973 (Second Session)*.

Motion approved.

Bill 120 read a second time and referred to Committee of the Whole House at the next sitting after today.

HON. MRS. DAILLY: Second reading of Bill 116, Mr. Speaker.

PUBLIC SERVICE ACT

HON. E. HALL (Provincial Secretary): Bill 116, the Public Service Act is before you, Mr. Speaker, for one or two reasons. First of all, for renaming this particular Act the *Public Service Act* instead of the Civil Service Act in keeping with the findings of the inquiry I occasioned to take place a year ago.

Secondly, since you have before you in committee stage Bill 75, which seeks to give collective bargaining privileges and rights and freedoms to the civil service of the province, we need therefore to take out of the *Civil Service Act* those aspects of the Act that seek to determine wages and working conditions. That will now be up for bargaining and agreement. Therefore, it is in a real way a housekeeping procedure we are involved in.

There are, however, a number of principles in the bill. But because they are singular and different each to the other Act, it would best be handled in the committee stage.

I therefore move second reading of the bill, Mr. Speaker.

MR. McGEER: In section 34 of this particular Act — and I realize that we are not debating individual sections, only the principle here — I noticed that there is a little marginal notation, "appointments upon merit." Will that disqualify defeated NDP candidates under this section?

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER: The Hon. Provincial Secretary closes the debate.

HON. MR. HALL: Question.

Motion approved.

Bill 116 read a second time and referred to Committee of the Whole House at the next sitting after today.

HON. MRS. DAILLY: Committee on Bill 75, Mr. Speaker.

PUBLIC SERVICE LABOUR RELATIONS ACT

The House in committee on Bill 75; Mr. Liden in the chair.

On section 1.

MR. G.S. WALLACE (Oak Bay): Mr. Chairman, we've received communications from the B.C. Institute of Technology which set out, in our opinion, some reasonable grounds why they should be excluded from the provisions of this Act. The main reason they give is that they are — and I may say that I speak in support of the point of view that they put forward — an educational institute.

Perhaps in winding up the debate the Minister can confirm, or refute, the evidence that's been presented by the staff at the BCIT to the effect that they are an educational institute which had been given verbal assurance by the Minister of Education (Hon. Mrs. Dailly) that next year they would be given the right to choose their own bargaining unit, and that they felt that they were not suitable for inclusion under one of the three units set up under this Act.

The other part of the evidence presented by letter to all Members of the House. suggested that the Provincial Secretary — and I haven't got the file in front of me as to the exact date - at a certain date last year or earlier this year intervened when negotiations were close to settlement. It would appear that this is a unilateral intrusion by the Minister when they were close to agreement — an agreement which they claim and state was so much better than a similar agreement worked out by the B.C. Government Employees' Union.

It is obviously the feeling of the employees of the B.C. Institute of Technology (1) that they shouldn't be in this bargaining unit in the first place, and (2) that the history of government intervention, in their opinion, leads them to suspect that this would not be a suitable bargaining unit for them in the future.

I'm merely raising this point, Mr. Chairman, so that the Minister will have an opportunity to clarify — I notice the Minister of Education is busy in caucus with the Provincial Secretary — to clarify the statement about plans to give the institute autonomy in similar terms to a regional college. It seems clear that it is the feeling of the staff at BCIT that they wish to be excluded from the provisions of this bill.

I'd like to ask the Minister finally if, in fact, the staff has been given any opportunity to vote and express their wishes. When we debated the labour code, and quite rightly so, it was often stated that the wish of this government and the wish of the opposition has always been, wherever possible, to give employees the free choice of selecting their own bargaining unit.

I wonder if the Provincial Secretary would also care to tell us whether or not the BCIT staff were given this opportunity to express their preference in a vote. If this has not been done, is it intended that in the near future they should be given this opportunity? I feel that, in terms of the letters that they have sent to our office, it is quite clear that they have no wish to be included under this bill.

With that thought in mind, Mr. Chairman, I move the amendment standing in my name on the order paper: "To amend section 1 by adding after clause (E) of subsection (x) of the definition of 'employee' the following clause: '(F) the British Columbia Institute of Technology.'"

HON. E. HALL (Provincial Secretary): Mr. Chairman, the government isn't prepared to accept the amendment, which is all I can speak about at this particular point in time. I hopefully will be able to answer some but not all of the Member's questions, most of which I think were out of order in this debate, after we dispose of the amendment.

In order to explain to the Member why I don't feel it correct to accept the amendment in his name on the order paper, it is simply this: we have to proceed along certain courses of action, each of which has to be authorized by this Legislature in the form of an Act, each of which must then take its place as described in the events that will be found in the various sections as we go through this Act.

Unfortunately, at the same time we will also be moving — as the Member has made reference to — to the granting of independence to that post-secondary institute of education. We hope that will be done as soon as possible. I can't guarantee it because the House is going to do that. I've already, as you know if you've read the correspondence, made one assumption and assurance to these people that could not be delivered by this House. I'm not going to make another one. Therefore these public servants will have to be somewhere in the meantime; I suggest that the best place for them to be is under the aegis, as they

are at the moment, of the *Public Service Labour Relations Act* — or activity, as it is at the moment.

Amendment negatived.

HON. MR. HALL: I want to respond to the rest of the question.

MR. WALLACE: I apologize; I was slow to get up before you called the question. I've got the file now in front of me.

I wonder, in light of the Minister's remarks, is he then saying that the opportunity will be given to the employees at BCIT to express their wishes after they become an autonomous body? Again, I know the Minister can't give....

HON. MR. HALL: I'll give you what I think will happen now. First of all, this Act does not name any union or group of people in any sense of the word as having the automatic jurisdiction of any one of the three units, other than section 4(a), which is to do with nurses. When this Act goes through, every person who works for the government will have an opportunity to vote or to sign a card or to do something to indicate which, or how, or what union is going to represent them. With regard to each of those three units that are described in section 4, that association, group of people, union, that gets the majority will be, in effect, the bargaining agent for the employee, so there will be an opportunity to vote yes or no on something or other whenever this thing becomes law.

When the happy day arrives — and I think it will be a happy day — that the BCIT becomes a fully-fledged, standing-up-proud-and-tall institute of public education in the post-secondary field, with its own board of governors or regents or whatever the expression may be, following the introduction and passage of the bill in this Legislature by the Member for Burnaby North (Hon. Mrs. Dailly), they then will also have an opportunity, having become excluded from this Act, to determine who will represent them at that time — at which time, I suppose, such varied associations as the BCTF, down to the Canadian Union of Public Employees or the Retail Clerks, can go for the certification under the Labour Relations Act.

I think we have to do it step by step. It may seem a little bit pedantic, but if holes are allowed to develop in this thing then I think it becomes a little frenetic.

MR. WALLACE: This is just a temporary arrangement, in other words.

MR. J.R. CHABOT (Columbia River): There are many observations I'd like to make in the committee stage of this Act in the various sections. I have amendments on the order paper as well on certain sections.

Unfortunately I must attend the committee meeting in about 14 minutes, and prior to that time I must study some of the documents presented to the privilege committee. I can't be at both places and therefore, in all fairness not only to myself but to other Members who are on that committee who have amendments and I'm sure would like to speak to this particular stage of the *Public Service Labour Relations Act*, I have no alternative but to move the committee rise and report progress and ask leave to sit again.

HON. MR. HALL: Mr. Chairman, is that motion debatable? I don't think it is.

I don't think it's acceptable at the time, because no matter which piece of legislation we're going to be on in the next two hours, there are Members involved.

MR. CHAIRMAN: The motion has been made that the committee rise and report progress.

Motion negatived.

MR. CHABOT: Mr. Chairman, it's most unfair that the Minister is unwilling to allow a Member who has another obligation to appear on a special committee....

MR. CHAIRMAN: Are you speaking on section 1?

MR. CHABOT: The answer is yes, I'm speaking on section 1.

MR. CHAIRMAN: Proceed.

MR. CHABOT: And that has to do with my responsibilities in this House and my opportunities in this House as well. You passed a motion last night which, because of a certain set meeting this afternoon, denies me the opportunity of debating this legislation. It's most unfair. It's most callous on the part of that Minister and on the part of that government as well that a Member does not have the right to sit on this floor because of his responsibility in committee.

HON. MR. HALL: Mr. Chairman, on a point of order.

MR. CHAIRMAN: State your point of order.

HON. MR. HALL: Mr. Chairman, on a point of order.

MR. CHAIRMAN: State your point of order.

HON. MR. HALL: I didn't refuse him, Mr. Chairman. The House has just voted that we do not rise and seek to report progress and ask leave to sit again. But I just want to point out, Mr. Chairman, that no matter what we do, some Member of that committee is going to suffer some default in terms of his debate in the House on Bill 75 or bill whatever number we want to call next at this time of the day. What the Member would seek to do is deprive some other Member of what he wants for himself.

MR. CHABOT: Oh, come on.

MR. CHAIRMAN: I'm going to get back to Bill 75, section 1, and I'm going to recognize the Second Member for Victoria (Mr. D.A. Anderson).

MR. CHABOT: Are you denying me the opportunity to...?

MR. CHAIRMAN: Are you rising on a point of order?

MR. CHABOT: Yes, on a point of order.

MR. CHAIRMAN: State your point of order.

MR. CHABOT: This is a very critical piece of legislation we're discussing. It's one which has a great series of amendments on the order paper. Therefore, there is a lot of significance attached to this particular piece of legislation we're discussing on the part of other Members and myself as well. Here I won't be.... I'll be denied the opportunity of presenting an amendment to this legislation...

MR. CHAIRMAN: Order.

MR. CHABOT: ...because I have the responsibility to be in another committee.

MR. CHAIRMAN: Will the Member take his seat? That question has been dealt with.

[Mr. Dent in the chair.]

MR. D.A. ANDERSON: Mr. Chairman, on section 1 the Minister turned back an amendment that would have excluded the members of the British Columbia Institute of Technology from being exempted. But a very similar case in some respects exists for the Workmen's Compensation Board employees. These people have decided, by an 82 per cent vote I believe it was, that they wanted their own union. They are not a Crown agency in the traditional sense. They are not acting on behalf of the Crown. They are not even being funded by the Crown directly; they are funded by contribution.

They feel that they would prefer their own association, even though there was a strong effort made to have them in the B.C. Government Employees Union. Despite that — and I might add it has been stated to me by one employee of the Workmen's Compensation Board — that despite the B.C. Government Employees' Union waging a very strong campaign, they want their own. They went through the required procedures and they still want to be on their own. They see no reason for them to be included in a bargaining unit which they feel is inappropriate for them.

There are some 800 workers in this particular group and they feel that it's "a travesty of justice and a breach of democratic rights" for them not to be given the opportunity of choosing their own union.

A letter was sent to the Hon. Premier; a copy was sent to me on this issue. Material was provided to us from the association, and I think they made a pretty good case. I would therefore move, Mr. Chairman, that we add after clause (E) of subsection (x) of the definition of "employee" the following clause fl: "The Workmen's Compensation Board" which would result in them being excluded.

If it so happens that at a later time they change their minds and if the B.C. Government Employees' Union makes a better case, and they manage to persuade a majority, rather than 18 per cent, that they are the appropriate bargaining unit, I'm quite sure we could make the changes in this House with no trouble at all. But at the present time only 18 per cent have indicated their desire to be represented by the B.C. Government Employees' Association. The rest wish their own. I would move this amendment and urge the House to support it.

HON. MR. HALL: I wouldn't be completely frank with the House if I didn't say to the House that this particular area the Member for Victoria has raised isn't causing me some problems. I've had correspondence, I've had phone calls and I'm conscious of a genuine desire on the part of the Workmen's Compensation Board employees to involve themselves in the selection of the union of their choice.

It's also been brought to my attention by the members of the Department of Labour, the Minister of Labour, the Deputy Minister of Labour that, in effect, this Act currently excludes the Workmen's Compensation Board employees. Therefore, we are, I suppose, dealing with an amendment that is somewhat superfluous. In effect, the Member has inadvertently won his case, perhaps — if indeed he was presenting it as a case in that fashion. I mean that sincerely.

However, I do know that there are organizational

campaigns going on at these places. I'm at something of a loss to satisfy the House in its entirety in this particular one instance. What has happened that has caused us some confusion is that when Bill 182 was laid on the order paper it used exactly the same words when it described "agency of the Crown" in section 1. But it went further and specifically exempted the Workmen's Compensation Board employees in the definition section under the heading "employee."

It has now been brought to my attention by Mr. Ison, for instance, and Mr. Matkin, and my colleague from Revelstoke-Slocan the strict interpretation of the word "board" where all members of the board are appointed by an Act or by the Lieutenant-Governor-in-Council, so it applies. This has only come to light very, very, very recently. Therefore, I think that we should take it that the Workmen's Compensation Board will not be included under the *Public Service Labour Relations Act*. That's not to say that they may not be represented by the B.C. Government Employees' Union and leave it at that. That would be my advice to the House.

MR. D.A. ANDERSON: If the Minister wishes to agree with the proposal...and I accept his assurance that the Workmen's Compensation Board Employees' Association will not have their rights to represent the Workmen's Compensation Board employees taken away. I'll be happy to withdraw my amendment on his assurance that they will be able to continue with their union in the same fashion that they're doing at the present time.

HON. MR. HALL: If you're asking for assurances as to whether that particular association would be declared by the Labour Relations Board a trade union within the meaning of the Act, et cetera, et cetera, I can't do that. There seems to be some very grave doubts as to whether it would. But if you will accept my assurance that nothing will be done to disturb that association in its endeavours to represent that body of work people, then you, of course, have my assurance, as indeed, any group of people getting together have my assurance.

I should also advise the House that even as we speak it's likely that Mr. Richardson, my Civil Service Commissioner, and Messrs. Matkin and Ison may indeed be talking at this moment about this problem. It's that current in nature.

MR. CHAIRMAN: The amendment is withdrawn.

MR. D.A. ANDERSON: Mr. Chairman, in section 1, I believe that we are going to be faced with a difficulty because in 1(1), where you have the definition of the word "Minister," I think that we're going to find a difficulty which

arose with another case of civil service collective bargaining where the same Minister was responsible for more than one function of the civil service.

In other words, the Minister that is responsible for the Civil Service Commission, as is the Provincial Secretary, is responsible for promotions, responsible for morale, responsible for informing members of the civil service of promotional opportunities, advancement by way of on-the-job training or other things. The same Minister should not wear the other hat of being the government's bargaining agent. The reason is fairly simple. If he is to carry on his function as a government bargaining agent in a non-paternal fashion, he has to be a hard-nosed negotiator. It makes sense that if you have a good union, you want it met with a good member of government on the management side to negotiate the settlement of wage disputes or any other disputes.

You do not want the same person, who one day is arguing on the question of pay, arguing the fact that some civil servants may or may not be overpaid or they're not entitled to a certain amount of extra money, responsible for the civil service commission and its function, which is something totally separate. The reason for this is clear.

You have a joint function. You have a conflict of duties. You have an erosion of the trust that the civil servants may have in the Civil Service Commission because, of course, that same Minister is involved in hard-nosed negotiating. While one day they may be calling him a son of a gun, it's a little difficult to ask them the day after to treat him in a very different manner as they should do if he's responsible for the Civil Service Commission.

So I would suggest, Mr. Speaker, that we amend this section, and amend the definition of "Minister" by removing the semicolon and add after the word "minister," in line three, the following words: "This minister shall not be a member of the Treasury Board or a member of the executive council designated under section 3."

Mr. Speaker, I mentioned when I started discussing this section that in another jurisdiction, namely the federal civil service, this division has proved to be very beneficial. While Treasury Board are always the bad guys, nevertheless the Civil Service Commission, or Public Service Commission, is not treated in the same fashion. The reason is that they are distinct and separate people. I would move this amendment standing in my name.

HON. MR. HALL: We had this point brought to us in the very first instance in the Higgins Commission report, who dealt with the kind of structures that were required, in their eyes, to deal with the public service of. the province. It's the government's intention that Ministers will not be involved in negotiations in the way the Member describes.

Very likely the worst thing that can happen is to have cabinet Ministers across the bargaining table dealing with the dollars and cents of an issue. In fact, we've gone to some extent in section 3 later on to determine exactly who is the bargaining agent for the government under the direction of the Treasury Board.

I think this amendment would be a little too far-reaching in its implications for me to accept, in that it would certainly rule out of question in terms of the economic planning of this province, four or five of Her Majesty's Ministers, and I don't think that's good. I don't think that we should allow that state of affairs to take place.

It places a restriction, I think, on the cabinet and on the Minister of Finance and the Audit Act, as to who could or could not be members of the Treasury Board to do all those other jobs the Treasury Board has to do. I therefore, Mr. Speaker, cannot accept the amendment as it's not anticipated under section 3 that the Ministers will be in the face-to-face negotiations that the Member makes reference to.

MR. D.A. ANDERSON: Perhaps the Hon. Minister is not aware of the merits of this, because I didn't stress the fact that in this House the Ministers are responsible for these operations. Maybe they are not actually sitting at the table, but if my hon. friend, the former Minister of Labour (Mr. Chabot), wishes to question, he has to question the Ministers who are responsible for their departments and their operations. This, I think, will tend to result in them becoming identified with the bargaining team.

If there are tough negotiations going on which may extend over a period of weeks, which may occur during the sessions of the House, I would think it very strange if the Members of the opposition did not question the Minister involved — fairly hard, I would trust — as to whether he's doing a good job, either to defend the public interest or whatever else he has in mind.

This type of thing leads to a conflict of interest, leads to the identification of the Minister with the bargaining team. If I can mention a name, the Hon. Bud Drury is always the black hat in all these set-piece negotiations with the civil service unions in Ottawa. He is the Minister responsible. He's not sitting on the board. He's not negotiating, but he appoints the people. He's the one that has to carry the can in the legislature, in the parliament. And I think that the same thing will happen here. I've seen it happen, I've been a member of the civil service when these negotiations were taking place.

Perhaps, while the Minister himself is quite right — that he won't be actually sitting there — he's going to be very closely identified with the bargaining team, and history shows this.

HON. MR. HALL: Well, I agree that history shows it in the federal civil service, but we're not going the federal civil service way. We're not going to have 75 contracts going every day the way they have in Ottawa. We're going to have three with 12 or 15 components, that's all. Also, I'm not so sure, with respect to the Member, that I want to deprive him of that privilege of grilling us.

The buck's got to stop somewhere, Mr. Member, and this is one of the reasons that I personally — and have recommended so to the cabinet — reject some of the aspects of the Higgins report, who wanted somehow to keep on putting it up further and further and further away into some group of beautiful people that didn't have the normal functions of people. The buck's got to stop somewhere and we may as well have it stopping on the Treasury benches.

MR. D.A. ANDERSON: All we need's a split.

Amendment negatived.

MR. D.A. ANDERSON: Mr. Chairman, in this definition Section 1 believe there is a failure to properly define those people who are in a confidential capacity, or in a managerial capacity, who, of course, should be excluded from the operations of the Act.

For example, say a person is employed in a confidential capacity — the Lieutenant-Governor, a Minister of the Crown, a caucus of the Legislature, the deputy head of a government department, or the chief executive officer, or of any other portion of the public service, I feel they should be excluded because of the normal rules that apply in cases of this nature where a person in a confidential capacity, aware of managerial decisions, enjoying managerial functions in many respects, simply is not appropriate for bargaining.

I have therefore an amendment on the order paper, top of page 17; it's fairly lengthy. It basically deals with those people who are in executive positions, people who are in the personnel departments who are involved in personnel work, and people who have to deal formally on behalf of the government with a grievance which may be put in in accordance with the grievance procedures of this Act, and others who may be in a special capacity.

The employee, for example, of the caucus of the NDP backbenchers is obviously in a rather curious and special position. I think it would be inappropriate to have him covered by this particular Act. Therefore, I move the amendment standing in my name, a copy of which I have here, which would exclude these people in confidential or managerial capacities.

HON. MR. HALL: I congratulate the Member for a well-thought-out amendment — an amendment

which would find acceptance, I suppose, in almost every board room in the province, but not this one. It is a different philosophy, and I think nothing points up the philosophy difference better than this amendment.

It's our desire, when making sure that work people have full and free collective bargaining arrangements, that that privilege, right or access be guaranteed to as many people as is possible. A study of history will show that the insistence on management to exclude those people in "confidential relationships" has caused more people to be kept back from reasonable rates of growth, salary-wise, reasonable improvements in job conditions, than anything else.

In fact we have already received in our committee work in the facilitation of collective bargaining almost complete agreement as to the levels of exclusion. We don't see as a government, in a philosophical way, the need to exclude people who are in a confidential capacity from the rights and freedoms of collective bargaining. Confidentiality per se is no reason to be excluded from hammering it out at the bargaining table. What should be the criterion is whether the person is

involved in labour-management relationships. You've included, I think, three of them in your amendment, under subsection (b) of your amendment, which are already covered in the Act anyway.

Therefore, I can't really accept your amendment because it simply says that because you are dealing with confidentiality of planning on highways or confidentiality of casework in Human Resources, or confidentiality of who gets the money in the Provincial Secretary's department...that's not sufficient reason for you not to be in a union.

In fact, the Premier is often on record as saying everyone should be in the union right up to the Deputy Minister. Well, we've not gone that far but...hopefully, he's out; we won't tell him that at the moment.

The fact of the matter is that we've gone as high as we possibly can by making sure we don't exclude in the way the Second Member for Victoria wants to exclude.

Mr. Speaker, the criterion should only be: is the person involved in management in the sense of hiring and firing and personnel practices? One of the amendments seeks to deal with the caucus of the Legislature, and so on and so forth. I will confess I've not had an opportunity to entirely follow that right the way through the Act, but I would imagine that those who are officers of the caucus are not public servants within the meaning of the Act because they come in by order-in-council. I would think that would be the answer on that one. I think so. I can find that out very quickly for you, but I'm certain that that's the case.

Interjection.

HON. MR. HALL: Yes, I'm sorry. At the moment I'd say to you, Mr. Member, that it's a well-thought-out amendment. It's one that would be found in most collective agreements throughout the province. But it's one that strikes at the very heart of the philosophical difference between you and I.

Amendment negatived.

Sections 1 and 2 approved.

On section 3.

MR. D.A. ANDERSON: Section 3 brings up a problem which I alluded to earlier when I was discussing responsibilities of Ministers, and that is if you have the Public Service Commission designated as the bargaining agent of the government and not some other agency. I mention that the Public Service Commission has a unique function at the present time which is quite separate from bargaining — and should be separate — from bargaining. There should be, I believe, two separate bodies involved.

Now I realize the Minister has not accepted this argument when we're dealing with Ministerial responsibility. But may I just bring to his attention the problem that can occur?

Perhaps there could be the danger, in as much as the Civil Service Commission or Public Service Commission has a vested interest in increasing the size of the civil service and reducing conflicts. After all, they may wish to hire more people to get around certain problems that are occurring between civil servants. They would say, quite rightly, "We want more people," and yet at the same time the government is saying, "No, no, no, no. You people hold the line, Your function is to bargain; your function is to act on behalf of management and say, 'Look, we don't want any more hired than the minimum number,' or whatever it might be."

I am sure the Minister can see the conflict which this legislation brings in. The two functions are different. One is, again, sitting on one side of the table being hard-nosed in bargaining, because if they're not going to act that way, we will probably simply have a company union. If we're going to have a really good B.C. Government Employees' Union, they're going to have to be tough. If they're tough, obviously the people on the other side are going to be tough too, or else they are going to get pushed all over the map, just the way the Minister of Transport and Communications (Hon. Mr. Strachan) was pushed all over the map in the ferries dispute.

Now we need to have toughness if we're going to have a good union. If we're not — if the Minister doesn't think we're going to have a particularly good

union — then I would say this section is perfectly all right. But if he is going to have a bushy-tailed fighting union, he's going to have to realize that the Public Service Commission is going to get put into situations of conflict where on the one hand they're trying to preserve morale; they're trying to say to employees "Okay, you need a few extra people," while on the other they're trying to cut costs through wage negotiations and therefore saying "fewer people".

I just fail to see why we should put the Public Service Commission into this adversary situation when it comes to negotiation and bargaining. It's unnecessary and could be done by Treasury Board.

HON. MR. HALL: Well, Mr. Member, "just done by Treasury Board." I.... It's taken me....

MR. D.A. ANDERSON: A bargaining agent for the government is the Public Service....

HON. MR. HALL: Yes, I'm sorry. Let me start again. I'm trying to jump ahead of you and I shouldn't do that.

Your argument is based on the fact the Public Service Commission is in charge of establishing the number of people working in any one organization, branch or department. That's not the fact. The fact of the matter is that it's different from, perhaps, the federal civil service which you may be more familiar with. Treasury Board itself is the holder of that particular power. In fact, one of my problems....

Interjection.

HON. MR. HALL: Well let me finish and then respond. One of my problems at the moment, in view of the new programmes that the government are entertaining, is recruitment. There are 11 single and distinct procedures that must be undertaken before the establishment of the civil service is increased by one person. The group of people that have the controlling feature — in fact the spark-plug — of the scheme altogether is the Treasury Board, not the Public Service Commission. The Public Service Commission can act only in terms of increasing the establishment by an order-in-council that first of all has had the approval of Treasury Board and then the cabinet itself. Now if I've misunderstood you, perhaps you'll respond.

MR. D.A. ANDERSON: You have here in section 3: "The bargaining agent for the Government is the Public Service Commission acting on behalf of, and under the direction of, the Treasury Board...." Now, what I'm suggesting to you is the Public Service Commission is responsible for morale in the civil service. I just don't feel that it's the best thing to do to put them in the position of being the adversary of the union when it comes to negotiations, when indeed I think they should adopt a much more flexible and soft role, if you like, when dealing with these questions in between the negotiations that are going on.

I would far prefer to see the Treasury Board and perhaps the Minister of Finance — or some other Minister, yourself for example — being responsible for protecting the public purse and making sure that the public money is handed out grudgingly rather than generously, because that's what the management function is under these circumstances when faced with a good union. I fail to see how you can effectively carry on tough negotiations and the day after step into a different role, a much more conciliatory role, not an adversary role, when it comes to morale and other questions. There's a dilemma there which I'm afraid the Minister's remarks have not solved.

HON. MR. HALL: I agree there's a dilemma. This dilemma was presented to us — and now I fully understand what you mean — in the Higgins commission report. They wouldn't face: that dilemma. Rather than face that dilemma and brace themselves and come up a recommendation....

I shouldn't be critical of that commission; they were a very good commission. What I'm saying is that instead of grasping the nettle as the government has done in Bill 75, the commission has gone the way you are going, in effect, of erecting different structures. All I can respond now that I fully understand your question is that we don't see necessarily that you can't be a good tough bargainer and a good employer. Why you have to have two groups of people with presumably two different approaches, we fail to understand. We believe that once free and full collective bargaining takes place, we can have tough, no-holds-barred negotiations; at the same time we can still engage in a discourse with the employees of this government in terms of merit, in terms of training, in terms of safety, in terms of travelling, in terms of pension and everything else, I don't see where we need thrash this particular bogeyman that was first raised a year ago.

MR. F.X. RICHTER (Leader of the Opposition): Due to the Member who was handling this bill having to be out at another committee, may I have permission to move the amendment to section 3 standing in his name on the order paper?

MR. CHAIRMAN: Yes. The procedure, Hon. Member, is that you adopt the amendment as your own, which is the acceptable thing.

HON. MR. HALL: Speaking to the amendment presented by the Hon. Leader of the Opposition on

behalf of the Member for Langley (Mr. McClelland), what the Member seeks to do is simply and squarely make the Treasury Board the bargaining agent of the government, and there's no way. We know the buck's got to stop somewhere, but we want the buck to go a couple of steps before it arrives on our desk.

The Public Service Commission is a commission which, in another Act we will deal with later on, is going to be expanded. It will be comprised of first-class people with a great deal of experience in the bargaining field, not only in the public service but also hopefully in other sectors. Frankly that's the only way this government could possibly handle wage negotiations for 40,000 people. There's no way in which four men of the Treasury Board, including the Premier of this province, will be handling dollars and cents, day and night over a table, face to face with 40,000 employees.

Amendment negatived.

Section 3 approved.

On section 4.

MR. D.A. ANDERSON: Section 4 gives us three bargaining units essentially. The difficulty here is that we are trying to force together a large number of disparate groups.

I'll refer to one example. I had some of the officers of the B.C. ferry system and the highways department ferry system come to me. They said, "Look, we are professional mariners. We enjoy working on the B.C. ferries but we may not work there forever. There are professional challenges elsewhere." And they put forward a very reasonable case that their own professional association gives them service which is well beyond what the B.C. Government Employees' Union would do, simply because it is geared specifically to their task, their training, their occupation and their problems.

They said, "Look, what we want to do is continue with our present association because it's clearly the appropriate unit for us." Personally, I think they're right. They came up with a very, very good argument. There may well be other groups; in fact there are plenty of other groups. I don't want to go into the other examples I've got, but this indicated to me fairly clearly — and I think indicates to the House — that to try and force people into three separate groups is simply trying to simplify things too much.

There are enormous numbers of people hired by the provincial service, many different skills involved, and sometimes you have an interest which supersedes their interest as civil servants. These people regard themselves not so much as civil servants, for example, but as merchant marine officers. They take a great deal of professional pride in that fact.

Mr. Chairman, I think I would like to have clarification from the Minister on this section because it appears to me that it simply doesn't take care of the problem of groups such as this.

It also appears to me that it is in conflict with section 7. If you look at section 7 — I realize we're looking a little ahead — it's on change of certification. Now how on earth, for example, if every single one of these ferry officers is thoroughly dissatisfied, are they going to get 50 per cent plus 1 of all the people in their group to change the certification? It's obviously going to be impossible for them to do, even though every single ferry officer thought that the system they were under and the group in which they had been put were quite inappropriate for them. They just can't get out of it unless they can persuade people in many different trades and occupations, who have different interests and different viewpoints, that the whole thing should be dismantled or that another unit should be brought in.

It appears to me that section 7 — and I'll get to this in a moment — is really redundant. I just don't see how you can possibly get a change of certification in the bargaining unit when you have so many different groups put together in one specific unit. If it does collapse, I assume your whole system of Collective bargaining will collapse. It certainly won't take care of the individual group which may have a separate point of view and will want to have that point of view maintained and their separate interests protected by quite special associations.

HON. MR. HALL: I think I should respond to that. Did the Member move an amendment? It's not on the order paper. Are you moving an amendment?

MR. D.A. ANDERSON: No. I am just trying to raise these points. I think I put 30 amendments on the labour bill and got more of them accepted; I put a whole series on this bill. I could put more amendments, but it is pointless.

HON. MR. HALL: All I am asking you is if this amendment was on the order paper. I'm not saying that I am happy that it's on or not on; I just wanted to find out if it was.

In response to the Member's questioning about section 4, it is our view that this is the section that will ruffle feathers, that will upset certain people in the public service. There is no question about that, but I don't know how else one can actually erect a meaningful bargaining procedure with 40,000 people covering the kinds of trades and occupations there are in the civil service without falling into the pitfalls of the federal government and come up with a decent, workable system.

I can think offhand of 25 trade unions that would be knocking at the door tomorrow if I were to agree

with one of the Member's suggestions. We have been around a bit. We've not been around the government a long time but we've been around in life a long time. There's no way that this government is going to walk into that kind of whipsawing arrangement on behalf of the people of this province, period. No way at all. We love the trade union movement; we feel proud to be associated with the trade union movement in many of our political endeavours. We are not that crazy to start walking into a whipsawing arrangement, period.

There are certain people who work on the third floor who are left-handed pencil sharpeners who claim a singularity of endeavour that is almost frightening in its intensity. They always want to be members of their own trade union. I can think of studies I have read when I was a student of labour matters a long way away from here in which 30 members of a hog bristle processing group, which was over 105 years old in the City of Birmingham, resisted the overtures to join another union. We are in that kind of a box. We have commissioners of the Canadian Labour Congress currently spending most of their time trying to deal with this kind of singularity of specialty the Member makes general reference to.

I agree he makes a particularly good point; he has chosen probably the best of them all with the Merchant Service Guild. But in your debate you actually said you could go on to give more and more examples. That's the very point I am making: if you open the door for one you must open it up for them all.

We have chosen three because, frankly, our wisdom indicated that Bill 182 that had two was unworkable. That was just a bit too much to expect 40,000-odd people to look at, so we took the nurses' bargaining unit out because of a very cogent and cohesive history. Prior to that, if you will remember, in Bill 182 we had just (a) and (b). We had to tighten up the language in subsection (b).

Occupational gymnasts, remedial therapists, masseurs all believe they are professionals and believe that they should be licensed specially. Frankly, we've got the dilemma (it's the current word) of how you have carpenters, painters, electricians, plumbers, stationary engineers, beverage dispensers on the Queen of Prince Rupert — have we got alcohol on the Prince Rupert yet? — many of whom have no history of being in the private sector and being used to the unions that effectively cover the private sector.

We think this is a good piece; we will have a go at it. We believe that the two-tier system of having a component will meet those special and particular singularities to which the Member made reference.

Now, all that is left really is for us to persuade the Merchant Service Guild people that if they want always to have an access to that large union so they can become blue-water sailors again, that's a problem they will have to meet with themselves.

We think this is the best way of doing it, and that is an endorsation of the Higgins report that had all these hearings that you know so well.

MR. D.A. ANDERSON: May I ask the Provincial Secretary: where, for example, the ships officers wished to remain members of another and perhaps quite an expensive association — because it's virtually a requirement of theirs

now and certainly a requirement of this Act that they belong to essentially two associations — will he be willing to give the assurance that he will consider sympathetically any requests by them for some sort of grant to make up their professional association dues when the time comes for negotiation?

HON. MR. HALL: I will certainly look into that question, Mr. Member. I will go even further, and sympathetically too. If they want to use my good offices to get some talks going so that some of those overall national policies of the MSG — maybe the collective units that they will find themselves in — should interest themselves in getting part of that action as well, I will certainly lend the government's offices to anything that gets working people together for the betterment of working people. That's not just a cliché. I say to you: definitely, yes, we will look upon it.

Sections 4 and 5 approved.

On section 6.

MR. D.A. ANDERSON: This is a similar amendment. This section was not in previous legislation and perhaps the Minister will give some explanation of it. I think that an amendment is in order and I have one on the order paper, It's the same amendment essentially as I discussed previously: where you have a person in a managerial or confidential capacity, whether or not he is acting on behalf of the government, there should be exclusion.

The reason is fairly simple and I have given it before; I won't go into it again. I think this would be essentially a guarantee for the union members that there won't be included in their midst people whose loyalty is not. to the union. It is a guarantee to the union member; it's a desire on my part to make sure that those people who are included in the union, who may attempt to make managerial positions in the union and become officers of the union, really represent the union and have no conflict of interest and conflicting loyalties to the government with whom they have a managerial or confidential capacity.

The amendment definitely strengthens the union

operation and gives a better opportunity, I feel, for the union members to be sure that the people acting on their behalf are not infiltrated by government managers or people who are in the confidence of the government and that their loyalties are clear and simple.

I move the amendment standing in my name on the order paper.

HON. MR. HALL: This is the standard unfair labour practices section found in most collective agreements. I think it is the same as that found in Bill 11.

I'll be open with the House: it was brought to our attention by the representatives of the nurses' unions who pointed out clearly and strongly, in the first place, that there was no section originally dealing with unfair labour practices.

I don't see that your words add anything to the section because the determination of whether or not that interference takes place is with the Labour Relations Board. If the newly-constituted Labour Relations Board, with all its awesome powers, can't find out if there is an M15 agent or confidential agent or somebody involved in that kind of practice, I don't know who can.

I'm not so sure your words add anything to a very simple section that says no person shall, "interfere with the formation or administration of a union," and no person shall, "in any way discriminate against any employee who is engaged in the lawful activities of a union." I don't see that it adds anything to it.

MR. D.A. ANDERSON: The situation may arise where a member of a union may feel that his loyalty is more to the government because of a confidential capacity or managerial capacity.

I remember once running across someone on the ferry, funnily enough, who said, "Remember good old Bob Strachan? You know Bob Strachan?"

I said, "Yes."

"Well, I can sure remember him when he was a foreman. Did he ever tell you the time he was a foreman? I believe the company was A&W construction or something, and apparently old Bob was cracking the whip. He was representing management; he was a foreman."

This is the type of situation which I think we should try to avoid. We want to have a situation where the people who are in the employees' association are strictly employees and they know full well there can be solidarity among themselves because they don't have people who are managers or people in a confidential capacity.

Amendment negatived.

Section 6 approved.

On section 7.

MR. D.A. ANDERSON: On section 7, a change of certification. Once again We don't have an amendment.

If we read back to section 4, the third public service bargaining unit includes all employees other than those persons who are either nurses or professionals. It appears to me impossible to get any change of a bargaining unit once we have this cumbersome apparatus, this great umbrella which takes in so much underneath it. I just wonder whether the Hon. Provincial Secretary will comment on section 7.

I appears to be a fairly unworkable provision because of the fact that we have only three bargaining units.

HON. MR. HALL: I hate to think what the Member would say if this section wasn't in. This is a kind of "damned if you do, damned if you don't" argument. We had to put in some procedures whereby a changed certification can be made — period. That's one of the policies upon which we've stood for a long, long time.

I agree that the fact that it is going to take, in the instance of the general section, 4(c), something of the order of 15,000-plus-1 votes, let's say, is a monumental task. I agree with you that the union which will eventually get this certification by next April presumably will have to have made a terrible mess of it to lose it. I agree with that. But we had to do something.

While I'm on my feet, let me say that I don't consider this the last word; I don't consider that this will be the last time you will see the *Public Service Labour Relations Act.* It's a brand new game; it's a brand new thing. We've got some goodwill going and we've got to start somewhere. Maybe, in the fullness of time, we'll have to bring this bill back and have other looks at it as practice indicates.

Section 7 approved.

On section 8.

MR. D.A. ANDERSON: In section 8 we're dealing with religious conscience. I don't wish to repeat the many arguments that have been made before. But when a person who has a religious objection — something I don't understand despite many attempts of people to explain it to me; something I'm sure the government Ministers have the same difficulty understanding — to membership, these people — and they've said it time after time — cannot accept the fact that they make a contribution to support an organization which they feel is impossible for them to join.

I would like to take care of this problem by moving the amendment standing in my name on the order paper:

> "By deleting the words after the word 'wages' and substituting the following: 'to a charitable organization mutually agreed upon by the employee and the union, but if the employee and the union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part 1 of the *Income Tax Act* (Canada) as may be designated by the board, such assignment shall not be revoked without the consent of the board.'"

The reason why this is of more importance than in the previous legislation we were discussing is because we are here talking about the public service of the Province of British Columbia where all citizens of British Columbia — everyone within the confines of British Columbia who meet the requirement of citizenship of Canada are citizens of British

Columbia — can and should be entitled to to become members of the civil service if they're qualified and if an opening is there. We are not dealing with the private employer.

We have talked at great length about discrimination; we had discussions yesterday about the human rights legislation which is before the House at the present time. But if there is any place where you want to make sure that there can be no discrimination against a person who has a religious conviction, which you and I, Mr. Chairman, may not understand, it is in the public service of the Province of British Columbia.

Everybody pays the 5 per cent tax to the government; everybody pays the other taxes to the government depending upon their income and the amount they spend. Everybody is entitled, when dealing with their own government, to have the same opportunity as everybody else. A fair shake — that's all this amendment asks for.

It means that if they have a certain religious view, they should not be barred from applying to the public service of the Province of British Columbia simply because of that religious view, which would prevent them under the present legislation from accepting any employment.

The amendment is a modest one; it exists in other legislation. It has been found time after time that a minuscule fraction of I per cent of public servants or any other employees ever take advantage of it. It's a simple thing to police; there's no question of evading responsibilities. It's a simple case of conscience, a conscience which is quite clearly definable.

Mr. Chairman, I realize this has been rejected in the labour legislation that we've had up to now, but when dealing with the public service we're dealing with something else: the right of every single citizen of this province to have an equal crack at taking a government job. We should not discriminate in any way, shape or form even though it is on religious grounds. To leave the Act in its present form would be discrimination on religious grounds just as sure as can be. We know this from what these people have told us. They will be barred from even applying for government jobs if this section remains unamended.

I move my amendment.

HON. MR. HALL: I don't suppose I'm going to surprise the Member when I say we don't find the amendment acceptable. The arguments have been going on now for some four or five weeks in this House on this kind of section.

This is a repeat of the wording in Bill 11 which the House has decided upon. I can't accept it.

Everybody has the right to apply for a job in the civil service of this province. If there's ever been one group of people who have fought hard for recognition, it's the people who 31 years ago this month started in three different areas to try to get recognition in the civil service of this province. I think it would be silly for this amendment to go in when we don't have it in for the rest.

MR. D.A. ANDERSON: Mr. Speaker, we're here dealing with the public service of the Province of British Columbia. We know the attitude of these people. To pass this section unamended would be to discriminate against these people because of their religious views. There is no way that I can accept the arguments of the Provincial Secretary; we are in no way affecting the right to organize. We are simply dealing with a very special, curious group of people.

As I've said before, the measure of a democracy is how you treat minority groups who have different opinions from your own. I don't understand these people properly; the Premier doesn't; you don't, Mr. Chairman; I doubt if anybody in this room shares those convictions. But they have those convictions.

I would most strongly urge that this amendment be accepted.

Amendment negatived on the following division:

YEAS — 13

Chabot	Richter	Jordan
Fraser	McClelland	Morrison
Schroeder	Bennett	McGeer

Anderson, D.A. Williams, L.A. Gardom
Wallace

NAYS — 36

Hall Macdonald Barrett
Dailly Strachan Nimsick

Stupich	Hartley	Calder
Nunweiler	Brown	Sanford
D'Arcy	Cummings	Levi
Lorimer	Williams, R.A.	Cocke
King	Lea	Young
Radford	Lauk	Nicolson
Skelly	Gabelmann	Lockstead
Gorst	Rolston	Anderson, G.H.
Barnes	Steves	Kelly
Webster	Lewis	Liden

Sections 8 to 12 inclusive approved.

On section 13.

HON. MR. HALL: I would like to move the amendment standing in my name on the order paper on page 18 of today's issue. I have a copy in my hand which I will hand to you, Mr. Chairman.

Mr. Chairman, the amendment to section 13 seeks to further particularize section 13(a). As it is in the bill before you it says, "the principle of merit and its application in the appointment and promotion of employees under the *Public Service Act*;" that being an exception to bargaining.

However, in our work this summer we decided that we should, when we change the *Public Service Act*, deal specifically with this question of merit. In order that it may be fully understood we are making reference to the specific section in the *Public Service Act*, namely section 34 of the Act that was tabled yesterday. That way there can be no misunderstanding because, while my legislative counsel tell me the word "under" is sufficient, it perhaps is better for us all if we make reference to the particular section. That is the purpose of the amendment.

Amendment approved.

HON. MR. HALL: Mr. Chairman, perhaps I should now also talk about the second amendment, which is clause (c) of line 2. This was, frankly, a mistake in the bill. The three words "the effect of" were left out of the bill which was a mistake in drafting. The section will now read:

> "Every collective agreement shall include all matters affecting wages or salary, hours of work, and other working conditions, except
>
> (c) the organization, the establishment," — that means the number — "and the administration of the departments and branches of the Government except the effect of reductions in the establishment of employees...."

It doesn't really make complete sense unless you have "the effect of" reductions.

Amendment approved.

Section 13 approved with amendments.

On section 14.

HON. MR. HALL: Section 14, Mr. Chairman, needed some clarification. If you followed these dates upon which members of the union became members and were affected by the dues and all the rest of it, you came in a sort of full circle without getting anywhere. It needed some amendment, so we have cleared that language up. That again is, in the current vernacular of this session, a little "housekeeping" amendment.

Amendment approved.

Section 14 approved with amendment.

Sections 15 and 16 approved.

On section 17.

MR. D.A. ANDERSON: Mr. Chairman, this deals with settlement of disputes. In this instance it is time for all Members of the House to face up honestly to the question of the right to strike in the public service.

The fact is that the public service, where you have essential services, inevitably will not be permitted to have a strike. It is a fact of life which we have got to face up to. This Legislature will be called back into session if an essential provincial government service is interrupted and we will be asked, in the heat of the moment and the passion of the time, to force people back to work, which is wrong. I think it is a bad way of handling labour disputes.

Therefore, I would like to move the amendment standing in my name, that in 17(7), line 6, we add after the word "strike" the following words: "except that in a case where the Lieutenant-Governor in Council shall certify that the strike would jeopardize the maintenance of essential services to the public no such strike vote shall be held and the dispute shall be referred to an arbitrator as outlined under section 17(4)."

A very modest amendment, an amendment which would indicate that the Lieu tenant-Governor-in-Council is so concerned that they realize the essential service should not be interrupted. It prevents the charade of having a strike vote, of having a strike and calling the Legislature together to force them back to work. It is the Lieutenant-Governor-in-Council under this amendment who are given those powers. If they say "Look, chaps, there is no way we are going to permit this — we're going to have to bring them back to work," they can avoid the charade that would go

on otherwise.

It's not up to anybody else to determine, only the cabinet, exactly the same people who would be required to bring us back into session anyway. It simply avoids a couple of stupid, unnecessary steps which will lead to a great deal of public difficulties, which will lead to a great deal of bitterness and which will not lead to any settlement to the labour dispute in question.

This amendment would mean, therefore, that the Lieutenant-Governor-in-Council would take steps to avoid the phoniness of a strike.

HON. W.S. KING (Minister of Labour): Mr. Chairman, I find this a rather interesting position for the Hon. leader of the Liberal Party to take. I note that a number of municipalities, particularly on Vancouver Island and the lower mainland, have distributed resolutions which they have passed opposing the right to strike in the civil service as such, in the government service and in a variety of other areas which they like to refer to as essential services.

I would like to read, Mr. Chairman, the contents of a letter put out under the name of Mrs. T.W. Sturrock, acting city clerk for the City of Victoria. This is a letter directed to my office on September 10, 1973, and it says:

"Re: strikes and essential services.

"The following resolution was recently adopted by the Municipality of Saanich.

Whereas the B.C. Ferries strike and the Canadian railway strike provided to every citizen clear evidence of the serious and crippling effect of strikes in industries providing essential services;

"And whereas, under the laws of British Columbia, employees providing essential emergency services such as firefighters, nurses and ambulance drivers are permitted to strike; "And whereas a strike of such employees would be a serious threat to the health and safety and protection of ordinary citizens and their property;

"Therefore, be it resolved the Government of the Province of British Columbia be requested to introduce such legislation and take other measures as may be fair and equitable to both employees and employers to avoid the unfortunate consequences of a strike of employees providing essential emergency services to the public."

This same letter apparently, Mr. Chairman, was directed to the Hon. John Munro, the federal Liberal Minister of Labour, and his office did me the kindness of providing me with a copy of their response to Mrs. Sturrock's request. I would like to read that into the record, Mr. Chairman, It is a letter directed to Mrs. T.W. Sturrock, acting city clerk, Office of the Clerk, City Hall, Victoria. That's the constituency of the Hon. leader of the Liberal Party, I believe. It says:

"Dear Mrs. Sturrock:

"The Hon. John Munro, Minister of Labour, has asked me to acknowledge and thank you for your letter of September 10 which takes the form of a resolution adopted by the Municipality of Saanich recommending that the Government of Canada be requested to introduce legislation that would avoid the unfortunate consequences of a strike of employees providing essential emergency services to the public.

"My Minister has asked me to suggest that it is generally accepted that free collective bargaining, including the right to strike and lock out, is the most appropriate industrial relations system in a free democratic society such as we enjoy in Canada."

AN HON. MEMBER: Is that a Liberal?

HON. MR. KING: That's a Liberal, the federal Minister of Labour.

"To impose compulsory arbitration as the final method of resolving a dispute, even in so-called essential services, would not automatically bring an end to strikes, but would simply make them illegal.

"In Australia, where arbitration is compulsory and decisions are handled by labour courts, the incidence of illegal strikes is greater than the incidence of legal strikes in Canada.

"Another problem associated with imposing compulsory arbitration in so-called essential services is the definition of essential services. What criteria would be used in determining essential services? And if such a definition could be agreed upon by all concerned, what criteria would be used in determining wage levels and working conditions for those who would be denied the right to utilize economic self-help by way of a strike or lockout?

"I wish to assure you that my Minister and offices of his department are continually searching for ways and means to reduce the incidence of strikes in the federal jurisdiction. The Department of Labour is presently undertaking studies which hopefully will lead to a better understanding of the complex problems associated with labour-management relations. The department has already initiated an industry specialist programme designed to offer greater assistance to management and labour toward a continuing dialogue between

the parties during the closed period of collective agreements."

And so it goes.

So I wonder, Mr. Chairman, in light of the federal Liberal position, in light of the formal position of the federal Minister of Labour, which coincides very closely with the response that I had given in debate on the labour Bill 11, I wonder where this places the Liberal Party of British Columbia. I guess they find themselves way out in right field once again.

I don't know what kind of an alliance they're trying to develop, but it would seem perhaps that it's directed more at some other element than it is at unanimity with their own colleagues in the federal jurisdiction. Or does it simply mean, Mr. Chairman, that they take one position in opposition and another in government?

I'm not quite sure, Mr. Chairman, but I do find this rather startling inconsistency somewhat surprising. Rather than asking the Provincial Secretary to respond, perhaps the hon. leader of the Liberal Party should try to explain the inconsistency of his position.

MR. D.A. ANDERSON: Mr. Chairman, we were having a fairly rational debate of the sections of this bill. The Hon. Provincial Secretary brought up some good points; I withdrew an amendment at his request when he pointed out something I was unaware of. And then we bring on the heavy hand of the old Minister of Labour. He really is great.

Having turned down all the amendments in the labour bill but one which was a clear case of a drafting error, he brings up this great problem — this great problem that he sees. First of all, he introduces a letter from some other organization, another level of government, the City of Victoria, then assumes that this is the amendment before the House, which it is not.

He has not read the amendment before the House. He has not listened to the debate in the House, and then he goes on to this great simplistic argument that he likes putting forward about what the position is of the Liberal Party.

Let me tell you, Mr. Minister, if you're interested, through you, Mr. Chairman, that we make up our own minds as to what . we do in this House, and I think that's right. I would point out to you that if you don't like...as the Premier often points out that he doesn't like the actions of the federal government. He has a party in Ottawa called the NDP and 11 Members of which are from British Columbia....

HON. D. BARRETT (Premier): We like them.

MR. D.A. ANDERSON: Yes, you like them, but you certainly don't like their actions.

Interjection.

MR. D.A. ANDERSON: He consistently points out the fact that they're kept in power by an NDP group in Ottawa. He fails to point out when he's attacking them that the person that he's really attacking is poor old David Lewis, who gets it in the neck from his own side as well as from, of course, the government and the opposition now that the Tories have essentially taken away his thunder in the opposition there.

It's interesting that the Minister of Labour has put up his great straw man. The fact of the matter is that the amendment is fairly specific....

HON. MR. KING: Don't call John Munro a straw man; he's a good Minister.

MR. D.A. ANDERSON: The situation we have here...for instance, the Minister went on to ask about the problem of definition of essential services. Now if you'd read the amendment, which he normally doesn't do whether it's his bill or anybody else's, he would have discovered — and this is despite the invitation of the Premier in his normal sanctimonious tones about how important it is to get the views of the opposition and to get them putting them forward — despite that, he just makes fun of our amendments, consistently rejects them regardless of whether it's logical or otherwise.

In the amendment on page 18 may I point out that the definition obviously is in the hands of the Lieutenant-Governor-in-Council? It's the cabinet, the very group of people who will be issuing instructions under the present legislation to bring people back to, work anyway — and that we know. Why can't you face up to the fact that in certain essential services, which the cabinet knows to be essential, if they're going to remain as cabinet and carry out their functions as government of the Province of British Columbia, they're going to have to bring in the legislation, in a special sitting of this House in all probability, to get the people back to work.

The definition is simple. The definition of essential service is entirely up to the cabinet. It's entirely up to the Minister of Labour and his colleagues — not that I have any confidence in them, but he apparently does. Now if he doesn't think they're capable of deciding what's essential service or other, I wish he'd tell us because that's basically what he's suggested in his fatuous speech on this amendment.

As far as the economic self-help, the situation that we're faced with, which this amendment attempts to deal with in anticipation, is a situation where we have essential services which the cabinet considers to be so important that they cannot allow the people to take advantage of the provisions allowing strikes. We anticipate that by having compulsory arbitration

in those instances alone.

I wish the Minister would read these amendments more carefully. I wish he'd take his responsibilities more seriously. The fact is that we have here a situation which he knows full well is just absurd. He talks about economic self-help of the essential services going on strike. What absolute, blatant, fatuous nonsense! We are not going to have situations, where the cabinet itself has decided that these people should not be on strike, where they're going to remain on strike and not be called back. It's just ludicrous for the Minister who is responsible for labour peace in the province to come in and quote from letters from city councils, wherever they may be, quote from correspondence on that letter and refuse to deal with the amendments here.

He may make all the fun he likes of it, but we are faced with a potentially serious situation. We are attempting to put forward an amendment which would defuse the situation by sending it to compulsory arbitration. Under 17(4), which exists — section 17(4) of your own Act — we're attempting to get to the situation where instead of calling the Legislature together, where the cabinet has determined it's an essential service, we avoid that cumbersome mechanism which has in the past, let's face it, led to difficulties elsewhere and sometimes led to loss of life elsewhere, and have this thing handled in a more reasonable and dispassionate manner in anticipation by the amendment to section 17(7), line 6.

I really find that the government would be a lot better off if it would leave more rational Ministers, such as the Provincial Secretary, to handle questions such as this. If we have a delicate labour situation in the Province of British Columbia, I cannot see how the Minister of Labour himself, who has shown a demonstrable lack of ability to understand amendments and to understand legislation, can handle this difficult portfolio sensibly.

Mr. Chairman, this amendment is a serious one to deal with a serious problem. The government can make fun of it all they like but we in the opposition know that there are situations where such an amendment would be something. any government would be delighted to have. It is something which prevents them from having to call the Legislature. It allows them to avoid calling the Legislature into session; allows them to deal with the thing, with the problem that has developed, by handing it over to compulsory arbitration; allows them to avoid the confrontations and possible violence and possible death that has occurred in situations such as this in the past, and deal with it dispassionately.

I really find that for the Minister of Labour to come in and put forward such facetious remarks on this is to be quite uncalled for and quite absurd. As far as our position goes, if we don't like what our federal colleagues are doing, we say so. I said so frequently when I was a Member of the government backbench, as well as my present capacity.

Unlike the NDP — or I don't know, perhaps like them — we don't feel ourselves bound by their federal decision. We have here Douglas Fisher. Remember Douglas Fisher, the NDP, CCF, MP — the man who defeated C.D. Howe? In his article in the *Times* on October 17 he was talking about why the NDP continues to support the government.

He pointed out that a few members of the caucus may have been influenced by the fact that if they last as MPs until June, they become eligible for a lifetime pension of $390 a month. That's ex-NDP MPs saying that they're supporting the government in Ottawa for the reason that they want a pension.

MR. CHAIRMAN: Order!

HON. MR. HALL: Mr. Chairman, no matter how you dress up compulsory arbitration in language like this.... I can see the liberal, rational approach to that policy, but we differ on it. No matter how you wrap it up, whether compulsory arbitration be apprehended, be pre-emptive, or disguised in any other fashion, compulsory arbitration it is.

We maintain that when the situation deteriorates to a strike in essential services we must then respond in the time-honoured way that is the only one that's left open to us and that is to admit that the economic pressures on the province are such that this Legislature must be called into activity. That we hold fairly close to our hearts.

That's what's going to happen, and if we have made a mistake, Mr. Member, I guess we're going to pay for it. No question about that. I hope we don't. Nobody's more conscious than I of those problems, having as I say over the years spoken from those seats over there about matters like this. I well remember....

MRS. P.J. JORDAN (North Okanagan): You were better over here.

HON. MR. HALL: Was I better? I'm not too bad wherever I am, really. (Laughter.)

So I'm not prepared to accept this pre-emptive compulsory arbitration amendment.

Amendment negatived on the following division:

YEAS — 15

Chabot	Richter	Jordan
Fraser	Phillips	McClelland
Morrison	Schroeder	Bennett
McGeer	Anderson, D.A.	Williams, L.A.
Gardom	Curtis	Wallace

[Page 1328]

NAYS — 36

Hall	Macdonald	Barrett
Dailly	Strachan	Nimsick
Stupich	Hartley	Calder
Nunweiler	Brown	Sanford
D'Arcy	Cummings	Levi
Lorimer	Williams, R.A.	Cocke
King	Lea	Young
Radford	Lauk	Nicolson
Skelly	Gabelmann	Lockstead
Gorst	Rolston	Anderson, G.H.
Barnes	Steves	Kelly
Webster	Lewis	Liden

MR. WALLACE: Mr. Chairman, I regret that I'm not able to take part in this debate because of the committee on privilege holding its meeting, but I already spoke to this on second reading, and with that thought in mind I move the amendment standing in my name on the order paper.

Amendment negatived.

MR. D.A. ANDERSON: On subsection (11). Would the Minister please outline under what circumstances he envisages locking out the civil service?

HON. MR. HALL: Mr. Chairman, I imagine that if the labour-management climate deteriorates in the public service to such an extent that the government will be looking to this particular section, I guess we're not going to be too far from some real editorial comment in the newspapers, for one thing. It seems to me that this is the kind of section that has to really be in in terms of even-handedness; if indeed a strike is acceptable, then a lockout must be acceptable.

I know that the Member makes reference to the fact we're charged and we solemnly do swear to exercise our duties and make sure that the public service of the province carries on, but there may indeed become a time in one particular section, say the technical section or some highways work, when it's not in the best interests of recalcitrant employees on a dispute such as this, who are not responding to the actions of the mediator or arbitrator, to be on the job. I can't give you an actual answer to a hypothetical question, but it seems to me that that's the kind of even-handedness we want to see in a dispute.

MR. L.A. WILLIAMS (West Vancouver–Howe Sound): Mr. Chairman, I wonder if the Minister would also indicate the wisdom of the provisions in subsection (8).

It seems to me that the vote to be taken of all members of the union certified should be a vote taken of the bargaining unit in respect of which the dispute arises, and not just of one of the bargaining units. It may just be a matter of

wording, but if there is a bargaining unit having difficulty with the master collective agreement affecting them, it should be the members of that particular bargaining unit and not just of one of the bargaining units — it may be one of the others.

HON. MR. HALL: I think that you've misread the section. That was deliberately put in to clarify the language in the previous Bill 182 because it wasn't apparent that when an argument arises out of the master agreement for either of (4)(a), (4)(b) or (4)(c), if that is the case then all people in (4)(a) or (4)(b) or (4)(c) will vote on that dispute. If however the argument arises out of a component within (4)(a) or (4)(b) or (4)(c), only the component votes on that item. That language is very carefully spelled out in sections 8 and 9.

Sections 17 to 20 inclusive approved.

On section 21.

MR. D.A. ANDERSON: On section 21 we raise the question of conflict between the Ministers. Can the Attorney General assure me that we're not going to have the same Minister responsible for bargaining as we do for the Civil Service Commission?

HON. MR. HALL: Can I give you the assurance that the same Minister responsible for collective bargaining with the civil service is not this Minister?

MR. D.A. ANDERSON: Will not be the one who is responsible for the Civil Service Commission.

HON. MR. HALL: No, I cannot give you that assurance.

Sections 21 to 24 inclusive approved.

HON. MR. HALL: Mr. Chairman, on a point of order, I wonder if the Member heard me correctly. He nodded his head and I thought he should have shaken his head. I cannot give you that assurance.

MR. D.A. ANDERSON: I shake my head in despair.

HON. MR. HALL: Oh, I see. (Laughter.)

MR. D.A. ANDERSON: You refuse to understand.

Sections 25 and 26 approved.

On section 27.

[Page 1329]

MR. D.A. ANDERSON: Section 27 should be deleted, Mr. Chairman. This is the section which reads:

> "Any memorandum of understanding or agreement that was not negotiated under this Act is terminated on the date upon which this Act or any provision thereof comes into force."

I raised this in second reading with the Minister. He promised to look into it.

The situation I fear is that it may take a long time to get collective agreements negotiated. If we wipe out the results of all preceding negotiations, we're going to put just about everybody into limbo for perhaps a lengthy period of time. We may well be giving a curious and unfair advantage to those who negotiate early or, alternatively, those who negotiate late, depending on the circumstances.

I think if there's an existing collective agreement, it should remain in force until such time as it's superseded by another one duly negotiated.

I raised in second reading my own experience with the problem of delayed negotiations and an 18-month delay. I raised the question of the nurses in the federal civil service who were particularly unfortunate in having a very lengthy delay in the conclusion of negotiations. The result was that they were very badly treated, in my view, at the time the federal government allowed collective bargaining in their civil service.

The amendment I would propose is that we delete section 27 and renumber section 28 as 27. It's my last amendment; I trust the Minister will adopt a more responsible approach and accept this one. It's based on my own personal experience and the experience of others in another jurisdiction which had the question of collective bargaining and the changeover period. I think it makes a great deal of sense.

MR. CHAIRMAN: This particular amendment is out of order. The proper procedure for deleting is to defeat rather than to delete. Simply vote against the section.

MR. D.A. ANDERSON: I wonder if the Minister will indicate whether he would be willing to defeat the section?

HON. MR. HALL: I am not willing to defeat the section, but I am inclined to say to you, Mr. Member, that I have already been in touch personally with a number of groups of civil servants who are keenly anxious to get a governmental interpretation of the meaning of section 27. It's going to be my duty and responsibility to make sure the Civil Service Commission acquaint on all inquiries the true purpose of section 27.

The true purpose of section 27 is not to play fast and loose with any collective agreements — there are no collective agreements per se but agreements or letters of understanding or letters of intent — but not to change those terms at all until they are replaced by a collective bargaining agreement. Unless we have this in the Act, then I maintain, Mr. Chairman, that just as the amendment suggests, the government could play fast and loose, fast and loose could be played on the other side.

It's my understanding, for instance, in one memorandum of agreement, which specifically goes at cross-purposes with the section you voted for, is to do with the effect of reductions in the establishment. We can't have both pieces of work going along at the same time. So I maintain that section 27 is necessary during this transitional period.

But the members of the public service should not look upon this in any shape or form as an avenue of getting out of our obligations.

Sections 27 and 28 approved.

Title approved.

HON. MR. HALL: Mr. Chairman, I move the committee rise and report the bill complete with amendments.

Motion approved.

The House resumed; Mr. Speaker in the chair.

Bill 75, *Public Service Labour Relations Act*, reported complete with amendments to be considered at the next sitting of the House after today.

MR. CHAIRMAN: The committee reports that divisions took place on sections 8 and 17 and requests that these divisions be recorded in the *Journals* of the House.

Leave granted.

HON. MR. BARRETT: Committee on Bill 81, Mr. Speaker.

MEDICAL CENTRE OF BRITISH COLUMBIA ACT

House in committee on Bill 81; Mr. Dent in the chair.

Sections 1 to 5 inclusive approved.

On section 6.

HON. D.G. COCKE (Minister of Health Services and Hospital Insurance): Mr. Chairman, I move the amendment standing in my name on the order paper

HON. MR. BARRETT: Report on Bill 70, Mr. Speaker.

PETROLEUM CORPORATION ACT

Bill 70 read a third time and passed on the following division:

YEAS — 33

Hall	Macdonald	Barrett
Dailly	Strachan	Nimsick
Stupich	Hartley	Calder
Nunweiler	Brown	Sanford
D'Arcy	Dent	Lorimer
Williams, R.A.	Cocke	King
Lea	Young	Radford
Lauk	Nicolson	Skelly
Gabelmann	Lockstead	Gorst
Rolston	Barnes	Steves
Kelly	Webster	Liden

NAYS — 15

Chabot	Richter	Jordan
Smith	Fraser	Phillips
McClelland	Morrison	Schroeder
Bennett	Anderson, D.A.	Williams, L.A.
Gardom	Curtis	Wallace

HON. MR. BARRETT: Report on Bill 71, Mr. Speaker.

WEED CONTROL ACT

Bill 71 read a third time and passed.

HON. MR. BARRETT: Report on Bill 75, Mr. Speaker.

PUBLIC SERVICE LABOUR RELATIONS ACT

Bill 75 read a third time and passed.

HON. MR. BARRETT: Report on Bill 80, Mr. Speaker.

AN ACT TO AMEND THE MINES REGULATION ACT

Bill 80 read a third time and passed.

HON. MR. BARRETT: Report on Bill 81, Mr. Speaker.

March 14, 1977.

The Honourable Grace M. McCarthy,
Provincial Secretary and Minister
of Travel Industry,
Parliament Buildings,
Victoria, British Columbia.

Dear Madam Minister:

Under date of January 20, 1977, on behalf of the Government of the Province of British Columbia, you appointed me as a Committee of One to review the recommendations of the Higgins Report filed in December, 1972 and to inquire into the effectiveness of the legislation enacted for the purpose of implementing these recommendations and to report on the need or desirability of amendment to such legislation at an early date.

I am now in the position to provide you with my findings and recommendations and take pleasure in presenting you with the attached report.

While implementation of the major recommendations would necessitate rewriting of legislation, I am confident that, when put into effect, the recommendations will facilitate an improved framework and set of procedures to cover collective bargaining and personnel management practices in the Public Service of the Province.

No doubt you will wish to discuss the report with me, and I shall be pleased to meet with you for that purpose.

Respectfully submitted,

R. D. Higgins.

DEPARTMENT OF FINANCE
RECEIVED
MAR 25 1977
MINISTER'S OFFICE
VICTORIA, B.C.

THE HIGGINS REPORT REVISITED

Report and Recommendations
of the Committee of One
Appointed to Review the
Recommendations of the
Higgins Report (1972) and
to Inquire into the Effectiveness
of the Legislative Action Taken
thereon.

March, 1977

PREFACE

The writer was appointed a Committee of One on January 20, 1977. His terms of reference were to review the recommendations of the Higgins Report filed in December, 1972 and to inquire into the effectivenesss of the legislation enacted for the purpose of implementing these recommendations and to report to the Honourable the Provincial Secretary on the need or desirability of amendment to such legislation.

While it was necessary for the Committee to go over the Higgins Report, relating its findings and recommendations to the pertinent legislation and personnel policies, and to consult with and pose questions to a number of senior officials, for the most part the inquiry was carried out by way of hearings attended by interested parties (Government Employee Relations Bureau, Public Service Commission, B. C. Government Employees' Union, B. C. Government Professional Employees Association, Registered Psychiatric Nurses Association of British Columbia and Registered Nurses Association of British Columbia). At the hearings each of the parties was given the opportunity to make representations, both oral and in writing, and also to make observations on the representations of the other parties. It is interesting to note that, during the

PREFACE

hearings, there was evidence of some consensus developing among the parties although, depending on the issue, the consensus was not always between the same parties.

At all times, the Committee was conscious that the only reason for recommending changes to legislation, procedures and practices should be to provide for improvement of the present system. Moreover, the Committee firmly believes that the achievement of labour peace stems more from mutual tolerance, respect and good faith of the parties than from legislation.

In presenting its report, the Committee has given the history leading up to its appointment. This is followed by a chapter-by-chapter account of the principal issues considered by the Committee, together with recommendations. The recommendations are then summarized at the end of the report.

The Committee appreciates the interest and co-operation extended by all parties. Most representations were made in a constructive vein, and were of value in the formulation of the report. Also, the Committee expresses its sincere thanks to Mrs. Colette Marshall, who provided the secretarial and typing assistance and who carried out much of the basic research.

TABLE OF CONTENTS

PREFACE		iii
Chapter I	HISTORY	1
Chapter II	PUBLIC SERVICE ADJUDICATION BOARD	36
Chapter III	DEFINITION OF PUBLIC SERVICE	44
Chapter IV	DEFINITION OF EMPLOYEE	48
Chapter V	EXCLUSIONS	51
Chapter VI	TREASURY BOARD	55
Chapter VII	EMPLOYEE REPRESENTATION	61
Chapter VIII	SCOPE OF BARGAINING	68
Chapter IX	BARGAINING PROCEDURES	77
Chapter X	DISPUTE SETTLEMENT	83
Chapter XI	PUBLIC SERVICE COMMISSION	91
Chapter XII	MISCELLANEOUS	100
Chapter XIII	CONCLUSION	106
SUMMARY OF RECOMMENDATIONS		108
APPENDIX	STRUCTURE OF BARGAINING UNITS	120

CHAPTER I

HISTORY

A Commission of Inquiry was appointed by way of Order-in-Council No. 3786, dated October 19, 1972. The terms of reference of the Commission were to make inquiry into and concerning employer/employee relations in the public service in the province and report its findings and recommendations to the Lieutenant-Governor in Council. The Commission reported to the then Government in December, 1972. As the Commission was under the chairmanship of the writer, it has since be referred to as the "Higgins Commission" and its report has been referred to as the "Higgins Report". The Commission and its report will be so referred to in this report.

The Higgins Commission recommended that full collective bargaining should be the method used to determine salaries, wages, and working conditions in the public service in British Columbia[1], indicating that its main concern was with the employees holding appointments under the then Civil Service Act and who did not have the right to

---

[1] Report and Recommendations of the Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia. (Higgins Report), p. 8.

bargain collectively.[2] It then went on to make a number of recommendations as to the structures and procedures for collective bargaining and other personnel practices and procedures, the most significant of the recommendations being:

1. That legislation to govern employer/employee relations in the provincial public service take the form of a Public Service Labour Relations Act.[3]

2. That the Treasury Board be named the representative of the employer under the Public Service Labour Relations Act and that, to carry out this function, there be established a Personnel Policy Secretariat directly responsible to Treasury Board and under a director with the rank of Deputy Minister, and that -
Such a provision be made by an amendment to the Audit Act and the Act be appropriately renamed the Financial Administration Act.[4]

3. That a separate independent agency be established, responsible for the administration of the proposed Public Service Labour Relations Act, and that the agency be known as the Public Service Adjudication Board and be composed

---

[2] Higgins Report, p. 11.

[3] Ibid., p. 18.

[4] Ibid., pp. 21-22.

of a chairman and two other members, one to be representative of the employee interests and the other to be representative of the employer interests.[5]

4. That all public service employees be placed in one of only two bargaining units:

   (a) a "licensed professional bargaining unit" to cover all employees in professional classifications whose association has statutory authority to license persons to practice that profession;

   (b) a "public service bargaining unit" to cover all employees other than licensed professionals.[6]

5. That employees within the bargaining units be free to select the bargaining agent of their choice.[7]

6. That certain certification provisions be included in the Public Service Labour Relations Act as well as provisions to permit employees in a bargaining unit to change their bargaining agent.[8]

---

[5] Higgins Report, p. 62.

[6] Ibid., pp. 29-32.

[7] Ibid., p. 32.

[8] Ibid., pp. 32-34.

7. That the Public Service Labour Relations Act provide that those persons performing managerial or confidential roles be not considered employees for the purpose of the Act, and that -

The designation of positions as managerial or confidential be left to the two parties, and that -

If the two parties cannot agree the area of disagreement be placed before the Public Service Adjudication Board for a ruling.[9]

8. That the Public Service Labour Relations Act provide that each collective agreement contain a clause requiring the employer to deduct from the monthly pay for each employee affected by the collective agreement, whether or not the employee is a member of the employee bargaining agent, the amount of regular monthly membership dues payable by a member of the bargaining agent, i.e. "Rand Formula".[10]

9. (a) That the scope of bargainable issues be as broad as possible.

(b) That the merit system in the public service be excluded from the collective bargaining process.

(c) (i) That the subject of superannuation be excluded from the collective bargaining process, but

---

[9] Higgins Report, pp. 35-36.

[10] Ibid., pp. 39-40.

that this situation be reviewed after a reasonable period of time.

(ii) That the Civil Service Superannuation Act be renamed the Public Service Superannuation Act and that the Act be amended to provide for the establishment of a joint employer/employee committee under a neutral chairman; the responsibilities of the committee to include the making of recommendations on needed amendments to the superannuation plan and to oversee the investment of monies in the superannuation fund with the view to ensuring optimum returns.

(d) That the criteria upon which classification is based be subject to negotiation and that, while not a negotiable item, the application of the classification system be subject to the grievance procedure.[11]

10. That a two-tier system of negotiations be implemented in the public service consisting of a "master" agreement covering those conditions of employment that are common to all members of a bargaining unit, and "component" agreements covering wages, salaries, and those conditions of employment peculiar to an occupational group, and that -

The definition of appropriate occupational groups for component bargaining purposes within the bargaining unit be

---

[11] Higgins Report, pp. 42-44.

left to the two parties, and that -

If the two parties cannot agree the area of disagreement be placed before the Public Service Adjudication Board for a ruling.[12]

11. That the Public Service Labour Relations Act contain certain provisions with regard to time limits within which negotiation must commence following certification of employee bargaining agent and also with regard to time limits within which negotiations must commence to facilitate renewal of a collective agreement.[13]

12. That the Public Service Labour Relations Act contain provisions whereby, in the event that the employer's representative and an employees' bargaining agent are unable to agree on any item to be included in a collective agreement, the Chairman of the Public Service Adjudication Board shall appoint a mediator to assist the parties in reaching agreement when both parties so request, and that -

Provisions be contained in the Act to allow for the parties to agree to submit the dispute to final and binding arbitration, and that -

Provisions be contained to allow for the taking of a strike vote by the employees' bargaining agent, strike action by

---

[12] Higgins Report, pp. 45-46.

[13] Ibid., p. 48.

employees and lock out action by the employer in instances where either party refuses to submit the dispute to arbitration.[14]

13. That the regulation establishing the Code of Conduct pursuant to the Corrections Act be rescinded so that employees at correctional centres would have access to the same grievance procedure as other public service employees.[15]

14. That the Public Service Labour Relations Act provide for a grievance procedure for employees not covered by a collective agreement.[16]

15. That the Public Service Labour Relations Act provide for appeals on matters within the purview of the Public Service Employment Commission. Such appeals being direct to the Commission and, failing resolution at the Commission level, the appeal may then be placed before the Public Service Adjudication Board for final and binding decision.[17]

16. That an in-service training programme be established immediately for management officials in government in the

---

[14] Higgins Report, pp. 49-56.

[15] Ibid., p. 59.

[16] Ibid., pp. 59-60.

[17] Ibid., p. 60.

field of collective bargaining, and that -

The necessary staff be recruited to increase the standard of service of personnel administration in the public service.[18]

17. That the responsibility for suspensions, dismissals for misconduct or negligence, together with the function of the Classification and Wage Division (and of organization and staff utilization studies plus establishment control), be transferred from the Civil Service Commission to the proposed Personnel Policy Secretariat of the Treasury Board, and that -

The Civil Service Commission be renamed the Public Service Employment Commission and be charged with the general administration of the revised Civil Service Act to be titled, the Public Service Employment Act, and that -

The Public Service Employment Commission be composed of three members. The Chairman to continue to be of Deputy Minister rank with all Commissioners appointed for a time certain during good behaviour, subject to removal only by the Lieutenant-Governor in Council on an address by the Legislative Assembly.[19]

18. That the current delegation of powers by the Civil Service Commission with respect to personnel administration be

---

[18] Higgins Report, pp. 65-67.

[19] Ibid., pp. 68-73.

revoked and that careful attention be paid by the Public Service Employment Commission and the Treasury Board to any continuing abuse of temporary appointments to the public service.[20]

19. That the Public Service Employment Act contain a specific definition of the components of merit, and that - The Act provide a certified employee bargaining agent the right to appoint an observer to the selection panel for all competitions save where no applications are received from provincial public service employees.[21]

20. That the Public Service Employment Commission give priority to the expansion of training and development programmes and that an Advisory Committee on Training composed of Commission, Departmental and Treasury Board officials be established to assist in and encourage the provision of a wide range of inter-departmental and departmental in-service training.[22]

In releasing the Higgins Report to the news media on January 11, 1973, the then Provincial Secretary, in his capacity as Minister

---

[20] Higgins Report, pp. 71-73.

[21] Ibid., pp. 72-74.

[22] Ibid., pp. 75-77.

responsible for the civil service, referred to the Report as a "first class piece of work" and said it would form the basis of legislation giving collective bargaining rights to provincial government employees which he had hopes of being drafted in time for the 1973 Spring Session of the Legislature.[23] The then Government acted swiftly and, during the Spring Session, the Provincial Secretary tabled Bill 182 (Public Service Labour Relations Act). The said Bill, however, only went through First Reading and, therefore, died on the Order Paper.

The Bill, with minor changes, was re-introduced during the 1973 Fall Session as Bill 75, together with a companion Bill, Bill 116 (Public Service Act) and, with enactment of the Public Service Labour Relations Act and the Public Service Act in November, 1973, legislation was in place to facilitate collective bargaining in the public service and to provide for related personnel matters.

Adaptation of the Higgins Report Recommendations

The legislation reflected the extent to which the Government had gone along with the recommendations contained in the Higgins Report. Some of the recommendations were accepted in their entirety, some were modified, and others were rejected. In other cases it was apparent

---

[23] The Province (Vancouver), January 12, 1973.

that those responsible for drafting the legislation had not grasped the intent of the recommendations. This can only be attributed to the fact that, during the drafting process, there was no involvement of the Chairman of the Higgins Commission let alone the Commission as a body.

The legislation followed the recommendation of the Higgins Commission that the opportunity for collective bargaining be extended to most public servants, as it did with the recommendation that there should be a Public Service Labour Relations Act. The legislation did recognize the Treasury Board as the body representative of the employer whose role would be to direct the activities of the employer's bargaining agent but, in designating the Public Service Commission as the bargaining agent for the government, one of the strongest recommendations of the Higgins Commission was ignored. The Higgins Commission recognized the distinction between personnel and labour relations functions and, as the following extract from its report indicates, was most emphatic in making this point.

> *"...the Civil Service Commission has in the past played a role in the determination of personnel policies with respect to pay and working conditions. The Commission of Inquiry, however, considers it both improper and illogical to assign to the Civil Service Commission the task of acting as the employer's bargaining agent. The essential function of a Civil Service Commission is to act as an independent body which ensures the maintenance*

of certain standards in personnel administration within the public service. Foremost in this is the Civil Service Commission's role in the application of the principle of recruitment to the public service by merit. If the Civil Service Commission were also to act as an agent of the employer at the bargaining table, it would completely forfeit the status of an impartial commission whose autonomy ensured that recruitment to the public service was free of political and personal consideration or any other forms of patronage.

In its investigations the Commission of Inquiry found a surprising lack of confidence in the Civil Service Commission due to its current role as an intermediary between the Treasury Board and the representatives of public service employees. While the Civil Service Commission is not at present representing the Province as an employer in the negotiation of a collective agreement, in the consultations that took place with the various employee groups it has been placed in the invidious position of appearing to be not only a spokesman of the employer but also one which did not possess the full competence to discharge this responsibility. To contemplate an extension of the current functions of the Civil Service Commission in this regard to the role of the employer bargaining agent would only serve to further exacerbate such tensions."[24]

---

[24] Higgins Report, pp. 20-21.

As the legislation designated the Labour Relations Board as the administrative agency responsible for the Public Service Labour Relations Act, it was apparent that the Higgins Commission did not put forward a sufficiently convincing argument when it recommended that a separate independent agency be established, responsible for the administration of the Public Service Labour Relations Act and that the agency be known as the Public Service Adjudication Board.

The legislation appeared to follow the recommendations of the Higgins Commission that the number of bargaining units be kept to a minimum, although the Public Service Labour Relations Act created a "nurses bargaining unit" in addition to the two bargaining units recommended in the Higgins Report. Actually, this led to a substantial denial of the Report of the Higgins Commission in this connection and displayed disregard for the concern expressed concerning proliferation of bargaining units.

The legislation followed the recommendation that employees within bargaining units be free to select the bargaining agent of their choice as it did the recommendation that certification provisions be included in the Public Service Labour Relations Act as well as provisions to permit employees in a bargaining unit to change their bargaining agent.

Provision was contained in the legislation for a procedure to

determine managerial and confidential exclusions very similar to that recommended by the Higgins Commission. However, the provision fell short of the full recommendation in that it did not allow for an area of disagreement concerning exclusion determination to be referred to a third party.

The legislation went beyond the Higgins Report recommendation that the form of union security be the "Rand Formula". Instead, it provided for a union shop provision for all persons becoming employees after a bargaining agent was certified. It permitted the "Rand Formula" to apply to persons who were employees on the date of certification and also to persons who are opposed to joining, or belonging to, a union by reason of religious beliefs.

Concerning the scope of bargainable issues, the legislation appeared to attempt to follow the recommendation that the merit system be excluded from bargaining but, it negated the recommendation, at least in part, by making such provision in the Public Service Labour Relations Act subject to a provision in the Public Service Act. The latter stipulates that the procedures to be followed in determining merit shall be subject to agreement by a joint employer/employee committee. The subject of superannuation was excluded from the collective bargaining process, as the Higgins Commission had recommended, as was the application of the classification system.

The Civil Service Superannuation Act was renamed the Public Service Superannuation Act but the recommendation that there be a joint employer/employee committee, the responsibilities of which would include the making of recommendations on superannuation, was ignored. The legislation listed two other matters as non-bargainable ones: one was the organization, establishment and administration of the departments and branches of the government except the effect of reductions in establishment of employees; the other was the procedures and methods of training or retraining employees, other than those affected by technological change, and other than training programmes administered within a branch or department that apply to one occupational group only.

With regard to the two-tier system of negotiations recommended by the Higgins Commission, again those drafting the legislation appeared to follow what was recommended. The legislation did provide for a system whereby the definition of appropriate occupational groups for component purposes be left to the parties but again it chose to ignore a very important part of a recommendation, that being that it did not allow for an area of disagreement concerning component definition to be referred to a third party.

To all intents and purposes, the recommendations of the Higgins Commission that the Public Service Labour Relations Act contain certain provisions with regard to time limits within which negotiations must commence after certification of an employee bargaining agent,

and also with regard to time limits within which negotiations must commence to facilitate renewal of a collective agreement, were reflected in the legislation. The same treatment was accorded the recommendation with respect to the appointment of a mediator to assist the parties in reaching agreement when both parties so request, the recommendation that the Act allow for the parties to submit the dispute to final and binding arbitration and the recommendation that the Act provide for the taking of a strike vote by the employees' bargaining agent, strike action by employees and lock out action by the employer in instances where either party refuses to submit the dispute to arbitration. The major differences between the recommendations and that reflected in legislation, insofar as these latter matters were concerned, were that either party was given the right to ask for the assistance of a mediator and that only three days strike notice was required as opposed to ten days.

The recommendation that the regulation establishing the Code of Conduct pursuant to the Corrections Act be rescinded, while not requiring action by legislation, was accepted and quickly acted upon by the government.

The acceptance of the recommendation that the Public Service Labour Relations Act provide for a grievance procedure for employees not covered by a collective agreement was reflected in the Public Service

Labour Relations Act and by the provision for a "Public Service Grievance Board" under the Public Service Act.

The recommendation that an in-service training programme be established for management officials in government in the field of collective bargaining did not require action by legislation. Insofar as this Committee has been able to ascertain there was no specific direction given the Public Service Commission in that regard although the Commission, of its own volition, did attempt to do what it could within budgetary restraints. The recommendation that the necessary staff be recruited to increase the standard of service of personnel administration in the public service was, at least in part, accepted. Not long after the filing of the Higgins Report, a move was made to increase the numbers of personnel officers on staff at both the Public Service Commission and departmental levels.

As the Higgins Commission recommendation that there be a Personnel Policy Secretariat directly responsible to Treasury Board and charged with the responsibility of acting as the bargaining agent of government was not accepted, it followed that the recommendation that certain responsibilities of the then Civil Service Commission be transferred to the proposed Personnel Policy Secretariat could not be implemented. It also followed that, as the role of the Civil Service Commission was not changed as recommended by the

Higgins Commission, there was no point in it being renamed the Public Service Employment Commission or the revised Civil Service Act to be titled the Public Service Employment Act. However, the revised Civil Service Act was titled the Public Service Act and the Civil Service Commission was renamed the Public Service Commission.

The recommendation that the current delegation of powers by the Civil Service Commission with respect to personnel administration be revoked and that careful attention be paid by the Public Service Commission and the Treasury Board to any continuing abuse of temporary appointments to the public service did not require any action by legislation. All that was necessary was for the Order-in-Council referred to in the Higgins Report[25] to be rescinded. This Committee understands that the Public Service Commission has discussed the matter with both past and present administrations, but that the said Order-in-Council is still in effect.

The legislation followed the recommendation that there be a specific definition of the components of merit, and wording almost identical to that put forward by the Higgins Commission was contained in the Public Service Act. The recommendation that the legislation provide

---

[25] Higgins Report, p. 71.

a certified employee bargaining agent the right to appoint an observer to selection panels was not followed. However, such a provision has become an accepted policy of the Public Service Commission.

Insofar as the last, but no means least, recommendation of the Higgins Commission was concerned - i.e. that priority be given to the expansion of training and development programmes and that an Advisory Committee on Training composed of Commission, Departmental and Treasury Board officials be established to assist in, and encourage, the provision of a wide range of inter-departmental and departmental in-service training, action by legislation was not required, but the Public Service Commission received no direction in that regard. The Public Service Commission, however, did take cognizance of the observations and recommendation contained in the Higgins Report and, while not involving Treasury Board, did set up an inter-departmental committee which made sincere attempts to set up and construct new and improved training programmes.

Certification of Bargaining Agents

Employee groups acted quickly in the area of certification. The B. C. Government Employees' Union was certified by the Labour Relations Board as the bargaining agent for the Public Service Bargaining Unit on March 18, 1974. The Registered Nurses Association of British Columbia and the Registered Psychiatric Nurses Association

of British Columbia were jointly certified as the bargaining agent for the Nurses' Bargaining Unit on April 16, 1974, and the B. C. Government Professional Employees Association was certified to bargain on behalf of the Licensed Professional Bargaining Unit on May 3, 1974.

An Account of Bargaining

As was envisaged by the Higgins Commission[26], the B. C. Government Employees' Union and the Public Service Commission dealt with the matter of managerial and confidential exclusions prior to commencement of negotiating the first master agreement for the Public Service Bargaining Unit. While there was give and take on both sides, and while neither side was completely satisfied with the outcome, agreement as to which positions and persons would be excluded from the provisions of the agreement did not take that long to reach. There was also agreement that the matter of exclusions should be dealt with on an "on-going" basis, in cases where either side sought changes.

Actual negotiations between the Public Service Commission and the B. C. Government Employees' Union commenced in April, 1974 and the first master agreement was signed on June 28, 1974. The Union was under pressure from its membership which had previously been denied the right to bargain collectively and was, therefore, anxious to

---

[26] Higgins Report, p. 35.

secure as much as possible in the first agreement; the Public Service Commission had little lead time to prepare for bargaining, it did not have the expertise required to carry out the role of negotiator for the government and experienced difficulty in obtaining a clear mandate. In spite of these factors and the periods of heated debate and argument, never did negotiations reach the stage of breaking down.

The contents of the master agreement drew criticism from many sources, particularly employers in the private sector. Some of what was in the agreement, however, reflected the philosophy of the then Government and, moreover, what was over-looked was the fact that certain benefits the agreement gave to public service employees were those that their counterparts in the private sector, and in other areas of the public sector, had enjoyed for some time. Line management was critical of the agreement, claiming that it took away the right to manage and that a number of provisions would preclude efficient administration. While some of the criticism was valid, some reflected the lack of understanding that the relationship between managerial persons and employees is different under collective bargaining.

Component negotiations between the Public Service Commission and the B. C. Government Employees' Union did not proceed as smoothly nor as quickly as the master agreement negotiations, despite the fact that attempts were made to expedite the thirteen sets of negotiations by having two or three sets going on concurrently. Both sides must

accept blame for this. Again, management negotiators were in the position of negotiating without adequate instructions and most of them lacked either negotiating experience or a proper knowledge of the public service and the governing legislation. On the union side, many of the components took the position that they were autonomous and attempted to build into their agreements matters which were non-negotiable or which rightfully belonged at the master agreement level. There were a number of instances where negotiations broke down and the assistance of a mediator was required. There were no work stoppages although two cases reached the strike vote stage. Component negotiations commenced in July, 1974 and did not end until the signing of the last agreements in April, 1975.

Criticism was directed at the component agreements, particularly insofar as the amount of wage and salary increases was concerned. While the cumulative effect of the staged increases in percentage terms may have appeared to reflect overly generous treatment, what was overlooked was that denial of collective bargaining to public service employees over the years had resulted in their salaries falling far behind the salaries of organized employees in the private sector and in other areas of the public sector and that a significant "catch up" was necessary.

The same procedure for determining exclusions was followed for the Nurses' Bargaining Unit as was followed in the case of the Public

Service Bargaining Unit represented by the B. C. Government Employees' Union. Prior to the first master agreement negotiations, the Public Service Commission and the representatives of the Nurses' Bargaining Unit met and agreed as to which positions would be excluded from the provisions of the agreement. In reaching agreement, comparison was made to the practice followed in general hospitals. In retrospect and from management's experience in attempting to administer the agreement since then, the comparison with general hospitals was not a valid one as neither the situation in general hospitals nor the type and nature of collective agreements covering nurses in general hospitals can be said to be analagous.

Negotiations for the Nurses' master agreement commenced in July, 1974 and the agreement was not signed until October 25, 1974. Negotiations for the two component agreements commenced immediately after the signing of the master agreement and the component agreements were signed on January 7, 1975. While the negotiations were protracted, there were no instances of breakdown at either level. It was not until the contents of both master and component agreements were known that "eyebrows were raised" both within and outside the public service. There were cases where certain provisions were more generous than those applying to nurses in general hospitals, cases where provisions were in conflict with legislation and cases where master agreement items had been dealt with at the component agreement level. Both sides must be faulted although the greater fault quite clearly belongs

to the government side. The negotiator for the government lacked an intimate knowledge of the public service and the governing legislation, and because of this particular care should have been given to ensure that he had proper and clear instructions.

In the case of the negotiations with the Licensed Professional Bargaining Unit for which the B. C. Government Professional Employees Association was certified as bargaining agent, the Public Service Commission attempted to deal with the matter of exclusions in the same manner as it had with the other two bargaining units. However, at the outset of discussions the Association took a very strong stand, stating that there should be very few, if any, exclusions from its bargaining unit. The reason put forward was that the Association was a management union and that if the same criteria were applied to it as were applied to the other two units, the unit would not be a viable one. The matter was never resolved, and has not been resolved to this day, although the Association did agree to a very few exclusions at the end of the master agreement negotiations when it appeared that, without exclusions, the conclusion of an agreement was in jeopardy. While the position taken by the Association may appear unreasonable, the government side must bear the brunt of the blame in that the Public Service Commission negotiators should have taken a firm stand and have refused to discuss other matters until a reasonable number of exclusions was forthcoming. The government side must also be faulted for not taking a stronger stand

on the matter of the number of components in the Licensed Professional Bargaining Unit. Twelve components for a unit of approximately one thousand employees is, to put it mildly, somewhat ridiculous, especially when seven of the components each represent thirty or fewer employees.

To say that the master agreement negotiations between the Public Service Commission and the B. C. Government Professional Employees Association, which commenced in July, 1974, were difficult and protracted would be an understatement. The Association maintained that, as its bargaining unit represented professionals, it should be treated differently in most respects and that its collective agreement should be built to reflect this. This Committee understands that the intransigent position of the Association was not discouraged by the other side. The Higgins Commission spent hours debating whether the need to treat licensed professionals separately was sufficiently great to warrant a slight modification to its non-fragmentary approach to bargaining unit determination, and concluded that the only valid reason was to avoid the conflict of interest with their professional body that their inclusion in a large bargaining unit could lead to. For that reason, and for that reason alone, the Higgins Commission recommended that there be a Licensed Professional Bargaining Unit.[27]

Eventually, agreement on the contents of a master agreement was reached between the negotiator for the government side and the

---

[27] Higgins Report, pp. 28-29.

negotiators for the B. C. Government Professional Employees Association. However, the majority of Public Service Commissioners refused to sign the agreement and the then Government declined to ratify it. A different negotiator for the government side was designated to attempt to re-negotiate the agreement and to modify it as much as possible. The agreement was modified somewhat and it was eventually ratified by both sides and signed on June 20, 1975. That agreement has ever since been the centre of controversy, with line management officials taking a very strong position that their ability to administer departments and branches in an efficient manner is hampered by the agreement, the most critical aspects of which being lack of sufficient management exclusions and the effect the flexible hours of work arrangement has on the hours of operation. The Joint Committee provided for in the contract and the powers delegated to such Committee have also been subject to criticism.

Negotiation of the B. C. Government Professional Employees Association component agreements commenced shortly after the master agreement was signed but, despite the fact that the question of salaries, and no other item, was dealt with at the component level, the last of the twelve component agreements was not signed until June 10, 1976. There were reasons for this. Probably the main reason was that the government side insisted on the agreements being negotiated consecutively rather than concurrently, its rationale being that, because the Association

had insisted on there being twelve components, when there was a definite historical relationship between certain job categories represented by different components insofar as both salaries and job function were concerned, such historical relationships should be maintained. The government side could foresee difficulties if negotiations were carried out concurrently, in that it was aware of the very definite views certain professionals had as to where their pay level should be relative to other professionals. Another reason was that there was a change in government in December, 1975, and the new Government took a much different approach from its predecessor in the matter of mandate and ratification of agreements. A third reason was the imposition of anti-inflation guidelines, which the Association contended resulted in some components having to agree to lower salaries than those afforded components negotiating earlier. During the component negotiations, there were instances when the assistance of a mediator was sought and there were instances where the Association requested the area of disagreement be settled by binding arbitration. In the instances where binding arbitration was sought, the government side declined to agree on grounds that the principle of comparability had been followed within the limits of the anti-inflation guidelines. The only criticism levelled at the component agreement settlements came from line management who observed, with justification, that senior categories within the bargaining unit were receiving greater remuneration than senior officials occupying excluded positions. Unfortunately, the same situation still prevails.

The second round of master agreement negotiations with the B. C. Government Employees' Union commenced in June, 1975 with the agreement being signed on November 14, 1975. With both sides working from a base and with more experienced negotiators, the initial stage proceeded with reasonable speed. There were times, however, when negotiations came close to breaking down due, on the one hand, to the Union's insistence on certain issues and, on the other, to the inability of Public Service Commission negotiators to respond because of lack of mandate direction. Greater involvement of line management by the government side led to greater consideration being given to departmental concerns and, from management's point of view, to a much more workable document on the attainment of the agreement. Possibly, the major gain in the new agreement, from the point of view of both sides, was what was thought to be clarification of master agreement items versus component agreement items. The major criticism of the agreement, from both within and outside of the public service, was the reduction of hours of work for a considerable number of employees.

Both sides considered the master agreement had now been improved and, consequently, expected the second round of component negotiations would proceed smoothly. Such was not to be the case. The negotiations commenced shortly after the introduction of the Federal Anti-Inflation Regulations. Subsequently, a provincial election was called, a new Government was elected and, in due course, opted for the province's inclusion under the Federal Anti-Inflation Guidelines. The parties,

meanwhile, were attempting to negotiate component agreements and, due only to responsible action on the part of the Union Executive, the government side was able to reach agreement with a number of components on most items other than wages. Certain other components, despite what was thought to be resolved in the second master agreement, strove to maintain the autonomous position they had demonstrated during the first round of component negotiations. Two of these were the Marine Services Licensed and Marine Services General Components, who were negotiating jointly with the government side. Unfortunately, while negotiations with these two components were in progress, though not smoothly, the British Columbia Ferries management announced that there were to be large scale lay-offs within the British Columbia Ferries operations. The timing of this announcement, although not intended to bring about a total breakdown in negotiations, could not have been better calculated to do so. To further complicate matters, at about the same time, Bill 24 (British Columbia Ferry Corporation Act) was tabled in the Legislature, the intent of the Bill being that the British Columbia Ferries would become a Crown Corporation and its employees would cease to be public service employees.

The Public Service Commission attempted to comply with the provisions of the master agreement concerning lay-off, but the Union did not respond as it viewed the lay-offs as unnecessary. There was a complete breakdown in negotiations, the two components took strike votes and served strike notice on the Public Service Commission. Strike action

would undoubtedly have taken place had not the Minister of Labour intervened and referred the matter in dispute to an Industrial Inquiry Commission pursuant to Section 122 of the Labour Code of British Columbia. Due to the complexity of the issues, the inquiry took over a month to conclude, but it had the desired result. The Commission's report was accepted by the Government Employee Relations Bureau, which had by that time replaced the Public Service Commission as the bargaining agent for government, and by the Marine Services General Component. To this date, the report has not been accepted by the Marine Services Licensed Component, although there has been no further indication of "job action" by that component.

Because of the question of the worth of the benefits obtained by the Union in the master agreement in light of the Anti-Inflation Guidelines, the Government Employee Relations Bureau and the Union agreed that there should be an "across-the-board" settlement on wages and salaries rather than a separate settlement for each component. Finally, and with the assistance of a mediator, a modest "across-the-board" settlement was reached between the parties and such settlement has recently been ratified. Insofar as the component agreements are concerned, at the time of writing this report, only one has been signed.

The second round of bargaining with the Nurses' Unit commenced in October, 1975. From the first day, the climate was strained and negotiations proceeded extremely slowly. The government side took the position that, particularly insofar as cost items were concerned,

the master agreement could not be dealt with in isolation from the component agreements. It also took the stand that the existing agreement did not provide for sufficient managerial exclusions and that it contained provisions that should not be there. The Nurses' Associations asserted that they saw no need for additional exclusions, that they wished to retain the provisions of the existing agreement and to build on them by adding certain benefits that the B. C. Government Employees' Union and the B. C. Government Professional Employees Association had acquired. Negotiations soon broke down and the Nurses' Associations asked for the assistance of a mediator. While he was able to get negotiations going again, the mediator did not "book out". He elected to remain in the background, with the consent of the parties, in case his services should be required further.

Negotiations proceeded very slowly with lengthy intervals between meetings. There was another breakdown in negotiations during the latter part of November, 1976 and the Nurses asked the mediator to "book out". The Nurses sought arbitration, but the Government Employee Relations Bureau would not consider such action at that time, stating that arbitration was not appropriate when the membership represented by the Nurses' Associations had not been given details of the settlement proposed by the government side. At the time of writing this report, the Nurses' Associations have gone to the membership to obtain a consensus on the offer from the

government side and the membership has endorsed strike action.

The second round of negotiations with the B. C. Government Professional Employees Association commenced late in October, 1976 and, at the time of writing the report, negotiations are continuing. Not much progress has been made, with the parties still at the stage of exchanging demands primarily relating to master agreement non-cost items.

Revisions to Legislation under Previous Government

In 1975, the previous Government tabled two Bills: Bill 135 (Public Service Labour Relations Amendment Act, 1975) and Bill 136 (Public Service Amendment Act, 1975). Both Bills passed Third Reading and were assented to June 26, 1975.

The amendments provided for by the Public Service Labour Relations Amendment Act could not have been considered to be of much significance, because the sections covering all but one of the amendments were never proclaimed. The section proclaimed related to the definition of "employee", the most notable effect of that section being that a person qualified under the Medical Act who is engaged and working in the practice of his profession was no longer considered to be an employee for purposes of the Act.

All but one of the amendments provided for by the Public Service

Amendment Act were for clarification purposes and the sections covering such amendments were not subject to proclamation. The section requiring proclamation, but which was never proclaimed, provided for an increase in the number of members of the Public Service Commission from five to nine.

Action Taken By Present Government

Shortly after the present Government took office in December, 1975, it observed upon what it considered to be inadequate avenues of communication between the Public Service Commission, which was the bargaining agent for the government, and the Treasury Board which was charged with the responsibility of giving direction to the Public Service Commission, and sought ways to rectify the situation.

As an interim measure, the Lieutenant-Governor in Council designated the Provincial Secretary as a member of the Treasury Board pursuant to Section 3 of the Public Service Labour Relations Act (Order-in-Council 1012/76 refers). Such action meant that the Provincial Secretary would not be a member of the Treasury Board for all purposes, but for the purposes only of the Public Service Labour Relations Act. At the same time as the Provincial Secretary was appointed to the Treasury Board, one of the members of the Public Service Commission was isolated from his colleagues and designated as Commissioner-in-Charge of Labour Relations with instructions to report direct to the Treasury Board through the Provincial Secretary on labour relations matters.

While the interim arrangement worked well, it was the Government's desire to have, as quickly as possible, a more formal way of providing it with a strong and viable bargaining agent. With this in mind, the Provincial Secretary, during the 1976 sitting of the Legislature, tabled Bill 81 (Public Service Act) and Bill 82 (Public Service Labour Relations Amendment Act, 1976). The revised Public Service Act and the Public Service Labour Relations Amendment Act, 1976 were enacted on June 29, 1976.

The principal thrust of the two Acts was a change in the Government's employee relations bargaining agency. The Treasury Board was designated as bargaining agent for the government, acting in consultation with and through a new Bureau to be known as the Government Employee Relations Bureau. The two Acts also had a pronounced effect on the Public Service Commission. By the transfer of personnel functions other than those involving appointment to and within the public service, and sponsoring, encouraging and administering programmes of employee safety and training, from the Commission to the Bureau directly, or to the Treasury Board, to be carried out with the assistance of the Bureau, the Commission was placed in the position of being more able to effectively carry out its role of an impartial, independent body to ensure that recruitment to and appointment within the public service should be solely on merit. Thus, one of the strongest recommendations contained in the Higgins Report[28] was

---

[28] Higgins Report, pp. 20-22.

finally implemented.

The new Public Service Act changed the title of the Public Service Grievance Board, which was never constituted, to the Public Service Adjudication Board and made alteration to both the structure and duties of the Board. To further strengthen the independency of the Public Service Commission, the Board's jurisdiction to hear appeals from decisions of the Commission was removed. Another change to the Board's duties was to allow it to act, subject to jurisdiction being conferred upon it pursuant to a collective agreement as defined in the Public Service Labour Relations Act, as a board of arbitration in respect of differences between the parties to a collective agreement.

As it experienced more time in office, and as its interest in collective bargaining heightened, the Government considered time was opportune for a thorough review of the collective bargaining procedures and methods within the public service and the governing legislation. The result was the appointment of this Committee.

CHAPTER II

PUBLIC SERVICE ADJUDICATION BOARD

While the subject covered by this chapter was neither a difficult one for the Committee to deal with nor one which was considered to be an overly contentious one, the Committee chose to deal with it first as the recommendations which flow from it have a significant bearing on the recommendations contained in other chapters.

Current Situation

The Public Service Grievance Board established by the Public Service Act, 1973 was never constituted and the part of the Public Service Act, 1976 which provides for the Public Service Adjudication Board, the successor to the Public Service Grievance Board, has not been proclaimed.

Without a Public Service Grievance Board, significant problems arose because, on the understanding that there was to be such a Board, the Public Service Commission and the employee bargaining agents included provisions in collective agreements to have certain matters referred to the Board for rulings. With no Board, those provisions in the collective agreements could not be complied with.

The absence of a Public Service Adjudication Board has generated at least as serious a situation. In fact, because of the alteration in the duties of the Public Service Commission and the modification in the duties of the Public Service Adjudication Board brought about by the new Act, it is essential that the Board be established as soon as possible if the recommendations made later in this chapter are not accepted. Briefly, the present duties of the Board are to deal with grievances of public service employees who are not covered by a collective agreement and, if authorized by a collective agreement, to arbitrate differences between the parties to the agreement.

> The Committee recommends that, if the recommendations set out in the latter part of this chapter are not followed, immediate action be taken to proclaim the part of the Public Service Act (Part III) providing for a Public Service Adjudication Board and that the Board be then constituted.

Proposed Situation

The reasoning put forward by the Higgins Commission for the establishment of a separate independent agency responsible for the administration of the Public Service Labour Relations Act with duties similar in scope to those performed by the Labour Relations Board in the private sector[1] is equally as sound today as it was in 1972. This Committee considers that the argument is even more

---

[1] Higgins Report, pp. 61-62.

compelling now for two reasons: first, present legislation provides for a Public Service Adjudication Board which, with an expansion of duties, could readily function as envisaged by the Higgins Commission; second, and with all due respect to the Chairman, Vice-Chairmen and members of the Labour Relations Board, there is a general impression, based on a number of decisions handed down by the Board, that there is confusion on the part of the Board as to the applicability of the Public Service Labour Relations Act in the public service as opposed to the applicability of the Labour Code, together with a lack of understanding of the public service classification system and the structure of the public service in general.[2] Also, there has been criticism of the delays experienced in having matters dealt with by the Board.

During the hearings held by this Committee, there was a consensus amongst the Public Service Commission, the Government Employee Relations

---

[2] Examples:

(a) Labour Relations Board Reference Number 166/74 B. C. Government Professional Employees Association - and - Public Service Commission - and - B. C. Government Employees' Union.

(b) Labour Relations Board Reference Number 45/75 Public Service Commission - and - The Printing Unions - and - B. C. Government Employees' Union.

(c) Labour Relations Board Reference Number 24/76 Robert Enoch - and - Public Service Commission - and - B. C. Government Employees' Union.

Bureau and the B. C. Government Employees' Union that the Public Service Adjudication Board's role should be expanded to include the responsibilities now assumed by the Labour Relations Board under the Public Service Labour Relations Act. In presenting its position on this matter, the Government Employee Relations Bureau made a very good point, and one that had been in the mind of the Committee. The point was that, notwithstanding the fact that the Public Service Adjudication Board's role should be expanded as declared, the area with regard to picketing, etc. should remain within the jurisdiction of the Labour Relations Board and, accordingly, it would be appropriate that Part V of the Labour Code apply to the public service where there is no conflict with the Public Service Labour Relations Act. The B. C. Government Employees' Union, in picking up the point made by the Government Employee Relations Bureau, went a step further and proposed that the Chairman of the Adjudication Board should also be a member of the Labour Relations Board when any matter under Part V of the Labour Code relating to a union or employer under the Public Service Labour Relations Act was being considered by a panel of the Labour Relations Board.

The B. C. Government Professional Employees Association, as a general principle, reserved judgment on the necessity for a new body to administer the Public Service Labour Relations Act, but took exception to the proposition that all but one part of the Labour Code should not apply to the public service without assurances that other

current statutory rights would be retained in an amended Public Service Labour Relations Act. The Nurses' Associations indicated satisfaction with the existing situation on what appeared to be the premise that a Public Service Adjudication Board would be less independent from the employer than the Labour Relations Board.

This Committee supports the proposal that the Labour Relations Board retain its jurisdiction over strikes, lockouts and picketing. Experience over the years has been that public service involvement with Part V of the Labour Code has been concerned with unions or persons who are outside public service jurisdiction and, therefore, to place any responsibility for policing the matters covered by Part V of the Labour Code with the Public Service Adjudication Board would serve to increase, rather than eliminate, the overlap of jurisdiction. Regarding the proposal by the B. C. Government Employees' Union that the Chairman of the Adjudication Board should be a member of the Labour Relations Board when there is public service involvement in a matter being considered by the Labour Relations Board under Part V of the Labour Code, this Committee rejected the proposal after serious thought although it could appreciate the Union's intent. The Committee's desire is for proper status of the Adjudication Board Chairman to be maintained and that could be in jeopardy if he were to be undermined at a Labour Relations Board hearing. Also, the Committee is of the opinion that, while there are areas where distinctions have to be made between the public and private sectors,

the area with which Part V of the Labour Code is concerned is not one of them.

Concerning the premise of the Nurses' Associations with regard to the question of independency of the Public Service Adjudication Board, the thrust of the Higgins Report was that the Adjudication Board, properly constituted, could be more independent of government.[3] This Committee, however, has dealt with a consideration overlooked by the Higgins Commission, that being that the Public Service Adjudication Board should be directly responsible to the Legislative Assembly. The concern expressed by the B. C. Government Professional Employees Association, insofar as the proposition that all but one part of the Labour Code should not apply to the public service is concerned, was well taken. This Committee, however, takes the view that it should go without saying that if the Labour Code were not to apply to the public service as proposed, it would be necessary to include in the Public Service Labour Relations Act a number of provisions presently contained in the Code. Some of these provisions, such as dispute procedures, are dealt with later in this report.

In summary, then, the Committee recommends:

1. that the Public Service Adjudication Board be established under the Public Service Labour Relations Act and be the agency responsible for the administration of said Act.

---

[3] Higgins Report, p. 61.

2. that with the exception of the matters of strikes and picketing, the Public Service Labour Relations Act be exclusive labour legislation for the public service, with the Labour Relations Board exercising jurisdiction over the public service only under Part V of the Labour Code of British Columbia and that jurisdiction should be subject to any specific provisions in the Public Service Labour Relations Act,

3. that the part of the present Public Service Act (Part III) referring to the Public Service Adjudication Board be removed from said Act, and that all reference to the Public Service Adjudication Board be contained in a revised Public Service Labour Relations Act.

4. that the constitution of the Public Service Adjudication Board be the same as presently described in Part III of the Public Service Act, but that the revised Public Service Labour Relations Act stipulate that the Public Service Adjudication Board is directly responsible to the Legislative Assembly.

5. that duties of the Public Service Adjudication Board be similar to those envisaged by the Higgins Commission,[4] with the exception that the Board should not hear appeals by public service employees who consider they have been aggrieved by a decision of the Public Service Commission. It is considered more appropriate that the method of appeal concerning Public Service Commission matters be provided for in the Public Service Act.

6. that there be no right of appeal in law against the decisions of the Public Service Adjudication Board, but that there should be access to the courts for the purpose of ensuring that the Board stays within its statutory jurisdiction and that it acts with procedural fairness.

---

[4] Higgins Report, p. 63.

This Committee strongly endorses the observation contained in the Higgins Report that the Public Service Adjudication Board should not act as an arbitrator on disputes that arise during the course of actual negotiations.[5]

As a final note to this chapter, the Committee would like to stress the need for great care to be taken in the making of appointments to the positions of Chairman and Vice-Chairmen of the Public Service Adjudication Board. While it will be necessary for the Chairman to bring many qualities to the job, it is essential that he bring an objective approach and be acceptable to both employer and employee sides. In the case of Vice-Chairmen, again certain qualities will be required, but it is essential that the appointments reflect both employer and employee interests.

---

[5] Higgins Report, p. 64.

CHAPTER III

DEFINITION OF PUBLIC SERVICE

Prior to the holding of its hearings, the Committee was aware that the absence of any concise statutory definition of "Public Service" had caused problems over the years. The Public Service Labour Relations Act contains no definition and the Public Service Act definition merely states "all employees under this Act". As public service labour legislation is separate from that of the private sector, the Committee was determined that the confusion that had existed must be overcome, and that the answer was to define "Public Service" on the basis of management control rather than on the basis of which agency has authority to make appointments.

The Committee was also aware of the Government's wish for some type of basic compensation policy applicable not only to public service employees but also, as far as possible, to employees of Crown corporations and other public agencies dependent to any significant degree upon the government for funding.

The Committee was receptive, therefore, when the Government Employee Relations Bureau put forward a proposal that appeared to answer the

definition question. The proposal also appeared to provide the means of establishing a basic compensation policy, or at least the means of establishing channels of communication to support the concept of co-ordination of collective bargaining and related matters between all organizations deemed to be within the government's overall operations.

The proposal was that legislation should define a specific group with the residual groups falling under the jurisdiction of the Labour Code. In other words, the Public Service Labour Relations Act should clearly define public service and separate that area into two definable groups: a larger group composed of all operations within the jurisdiction of the Act; and a group, within the larger group, for which the Treasury Board is the employer.

With the exception of the B. C. Government Professional Employees Association, there appeared to be a consensus that the Bureau's proposal had merit. The Association strongly opposed the suggestion that the jurisdiction of the Public Service Labour Relations Act be expanded to cover other public sector segments, contending that it would arouse mistrust and suspicion among the employees and organizations currently covered by the Labour Code, and do damage to industrial relations peace in the province. Had such comments come from the B. C. Government Employees' Union, possibly more cognizance

would have been taken of them because that Union is active in, and knowledgeable about, the labour movement in British Columbia.

This Committee considers the Government Employee Relations Bureau proposal to be a good one and will endorse it in the form of recommendations. In addition to clarifying "Public Service", it should help prevent the "whip-sawing" and "leap frogging" that has taken place between various segments of the public sector during the past few years.

> The Committee recommends that, under the revised Public Service Labour Relations Act, the Public Service be defined as the several positions in or under any department or ministry established under any Act of the Legislature, and any Board, Commission, Agency, Association or Organization of the Executive Government of British Columbia listed in an appendix to the Act.

By that definition, the Public Service would include Boards and Agencies which have been considered in the past to be separate employers. The Lieutenant-Governor in Council should be empowered to include agencies which, while operating outside the direct control of the Treasury Board, may be appropriate for inclusion under the Public Service Labour Relations Act.

> The Committee therefore recommends that the appendix to the Public Service Labour Relations Act be separated into two parts: Part I being that part of the Public Service for which the Treasury Board is designated as the employer and

> Part II being that part which would include agencies designated as separate employers.
>
> It also recommends that the Lieutenant-Governor in Council be empowered to move segments of the Public Service from one part to the other, or out of the jurisdiction of the Public Service Labour Relations Act to the jurisdiction of the Labour Code or vice versa.
>
> It further recommends that provisions be established for successor rights for segments being placed under or being removed from the jurisdiction of the Public Service Labour Relations Act.

In the chapter "Public Service Adjudication Board" the Committee recommended that the Board be the body responsible for the Public Service Labour Relations Act. From that recommendation flows the following:

> The Committee recommends that the Public Service Adjudication Board be empowered to define bargaining units for separate employers under the Public Service Labour Relations Act.

CHAPTER IV

DEFINITION OF EMPLOYEE

The subject covered by this chapter was not a contentious one and, during the hearings, there appeared to be a consensus that there should be some improvement made to the definition of "employee" as presently set out in the Public Service Labour Relations Act.

The Act makes the distinction between employees who are excluded from the provisions of the Act by definition and those who are excluded from the application of a collective agreement by agreement of the parties. The submission from the Government Employee Relations Bureau included a proposal that the definition of "employee" be amended to exclude all persons to whom the provisions of the Act do not apply.

The Bureau's proposal brought reaction from two of the employee groups. The B. C. Government Employees' Union made the point that exclusions, except those specifically named in the Act, should be determined through negotiations by the parties. The point was well taken. The B. C. Government Professional Employees Association made only a passing reference to the Bureau's proposal for amendment of the definition but, because of what it foresaw to be a direct conflict between that proposal and its views on exclusion designation,

it expounded at great length on the latter subject.

Exclusion designation is dealt with in another chapter. The definition that this Committee recommends should meet the intent of the Bureau's proposal and also allay the concern of the B. C. Government Employees' Union.

It is recommended that the following definition be included in the revised Public Service Labour Relations Act:

"employee" means a person employed in the public service, as defined in this Act, except a person who, in the opinion of the Public Service Adjudication Board, is:

(i) a person appointed to office by the Lieutenant-Governor in Council under the provisions of any Act of the Legislature;

(ii) a person appointed to office under the authority of the Speaker of the Legislative Assembly;

(iii) a person employed in the office of the Lieutenant-Governor in Council, a member of the Executive Council, or in the office of the Government or the Opposition parties;

(iv) a person locally engaged outside of British Columbia;

(v) a person whose compensation for the performance of the regular duties of his position or office consist of fees of office, or is related to the revenue of office in which he is employed;

(vi) a person qualified under the Legal Professions Act or the Medical Act, including an enrolled student under such Act, who is engaged in and working in the practice of his profession;

(vii) a person employed as a Justice of the Peace, or a Registrar, Deputy Registrar and Assistant Registrar of a registry of any Court, or a Court Administrator of any Court;

(viii) a person employed as a Sheriff and Senior Deputy Sheriff, or Chief Court Reporter and Deputy Chief Court Reporter;

(ix) a person employed by or under the Public Service Adjudication Board, the Budget Bureau of Treasury Board or the Government Employee Relations Bureau;

(x) a person whose term of employment is less than sixty days;

(xi) a person designated by the parties or the Public Service Adjudication Board as a managerial or confidential exclusion.

It will be noted that the major differences from the definition presently in the Act are the additions of persons described in (i), (ii), (iii) and (ix); the deletion of references to persons employed by, or in, Crown corporations and other agencies as a corollary to the recommendation in the chapter "Definition of the Public Service" with regard to separate employers, and the deletion of references to certain specific managerial and confidential classes which can be dealt with under the provision for exclusions.

CHAPTER V

EXCLUSIONS

The Higgins Commission, in dealing with the matter of exclusions, took the position that, since to be excluded is to be denied access to the collective bargaining process, the number of exclusions should be kept to a minimum. From that position flowed a further position that, when determining exclusions, care should be taken to ensure that only those persons having a definite responsibility for management of employees, as well as those persons engaged in a truly confidential capacity are excluded.[1]

In framing its recommendations on the subject, the Higgins Commission considered that the matter of determining which persons or positions should be excluded should be left to the parties but, realizing that there would be instances when the parties could not agree, also believed that there should be provision for the area of disagreement to be referred to a third party for a ruling. The Higgins Report contained the following recommendation:

---

[1] Higgins Report, p. 35.

"(a) *that the Public Service Labour Relations Act provide that those persons performing managerial or confidential roles are not considered employees for the purposes of the Act:*

(b) *that the designation of positions as managerial or confidential be left to the two parties; and that*

(c) *if the two parties cannot agree within a period of ninety days after the matter has been raised at the bargaining table, the area of disagreement be placed before the Public Service Adjudication Board for a ruling."*[2]

The Public Service Labour Relations Act contained provisions very similar to those covered by parts (a) and (b) of the recommendation presented by the Higgins Commission, but made no provision for an area of disagreement to be referred to a third party.

This Committee agrees with the Higgins Commission general approach to the matter, and considers it essential that there be provision for a third party to rule on areas of disagreement. Experience over the years has proven that such provision is indeed essential,

---

[2] Higgins Report, p. 36.

and there appeared to be a consensus in that regard amongst the parties attending the hearings held by the Committee. The Committee thinks the Higgins Commission was overly liberal in connection with the time it proposed be allowed to pass before an area of disagreement is referred to a third party. Also, the Committee's opinion is that the legislation should make it clear that the matter of exclusion designation should not be restricted to the time of the actual negotiations of a collective agreement between the parties. Structures of, and conditions within, ministries do not remain static and each party should be free to take up an exclusion matter with the other party at any time.

> The Committee recommends that, in addition to the provisions presently contained in Section 12 of the Public Service Labour Relations Act, there be the following provisions in the revised Act:
>
> 1. that negotiation between the parties to determine employees or classes of employees to be excluded from a collective agreement shall not be restricted to the time of the actual negotiations of a collective agreement, but that such negotiation may take place prior to the actual negotiations of a collective agreement or at any time during the life of a collective agreement; and
>
> 2. that if the parties cannot agree within a period of sixty days after an exclusion matter has been raised by either party, the area of disagreement must be placed before the Public Service Adjudication Board for a ruling.

It is also the view of this Committee that guidelines should be set

out in the revised Act to assist the parties and the Board in the matter of exclusion designation. While there was not complete consensus amongst the parties in this regard, it should be noted that guidelines similar to those this Committee has in mind, presently are contained in Article 2.01 of the present master agreement between the Government and the B. C. Government Employees' Union.

> The Committee recommends that the following guidelines for exclusion determination be set out in the revised Public Service Labour Relations Act:
>
> 1. position incumbents employed for the primary purpose of exercising management functions.
>
> 2. position incumbents employed in a confidential capacity in matters relating to the development of government programmes.
>
> 3. position incumbents employed in a confidential capacity in matters relating to labour relations, including all persons employed as Personnel Officers.
>
> 4. a sufficient number of position incumbents to represent management in matters relating to labour relations, taking into account both operational and geographical considerations.

While the guidelines set out above are not identical to those contained in the present B. C. Government Employees' Union master agreement, this Committee does not intend that legislative amendment be used to renegotiate or nullify the provisions of a collective agreement. In another chapter of this report, the point will be made that provisions must be included in legislation to preserve the sanctity and effect of agreements in effect upon enactment of revised legislation.

CHAPTER VI

TREASURY BOARD

As was indicated in the "History" chapter, by way of the Public Service Act, 1976 and the Public Service Labour Relations Act, 1976 the Treasury Board was designated as bargaining agent for the Government, acting in consultation with and through a new Bureau to be known as the Government Employee Relations Bureau. This action finally brought about the implementation of one of the strongest recommendations contained in the Higgins Report, and the Committee would not be making any observations had not certain matters arisen during its inquiry.

Firstly, while the Government Employee Relations Bureau is an agency of Treasury Board, all reference to it and its duties is contained in the Public Service Act and the Public Service Labour Relations Act; however, the Treasury Board and its powers and duties are established under the Audit Act. Secondly, there is evidence of an overlap of jurisdictions as the staff of Treasury Board is being organized, a situation this Committee understands is of concern to the Government. The Committee realizes it is running the risk of being accused of "second guessing" the Government in dealing with the latter matter. Nevertheless, it intends to make observations and put forward recommendations for

what it considers to be the best method of rectifying the situation in view of the Committee's terms of reference.

At this time, a unit is being organized within Treasury Board which is to be responsible for providing staff assistance and advisory services to the Chairman and members of Treasury Board, and included in its duties is the analysis of all existing and proposed government programmes. For want of a better title, the Committee will refer to such unit as the Budget Bureau.

The move to set up a Budget Bureau is a good one, and a move for which the Government should be commended. Contrary to the situation in other government jurisdictions, both at the Federal level and in other provinces, the Province of British Columbia to date has not had the machinery to permit the Treasury Board to discharge its functions in an efficient manner. It is to be noted that this shortcoming was alluded to by the Higgins Commission.[1]

The Government Employee Relations Bureau, pursuant to the provisions of the Public Service Act, 1976, is responsible for matters respecting organization, proposed organization, or proposed change in the organization of employees in all ministries, as well as being responsible for the matter of establishment control. At the time of the

---

[1] Higgins Report, p. 21.

enactment of the Public Service Act, however, there was no indication that there would be a Budget Bureau charged with the responsibility for programme analysis. This Committee suggests that the area of overlap is clear. How does one analyse a programme without examining the organizational structure that will facilitate the programme? Quite obviously, the relationship and the distribution of functions between the divisions of Treasury Board need to be clarified. The Committee has addressed itself to this matter.

The Budget Bureau should be assigned the responsibility for identifying organizational problems and specifying organizational structures in existing or proposed new ministries or other government bodies. This is necessary because matters of organization are a central consideration in analysing programme activities and assessing the efficiency of programme adminsitration within the government. It follows, then, that when analysing programmes, Budget Bureau staff should be examining organizational problems and structures as a matter of course, and there should be no need for a separate unit within the Government Employee Relations Bureau dealing with organization matters. It also follows that the matter of application of the classification system more rightfully belongs within the jurisdiction of the Budget Bureau than within the jurisdiction of the Government Employee Relations Bureau, because organizational structure and the application of classifications to the positions within the structure go hand-in-hand. The system of classification, however, and the devising of classification standards, should remain with the Government Employee Relations Bureau

because the system of classification is a negotiable item.

Concerning the matter of establishment control, the Committee considers it more logical that such be transferred to the Budget Bureau than remain within the jurisdiction of the Government Employee Relations Bureau. After all, establishment control is a form of budgetary control and the Budget Bureau will be reviewing all other aspects of expenditure control in relation to budgets.

Before going into the matter of line of reporting of the top level positions within the Treasury Board hierarchy, the Committee wishes to make recommendations relative to the observations it has made to date.

Accordingly, the Committee recommends:

1. that the part of the present Public Service Act (Part II) referring to the Treasury Board and the Government Employee Relations Bureau be removed from said Act.

2. that the Audit Act be revised and be more appropriately renamed the Financial Administration Act.

3. that the Financial Administration Act contain a full description of the powers and duties of the Treasury Board.

4. that the Financial Administration Act define specifically the respective duties and responsibilities of the Government Employee Relations Bureau and the Budget Bureau, and that such reflect the transfer of the responsibility for organizational analysis, establishment control and application of the classification system from the former to the latter.

The matter of line of reporting of the top level positions within Treasury Board had been of concern to the Committee prior to the holding of its hearings. In the submission presented by the Public Service Commission, there was the recommendation that the office of the Secretary to the Treasury Board be divorced from the office of the Deputy Minister of Finance, that the Secretary to the Treasury Board should have the status of a Deputy Minister and that both the Government Employee Relations Bureau and the Budget Bureau should report to the Secretary of the Treasury Board.

While this Committee is in accord with the recommendation that the office of the Secretary to the Treasury Board be divorced from the office of the Deputy Minister of Finance, if for no other reason than such change would remove any apparent relationship between the Ministry of Finance and the Treasury Board in the eyes of other ministries and clearly establish the separate status of the two bodies, it cannot agree with the recommendation that the two Bureaux of Treasury Board should report to the Secretary. By statute, the Chairman of the Government Employee Relations Bureau has Deputy Minister status and reports directly to the Chairman of the Treasury Board. He should continue to so report in that, as the bargaining arm of government, it is essential that the Government Employee Relations Bureau has ready and immediate access to Treasury Board. This Committee understands that the official presently in charge of the Budget Bureau also reports directly to the Chairman of the Treasury Board. In view of the Budget Bureau's terms of reference and the functions assigned to it, the direct line of reporting should continue and

the office of the official in charge of the Bureau should have Deputy Minister status. The resultant conclusion, then, is that there is no need for a full-time Secretary to the Treasury Board and there would appear no reason, other than present statutory requirements, why the official in charge of the Budget Bureau could not double in the capacity of Secretary.

> The Committee recommends that the Financial Administration Act not specify that the Deputy Minister of Finance shall be ex officio Secretary to the Treasury Board but, instead, that the pertinent section of the Act merely require that a senior official of the Treasury Board be Secretary.

Another matter that arose during the Committee's inquiry was what to some may be viewed as an overlap in the respective responsibilities of the Budget Bureau and the Public Service Commission for the training function. The Committee does not consider that there need be overlap, and that any problems envisaged should not arise if there is proper co-ordination of activities. The Budget Bureau, due to its close association with programmes and management staff in all ministries, should be responsible for identifying management potential and understaking manpower planning processes within ministries. As an extension of this responsibility, the Bureau should identify with ministry officials the principle staff training requirements. At that point, the Public Service Commission should assume the responsibility for co-ordinating the implementation of the required training courses. More detailed remarks with regard to training will be found in another chapter.

CHAPTER VII

EMPLOYEE REPRESENTATION

The subject of this chapter was one of the most difficult, if not the most difficult, with which this Committee had to deal. From the outset of its deliberations, the Committee realized that the issue would be a contentious one and that it would receive differing views from the various parties attending the hearings. The Committee decided, quite early, that it had a number of options:

1. it could recommend that the status quo be maintained - i.e. that there continue to be three bargaining units;
2. it could make the same recommendation as the Higgins Commission -- i.e. that there be two bargaining units;[1]
3. it could recommend that there be only one bargaining unit;
4. it could recommend that the legislation be silent on the number of bargaining units - i.e. that there be an unlimited number;

and that its decision would depend upon the extent to which it was convinced that the non-fragmentary approach was more suitable for the collective bargaining process in the public service than the fragmentary approach, or vice versa.

---

[1] Higgins Report, pp. 29,31,32.

During the hearings, the Government Employee Relations Bureau presented a co-ordinated, interrelated argument in favour of the single bargaining unit concept and, in so doing, repeated much of the reasoning behind the Higgins Commission advocacy of the non-fragmentary approach.[2]

The B. C. Government Employees' Union, for obvious reasons, could not endorse the Bureau's proposal and advocated retention of the status quo. The spokesperson for that Union, however, made the point that the B. C. Government Employees' Union presently represents more employees in professional classifications than does the B. C. Government Professional Employees Association, albeit those professionals represented by the former are not required to be licensed. The B. C. Government Professional Employees Association argued strenuously against the Bureau's proposal that there be a single bargaining unit, as did the Nurses' Associations. Both presentations were charged with emotionalism due to the understandable concern for preservation of the respective bargaining units.

The B. C. Government Professional Employees Association put forward a variety of reasons for its bargaining unit being retained and, in so doing, made repeated reference to the Higgins Commission. What that Association overlooked was that there was only one reason why the Higgins Commission recommended that there be a separate bargaining unit for licensed professionals; that reason was that their inclusion

---

[2] Higgins Report, pp. 26-27, 29-30.

in a large bargaining unit could lead to a situation whereby their ethical and professional responsibilities could be at odds with the requirements of that bargaining unit.[3] The Nurses' Associations' approach was somewhat more objective, and included the point that the two Associations are certified as bargaining agents under the Labour Code for employees outside of the public service and that nurses, irrespective of their employer, expect their professional association to bargain on their behalf.

Both the B. C. Government Professional Employees Association and the Nurses' Associations made reference to a recommendation put forward by the Public Service Commission that there be a joint council consisting of representatives of all bargaining units and management to consider matters which should be common to all employees, and contended that the establishment of such a joint council would resolve some of the problem areas alluded to in the Government Employee Relations Bureau submission. One of the spokespersons, however, stated that there would need to be a method for the settling of disputes at the joint council level. This attitude would only result in the creation of yet another level of bargaining should a joint council be set up.

The method by which the Higgins Commission handled the complex and contentious issue of employee representation must be thoroughly

---

[3] Higgins Report, p. 28.

examined. This is necessary because it is apparent that, quite unintentionally, the Higgins Commission created a problem that this Committee has inherited.

After debating at great length the advantages and disadvantages of an all-encompassing bargaining unit as opposed to the multiple bargaining unit concept, the Higgins Commission concluded that the all-encompassing approach was the answer. It stated that such approach would mean that the employees would be represented by a single effective organization, able to negotiate standard conditions of employment throughout the public service. However, by recommending that there also be a "licensed professional bargaining unit", the Higgins Commission contradicted its major conclusion.[4]

When the Legislature enacted the Public Service Labour Relations Act, 1973 and provided therein a third bargaining unit to apply to nurses, the non-fragmentary approach of the Higgins Commission was further eroded. As bargaining proceeded and agreements were signed, situations that the Higgins Commission had cautioned against appeared and, for that matter, exist today. Examples are:

1. District Managers in the Ministry of Highways who are non-professionals receiving salaries and benefits different from licensed professionals carrying out the identical job function in the same Ministry.

---

[4] Higgins Report, pp. 23-31.

2. Nurses in institutions receiving salary increments on an automatic basis working alongside nursing support personnel whose salary increments are based on performance.

3. Senior technicians in a number of ministries working along side junior licensed professionals with each receiving different overall benefits.

4. Employees of closely related disciplines, such as occupational therapy and physiotherapy, being in separate bargaining units and receiving different benefits solely because one discipline has a licensing body and the other has not.

5. A non-professional in charge of forest protection in one district within the Forest Service having a salary and set of working conditions different from his counterpart in another district because the latter is a licensed professional.

Situations such as these should not be allowed to continue. Not only do they do nothing for the morale of by far the majority of public service employees, but they also serve to contribute to inter-union rivalry and detract from effective and stable collective bargaining. If the present fragmentary structure remains or is expanded, there is no doubt but that things will become worse; thus, the only likely manoeuvre open to the government negotiator will be to hold to the position of the large unit when dealing with the small units.

Of the options set out at the beginning of this chapter, this Committee has to take the view that there is only one open to it. The Higgins Commission was correct when it concluded that the all-encompassing approach was the answer. In retrospect, it is apparent that it should have adhered to that principle, although it must be noted that the situation has changed since 1972. At that time, there was no provision under the then Labour Relations Act for access to the collective bargaining process by licensed professionals and, over the years, the attitude of professionals generally has changed. While they still avoid the use of the word "union" when referring to the organizations that bargain on their behalf, they apparently no longer believe that a strong and vital position at the bargaining table is inconsistent with professionalism.

In the opinion of this Committee, the reason for the Higgins Commission recommendation that there be a separate bargaining unit for professionals, i.e. conflict with the licensing body, was overstated then and has even less validity now. What must be understood is that there is a difference between having the right to strike and actually engaging in a strike, and this Committee has seen no evidence that the B. C. Government Employees' Union holds the necessity to provide essential services in the interests of health, life and safety in any lower perspective than members of professional associations.

> The Committee recommends that the revised Public Service Labour Relations Act provide that there be one bargaining unit in that part of the public service for which the Treasury Board is designated as the employer. (See chapter entitled "Definition of Public Service" for recommendation that there be a two part definition of public service.)

This Committee recognizes that it is difficult to undo the past, and that the foregoing recommendation will invite strong opposition from the B. C. Government Professional Employees Association and the Nurses' Associations. However, it is the Committee's most sincere hope that the two groups will eventually realize that the intent of the change is not to deny them access to collective bargaining, but to provide for a more orderly collective bargaining process for all public service employees.

As a corollary to the recommendation in the chapter "Definition of Public Service" for an expanded definition of public service, it is essential that this chapter contain a recommendation with regard to bargaining units for employees in agencies designated as separate employers.

> The Committee therefore recommends that, when the Public Service Adjudication Board is defining bargaining units for agencies designated as separate employers, it be restricted to defining one bargaining unit for each separate employer, and that the revised Public Service Labour Relations Act so provide.

CHAPTER VIII

SCOPE OF BARGAINING

The Higgins Commission recommended that the scope of bargainable issues be as broad as possible. Its report then went on to indicate that there were two possible approaches to defining the wide scope recommended: one is to list the items that should be subject to bargaining; the other is to set out the items to be excluded from bargaining, any other items being, by implication, subject to bargaining.[1] The Higgins Commission considered the latter approach to be more practical and that approach was followed when the Public Service Labour Relations Act was drafted.

As there was consensus among the parties on some items and differing views with respect to other items declared non-negotiable by Section 13 of the Public Service Labour Relations Act, and a request from both the management side and one of the bargaining units for clarification of the scope of excluded items, this chapter will deal with the items in the same sequence as set out in the Act.

1. Merit Principle

   The Act excludes the principle of merit and its application in the appointment and promotion of employees, subject to Section 20 of the Public Service Act.

---

[1] Higgins Report, p. 42.

The Higgins Commission recommended that the merit system be excluded from collective bargaining[2] but, as indicated in the chapter "History", the legislation negated the recommendation, at least in part. The Public Service Act provides that the procedures to be followed in determining merit shall be subject to agreement by a joint employer/employee committee.

While there was no significant comment on this item, there was a view expressed during the hearings that clarification was required. The Government Employee Relations Bureau took the position that, with the separation of the Public Service Commission from the bargaining process and its establishment as an independent agency, no responsibility of the Commission should be subject to collective bargaining. The Public Service Commission expressed similar views stating that, to ensure its independence, it should not be subject to any agreement with respect to procedures made by another agency.

This Committee endorses the recommendation of the Higgins Commission and considers it should have been followed without modification. The Committee's recommendation, therefore, reflects the Committee's stand in that regard and also should provide the clarification necessary.

---

[2] Higgins Report, p. 42.

> The Committee recommends that Section 13(a) of the Public Service Labour Relations Act be deleted and that it be replaced in the revised Act with the following:
>
> (a) the principle of merit and its application in appointments to and within the Public Service.

This recommendation should not be interpreted to mean that the Committee does not believe that an employee bargaining agent should not be consulted in matters involving merit determination, as the Committee's position is quite to the contrary. The Committee's view is that no such provision should be contained in the Act governing labour legislation. A recommendation for a means of consultation is included in the chapter "Public Service Commission".

2. Superannuation

The Act excludes all matters included under the Public Service Superannuation Act.

This is in line with what the Higgins Commission recommended. However, the further recommendation that there be a joint employer/employee committee whose responsibilities would include the making of recommendations on superannuation matters and the overseeing of investment of monies in the superannuation fund was ignored.[3]

---

[3] Higgins Report, p. 43.

At the outset of the hearings, the B. C. Government Employees' Union took a strong stand that the matter of superannuation should be negotiable. Later, however, it tempered its stand by saying that the establishment of the joint committee recommended by the Higgins Commission would suffice, at least as an interim measure. It made a further concession by stating that it did not necessarily agree with the need for the committee to oversee investment of funds. The B. C. Government Professional Employees Association and the Nurses' Associations endorsed the joint committee concept; the Government Employee Relations Bureau was silent on the matter, while the Public Service Commission indicated that it failed to see what benefit would be provided by establishing a committee.

The reasons for the Higgins Commission recommending that the subject of superannuation be excluded from the collective bargaining process are as valid now as they were in 1972.[4] This Committee sees much merit in the joint committee concept, however, and thinks that the Higgins Commission recommendation in that regard should have been given more serious consideration. With that in mind, the Committee held a discussion with the Superannuation Commissioner and ascertained that there is provision for a similar committee under the Municipal Superannuation Act and that such committee is operative. The main differences between the committee established under the

---

[4] Higgins Report, p. 43.

Municipal Superannuation Act and the one the Higgins Commission envisaged being established under the Public Service Superannuation Act are that the former is chaired by the Superannuation Commissioner and its responsibilities do not include overseeing the investment of funds. Therefore, with some modification to the terms of reference proposed by the Higgins Commission, this Committee would suggest that there should be no objection to a joint committee being set up under the Public Service Superannuation Act.

> The Committee recommends that the Public Service Superannuation Act be amended to provide for the establishment of a joint committee composed of members, equal in number, from the employee organizations and the employer under the chairmanship of a neutral person.
>
> The joint committee should be responsible for making recommendations to the Government, through the Provincial Secretary, on needed amendments to the superannuation plan.

3. Organization, Establishment, Etc.

The Act excludes organization, establishment and administration of the departments of the government, except the effect of reductions in establishment of employees, which shall be negotiated by the parties.

The Government Employee Relations Bureau submission, insofar as it related to this item, was misinterpreted by certain of the employee groups in that it was thought that the Bureau was attempting to build on what was presently there. The only plea

for a change came from the B. C. Government Employees' Union which, while accepting that organization and administration of various branches and ministries rest with management, claimed the "establishment" of a ministry or branch should be subject to union/management discussions. The reason given was that there were too many cases of the abuse of temporary employees.

While the Committee appreciates and understands the concern of the B. C. Government Employees' Union, it cannot agree that the proper avenue is to amend the subsection of the Act. The Committee addresses itself to the matter of temporary employees in the chapter "Public Service Commission". The Committee would also observe that there is a difference between discussion and negotiation, and that there is nothing in the Act to preclude discussion of non-negotiable matters.

4. Classification

The Act excludes the application of the system of classification of positions or job evaluation under the Public Service Act and regulations.

More than one of the parties attending the hearings raised the question as to what part of classification is negotiable and, in effect, what is the system of classification. To anyone familiar with classification and job evaluation, the question

was a strange one but, as clarification is obviously required, an appropriate definition should be included in the revised Public Service Labour Relations Act.

> The Committee therefore recommends that the revised Public Service Labour Relations Act contain the following definition:
>
> "system of classification" means the method of determining the relative placement of positions on the basis of the relative worth of duties and responsibilities.

In the event that illustration is required, the Committee would state that there are a number of methods: the Factor Comparison Method, whereby a number of bench-mark positions are carefully selected so that comparison may be made between the bench-marks and the positions being evaluated on the basis of such factors as education, experience, monetary responsibility, supervision received, supervision exercised, etc; the Point Rating Method, which is really a refinement of the Factor Comparison Method, whereby the factors are assigned a weighting in terms of points; the Position Standard Method, whereby the standard clearly sets out, in narrative terms, examples of job functions and the level of duties and responsibilities required to warrant a certain classification level; and so on.

Application of the system, which is not negotiable, is the utilization of the method - e.g. in the case of the Factor Comparison Method it would be the carrying out of the comparison

between the bench-mark positions and the positions being evaluated.

5. Training

The Act excludes the procedures and methods of training or retraining employees, other than those affected by Section 18 and other than training programmes administered within a branch or department that apply to one occupational group only.

That this became a contentious issue was undoubtedly due to the initial submissions from the Government Employee Relations Bureau and the Public Service Commission. The submission from the former, while not indicating that all aspects of the training function are under the jurisdiction of the Public Service Commission, contended that, with the action that had been taken to provide for the establishment of the Commission as an independent agency, its procedures for training and retraining of employees were not appropriate matters for collective bargaining. The Public Service Commission took the position that all aspects of training, other than those associated with technological change, should not be negotiable as training is the responsibility of the Commission.

The B. C. Government Employees' Union took the opposite view, stating that the provisions of the present subsection of the Act, which permits only those training programmes administered within a branch or department that apply to one occupational

group to be the subject of negotiations, are unnecessarily restrictive. That Union, therefore, argued strenuously against the submission of both the Government Employee Relations Bureau and the Public Service Commission. The B. C.Government Professional Employees Association also voiced objection to any suggestion that training be barred from the negotiating table.

The Public Service Commission does have the statutory right "to sponsor, encourage, administer, or participate in programmes of employee training and safety". Therefore, the Commission should be free to sponsor programmes such as those considered to be in the interests of providing a better calibre of employee or of providing certain skills in areas where they are lacking. Such is completely in line with its role as the recruiting arm of government. There are other aspects of training, however, that rightfully belong at the bargaining table and the Committee agrees with the B. C. Government Employees' Union that the present arrangement is overly restrictive.

It is apparent to this Committee that a change is required with regard to the designation of the part of the training function which is non-negotiable.

The Committee recommends that Section 13(e) of the Public Service Labour Relations Act be deleted and that it be replaced in the revised Act with the following:

(e) training programmes sponsored by the Public Service Commission.

CHAPTER IX

BARGAINING PROCEDURES

The subject covered by this chapter was a most contentious one with some of the parties, due to what had transpired since collective bargaining was afforded public service employees, coming to the hearings in anticipation of what the submissions of other parties would contain.

The Higgins Commission included in its recommendations what it considered to be a unique approach to bargaining procedures. It recommended that a two-tier system of negotiations be implemented: a "master" agreement covering those conditions of employment that are common to all members of the bargaining unit; and "component" agreements covering wages, salaries and those conditions of employment peculiar to an occupational group. Realizing that differences could arise between the parties as to what constituted an occupational group, it recommended that provision be made for such differences to be placed before the Public Service Adjudication Board for a ruling.

The Higgins Commission considered that the "master" agreement concept was in keeping with its conclusion that a bargaining unit should be service-wide in scope, and that the "component" agreement

concept recognized that special concerns and special interests exist among particular occupational groups.[1]

As was mentioned in the chapter "History", the Higgins Commission recommendation with regard to two-tier bargaining was accepted and also reflected in the Public Service Labour Relations Act. What exists, however, is not only a system of two-tier bargaining, but also a two-tier ratification process. The latter situation has a significant affect on the area of dispute settlement because component agreements are collective agreements and, therefore, do not stand alone. It is unfortunate that the Higgins Commission did not give due consideration to the ramifications that could arise. Under the two-tier arrangement, a master agreement can be negotiated, ratified and put into effect, then part or all of the bargaining unit can be affected by a dispute with a component composed of a small number of employees.

The submission from the Government Employee Relations Bureau claimed that the two-tier system had not worked, and that it should be eliminated and replaced by a system whereby there was one agreement with component addenda to that agreement. The B. C. Government Employees' Union advocated retention of the two-tier system for the reason that it had worked, and thought it would be unwise to tamper with a system designed for the public service that was working.

---

[1] Higgins Report, pp. 45-46.

The B. C. Government Professional Employees Association recommended that the two-tier system be substituted by a single agreement bargaining concept on the grounds that the two-tier system had not proven to be as workable nor as useful as had been anticipated. The Nurses' Associations stated that the present system had worked well for them and did not advocate any change. The Public Service Commission, in its initial submission, offered no comment on the subject.

During counter-argument, the B. C. Government Employees' Union focused on the dispute settlement area, contending that one of the main benefits of a two-tier structure was that it allowed for occupational disputes to be dealt with in isolation. By that means, the Union maintained, it would not be necessary to disrupt the complete operation of government as a result of an isolated dispute. It was the view of the Government Employee Relations Bureau that the principal value of the two-tier system was that it allowed smaller groups greater recognition than they would receive in a larger, homogeneous group, but that the compromise must be between the degree of recognition a small group can have and the power it can exert over the group as a whole. It also reiterated what had been said to be shortcomings of the system - that it is time consuming, that special concerns are limited, that it is counter-productive to the principle of equal treatment and that it tends to inhibit collective bargaining. The Nurses' Associations restated that the present system was working for them but, in so doing, implied that the application of the system in their bargaining unit could be different from the others. Later

during the hearings, the B. C. Government Professional Employees Association withdrew its proposal to eliminate the two-tier system.

The Committee, in dealing with this extremely contentious issue, has taken into account the views expressed by all parties and must conclude that some change in the present system is necessary.

The title of the Higgins Report was "Making Bargaining Work in British Columbia's Public Service". If those who claim that bargaining has worked are saying that, while there have been many instances of work stoppage in the private sector and in other parts of the public sector, there has been a general climate of peace in the public service, they are correct. On the other hand, bargaining in the public service has not worked as well nor as smoothly as envisaged by the Higgins Commission. The Higgins Commission recommended that the two-tier system be given a fair trial and this Committee, at least, is satisfied that this has been done.

The Committee cannot overlook that there has been a change in climate since the filing of the Higgins Report. Bargaining units have obtained significant improvements for public service employees in terms of better salaries, better benefits and other working conditions; for a number of reasons, one cannot contemplate further gains anywhere approaching those that have been made.

The Committee considers that there must continue to be a means for formal input at the component level. For that reason it cannot agree that the present two-tier system should be changed to the extent recommended by the Government Employee Relations Bureau. Nor can the Committee agree that the elimination of two-tier ratification would only lead to the dispute settlement problem described by the B. C. Government Employees' Union. To say that all members of the bargaining unit would be forced to withdraw their services if a component dispute could not be resolved in isolation is, to say the least, an exaggeration. A strike may result in all employees withdrawing all of their services, or part of the employees withdrawing part of their services - a broad spectrum of possibilities, the choice of which depends on whether the union is a responsible one.

> The Committee recommends that Section 11 of the Public Service Labour Relations Act be deleted and that it be replaced in the revised Act with the following:
>
> 11.(1) Every collective agreement concluded under section 9 or 10 shall consist of two or more parts as follows:-
>
> (a) a master part including all the terms and conditions of employment that are common to all employees in the bargaining unit; and
>
> (b) a subsidiary part for each occupational group including the terms and conditions of employment that apply only to employees in a specific occupational group in the bargaining unit.

(2) Specific occupational groups under clause (b) of subsection (1) shall be determined by negotiation between the parties.

(3) Where the parties are unable to reach agreement under the provisions of subsection (2) within thirty days of commencement of negotiations, the area of disagreement shall be placed before the Public Service Adjudication Board for a ruling.

The recommendation set out above makes it clear that there is only one agreement, thus providing that ratification must be on the complete agreement; it provides for formal input at the occupational group level; it allows for occupational group determination to be left to the parties and, where differences arise between the parties with regard to occupational group determination, it provides for the area of disagreement to be ruled upon by the Public Service Adjudication Board.

CHAPTER X

DISPUTE SETTLEMENT

The Committee was prepared for a lively exchange of views on the subject of dispute settlement; to some extent, this did take place. The strongest presentations came from the B. C. Government Professional Employees Association and the Nurses' Associations, both groups seeking the right to have some form of binding arbitration. The former referred to systems such as the one in the Federal Government where employee groups have the right to choose, prior to negotiations, whether disputes will be settled by binding arbitration or by the conciliation/strike route. The latter referred to Section 73 of the Labour Code of British Columbia which provides certain unions, including nurses, with the right to choose resolution of a dispute by binding arbitration when attempts by both parties to conclude a collective agreement have failed.

The Higgins Commission thoroughly explored the subject of compulsory binding arbitration and, on the basis of all evidence available at that time, rejected that method of dispute settlement. The following is an extract from the Higgins Report:

"If the value of a system using compulsory binding arbitration is weighed against that of a collective bargaining system free of such a constraint, there is growing evidence that the latter does more to encourage responsibility and stability.

The certainty of the imposition of a binding agreement upon both parties through compulsory arbitration reduces pressures on both sides to reach a joint agreement. There is little necessity for them to assume realistic positions or achieve an understanding with one another. It makes limited demands on the parties' sense of responsibility either in negotiations or in the subsequent application of the settlement. Although the consequences of a strike or lock out are quite different in the public sector, in seeking to remove the risk of such action it also removes the critical element of uncertainty and pressure from the bargaining table. Thus, while appearing to be a device for the effective solution of disputes arising from collective bargaining, compulsory arbitration in fact leads to a negation of the whole bargaining process.

The Commission has examined a number of proposed variations in the forms that arbitration may take, including the so called "final offer selection" or "last offer arbitration". This procedure attempts to simulate the pressures of full

collective bargaining by requiring the arbitrator to select the most reasonable offer of either party item by item. In the opinion of the Commission there is at present no evidence to suggest that it should modify its view that compulsory arbitration, in any form, seriously undermines the inducement to both parties to successfully conclude the joint determination of a collective agreement."[1]

This Committee concurs with the Higgins Commission rejection of binding arbitration. Subsequent events elsewhere have supported that stance. One only needs to look at the Federal scene to see the unrest that has been evident there. It is the firm opinion of the Committee that the spirit of compromise so necessary in any bargaining context will only be present when the uncertainty of dispute mechanism exists for both parties.

The Government Employee Relations Bureau and the Public Service Commission raised the only other matters concerning the present procedure. Both bodies proposed that the ten day reporting limit imposed on the mediator by the Public Service Labour Relations Act be extended to twenty days, and there was no indication of opposition to this from the employee bargaining agents. The Bureau made two other proposals: one was that an employee bargaining agent should be required to give ten days notice of strike action instead of the three days notice presently required by the Act; the other was that

---

[1] Higgins Report, p. 52.

the employer's last offer should be put to the membership of the bargaining unit before any strike action could be taken. Concerning the proposal that there be a ten day notice of strike action, there was no opposition offered; in fact, the proposal was endorsed by the B. C. Government Employees' Union. In the case of the proposal that the employer's last offer should be put to the membership prior to strike action, however, there was very strong reaction from the employee groups. Their position was that such was an unwarranted intrusion into the internal affairs of a union, a position with which this Committee must agree.

The proposal that the mediator's time limit be extended has merit but, rather than dealing with the matter by way of straight extension, the Committee considers it should be handled by wording similar to that in the pertinent counterpart section of the Labour Code. With regard to changing the time for notice of strike from three to ten days, it should be noted that ten day notice of strike action was what the Higgins Commission recommended.[2] The intent of the longer period is a sound one, in that time is provided for any final attempts to resolve the dispute before the actual work stoppage takes place. This is particularly appropriate in the public service in relation to the provision of emergency services.

The Committee addressed itself to two other concerns it had about the present procedure. Firstly, although the Committee thinks that

---

[2] Higgins Report, p. 56.

the language with regard to the timing of a strike vote implies that the vote shall not be taken until after the mediator has reported to the Chairman of the Board, the language should be improved because of the differences of opinion that have arisen. The Committee notes that the Higgins Report was clear in that regard.[3] Secondly, the present legislation does not make it mandatory that, when either party requests the services of a mediator, the request must be accompanied by a statement of the matters upon which the parties have, or have not, agreed. This omission has resulted in delays in mediation proceedings getting under way.

> The Committee recommends that the following amendments be made to Section 17 of the Public Service Labour Relations Act, and that such be reflected in the revised Act:
>
> 1. that the last three lines of subsection (1) be deleted and substituted by:
>
> ... the chairman of the board shall, upon the written request of either party, accompanied by a statement of matters upon which the parties have or have not agreed in the course of collective bargaining, appoint a mediator to confer with the parties and assist them in reaching a collective agreement.
>
> 2. that subsection (2) be deleted and substituted by:
>
> (2) The mediator shall, within ten days of his initial meeting with the parties, or within twenty days of his appointment, whichever is the lesser, or within such longer period as may be agreed upon by both parties, submit a report to the chairman of the board setting out the

---

[3] Higgins Report, p. 55.

matters upon which the parties have agreed and those matters upon which the parties are unable to agree.

3. that subsection (7) be changed to subsection (7)(a) and that subsection (7)(b) be added as follows:

   (b) No strike vote shall be conducted until after the mediator has submitted his report under subsection (2).

4. that subsection (8) and subsection (9) be deleted.

   (this is in keeping with the recommendation contained in the chapter "Bargaining Procedures" that there be only <u>one</u> agreement instead of the present "master" agreement and "subsidiary" agreement concept.)

5. that subsection (10)(b)(i) be deleted and substituted by:

   (i) the government's bargaining agent has been notified in writing by the bargaining agent for the employees that the employees have voted in favour of strike and ten days have elapsed after the notice was received.

6. that subsection (12)(a) be deleted and substituted by:

   (a) the employees' bargaining agent has been notified in writing by the government that the government will lock out the employees and ten days have elapsed after the notice was received.

In the chapter "Public Service Adjudication Board", the recommendation was made that the Public Service Labour Relations Act be the exclusive labour legislation for the public service, with the exception of the matters of strikes and picketing and, therefore, that the only jurisdiction with respect to the public service the Labour Relations Board

would retain would be those matters under Part V of the Labour Code. At the time of making that recommendation, however, the Committee observed that it would be necessary to include in the revised Public Service Labour Relations Act a number of provisions presently contained in the Labour Code.

The Committee considers that at least two provisions similar to those presently in the Labour Code should be included in the revised Public Service Labour Relations Act. The recommendations set out below, which primarily relate to maintenance of labour peace in the interests of essential services, reflect the Committee's view that, to fit the needs of the public service, greater responsibility for the application of the provisions concerned should be placed on the Public Service Adjudication Board rather than on the Ministry of Labour.

The Committee recommends that:

1. the revised Public Service Labour Relations Act provide for the right of the Chairman of the Public Service Adjudication Board to appoint an Industrial Inquiry Commission when he deems such appointment necessary to maintain or secure labour peace and to promote conditions favourable to settlement of disputes within the public service.

2. the revised Public Service Labour Relations Act provide that, in a situation where a strike vote has been taken and strike notice has been served, the Lieutenant-Governor in Council may request the Chairman of the Public Service Adjudication Board to designate those facilities, production and services that he deems necessary to prevent the immediate and serious danger to life, health and safety in the public service.

DISPUTE SETTLEMENT

The above recommendations will, no doubt, give rise to some disagreement on the grounds that they concern areas with which the parties themselves should deal. The Committee endorses the resolution of disputes and the agreement on essential service matters by the parties. Nevertheless, the Committee must take the stand that the provisions recommended are necessary.

CHAPTER XI

PUBLIC SERVICE COMMISSION

During the hearings held by this Committee, there was considerable criticism directed at the Public Service Commission as a body. It was apparent that the Commission has not been accepted as the independent and impartial body intended by the Legislature when the present Public Service Act was enacted. One bargaining unit even suggested that the membership of the Commission should be changed and the Chairman of the Commission, understandably sensitive to the criticism, echoed similar sentiments at the conclusion of the hearings.

Failure to gain acceptance can be attributed to both present and past circumstances. At present, members of the Commission are in the position of being expected to act as members of an impartial tribunal and yet, approximately a year ago, the same persons were performing an adversary role as representatives of the employer at the bargaining table. Also, the Public Service Act at present requires the Commission to participate in matters of discipline and employee benefits, both incompatible with its prime function. In addition, there is the question as to whether there should be some avenue for appealing the Commission's decisions.

While it is in no way the Committee's intention to jeopardize the position of the present incumbents, it is clear that the situation will not improve if the status quo is maintained. The Committee, therefore, must conclude that the membership of the Commission should be changed as soon as possible. When selecting new members, the independence and impartiality of the Commission would be enhanced if part of its membership was drawn from the community. This observation is similar to one made by the Higgins Commission.[1] In view of the fact that certain of its responsibilities have been transferred to the Government Employee Relations Bureau and that there will be recommendations in this chapter for the transfer of other responsibilities, the Committee considers that the number of Commission members need not exceed three. In fact, it is apparent that only one member need be employed on a full-time basis. What the Committee would envisage is a Commission composed of a full-time Chairman, drawn from within the public service to ensure that the Commission has a sound knowledge of the public service and its make-up, and two part-time members drawn from the community but not representing any particular interest. There is nothing in the Act to preclude the Commission from being so constituted.

Regarding matters dealing with discipline and employee benefits, quite clearly these should be transferred from the Commission to the

---

[1] Higgins Report, p. 70.

Treasury Board. The matter of employee benefits is a negotiable one and in no way should the Commission, or the Act that governs its activities, be associated with such matters as suspension, dismissal or withholding of a merit increase, as these are grievable. The Committee would go further and say that, while the Commission needs access to performance appraisal forms for selection purposes, it should have no involvement in the processing and endorsement of such forms because, in some cases, it could be endorsing reprimands.

Whether or not there should be an avenue for appealing decisions of the Commission is a debatable point. However, the Committee's opinion is that when an independent and impartial tribunal is established to ensure the protection of the principle that appointments to and within the public service should be solely on merit, it should be supreme in its own area. That is not to say that there should not be access to the courts for the purpose of ensuring that the Commission stays within its statutory jurisdiction and that it acts with procedural fairness.

Insofar as appeals to the Commission itself are concerned, the Committee notes that Section 5 of the Public Service Act allows the Commission to use discretion in the matter of hearing appeals. The Committee considers that the Commission should be obliged to

hear appeals placed before it.

On the basis of the foregoing observations, the Committee recommends:

1. that the revised Public Service Act be very clear in specifying that the Public Service Commission has <u>exclusive</u> jurisdiction over appointments to and within that part of the public service for which the Treasury Board is the employer.

2. that the membership of the Public Service Commission be changed as soon as possible.

3. that the Public Service Commission be composed of three members; a full-time Chairman to be selected from within the public service and two part-time members to be selected from the community.

4. that all duties relating to discipline and employee benefits be transferred from the Public Service Commission to Treasury Board. and that such be reflected in the revised Public Service Act and the new Financial Administration Act.

5. that it be obligatory for the Public Service Commission to hear appeals placed before it, and that such be reflected in the revised Public Service Act.

6. that there be no right of appeal in law against the decisions of the Public Service Commission, but that there should be access to the courts for the purpose of ensuring that the Commission stays within its statutory jurisdiction and that it acts with procedural fairness.

Other issues that arose during the hearings which are within the jurisdiction of the Public Service Commission were those of

one of co-ordinator. The need to involve employees and their representatives in safety and accident prevention is obvious and, as the B. C. Government Employees' Union observed, there is a very direct link between training and safety. As was the case with training then, this Committee considers that the Commission's role in the safety function should be one of co-ordinator.

The Committee recommends:

1. that the revised Public Service Act contain the following amendment to Section 4(d):

   (d) to sponsor and administer training programmes, and to co-ordinate all programmes relating to employee training and safety.

2. that the Public Service Commission give priority to the establishment of a committee to co-ordinate programmes relating to employee training and safety, and that such committee be composed of Public Service Commission, Government Employee Relations Bureau, Budget Bureau and ministerial officials.

In the chapter "Scope of Bargaining", the Committee made a recommendation to ensure that it would be clear to all that the merit principle and its application in appointment to and within the public service are non-negotiable. At the same time, the Committee conceded that there should be a means whereby an employee bargaining agent is consulted in matters involving the procedures to be followed in the determination of merit, but that such means should be provided for in the Public Service Act.

probationary appointments, training and safety. The B. C. Government Employees' Union was the most assertive contending that the placement of an employee rejected during probation, after winning a promotion, should be subject to the terms and conditions of a collective agreement. That Union also took exception to a proposal from the Public Service Commission that the area of training subject to negotiation be more restricted, claiming on the contrary that the right to negotiate training should be extended. It pointed out that training and safety are directly linked. The Government Employee Relations Bureau requested clarification as to the Commission's responsibilities for training and safety as did the Nurses' Associations.

The matter of confirmation or rejection during probation is an extension of the appointment process. Thus, it is not negotiable and is clearly a Commission responsibility. The Commission's involvement in training is referred to elsewhere in this report, but this Committee agrees that the extent of that involvement together with the Commission's role with regard to training requires clarification.

As was indicated in the chapter "Scope of Bargaining", there are many aspects of training that are negotiable. Nevertheless, the Commission must be free to sponsor training programmes where circumstances so dictate. Therefore, aside from the actual sponsoring of programmes and the administration of such programmes, this Committee views the general role of the Commission in the training function as

The Committee therefore recommends that the revised Public Service Act contain the following amendment to Section 20(3):

(3) The Commission shall from time to time consult with representatives of a bargaining agent certified under the Public Service Labour Relations Act and with the employer with respect to the procedures to be followed in considering the matters referred to in subsection (2).

The Committee also recommends that the revised Public Service Act provide a certified employee bargaining agent the right to appoint an observer to the selection panels for all competitions for positions within the bargaining unit represented by that bargaining agent.

Another matter of concern to this Committee is that relating to the delegation of Public Service Commission duties and the effect of such delegation on the use of temporary appointments. This situation was observed upon by the Higgins Commission and a recommendation was made with respect to it.[2] However, no concrete action has ever been taken on that recommendation and the situation now is much the same as it was in 1972.

In 1965, a significant number of agencies previously outside the jurisdiction of the then Civil Service Commission were brought under the provisions of the then Civil Service Act. At the same time, the

---

[2] Higgins Report, pp. 71-73.

Commission also received powers to delegate its duties by regulation and, under Order-in-Council 965/65, delegated its duties to the agencies concerned. Therefore, while the Commission technically remained responsible for the general supervision and inspection of the exercise and performance of these duties, in practice the procedures remained essentially as before.

The introduction of collective bargaining and an attempt to have a uniform application of the merit system dictated that such wide delegation of duties be revoked. The fact that this has not been done has caused significant problems for both the employee side and the employer side; it leads to abuse of the provisions for temporary appointments. The Commission has voiced its concern, but has been unable to convince either the past or present governments of the need to rescind Order-in-Council 965/65.

While there is, and always will be, the need for the Commission to delegate certain of its duties to certain ministries, the delegation should be on a very selective basis and should never again be allowed to affect the many thousands of employees as is presently the case.

> The Committee recommends that Order-in-Council 965/65 be rescinded as soon as possible and that, in future, the Public Service Commission be very selective with respect to delegation of its duties to ministries.

In concluding this chapter the Committee must express the hope that all are aware, and especially the Public Service Commission, that the change in the Commission's responsibilities brought about by the Public Service Act, 1976 and the Public Service Labour Relations Act, 1976, and the further changes which will ensue if the recommendations presented by this Committee are accepted, should not be viewed as a reduction in the importance or the stature of the Commission. Rather, the view should be that the changes ought to assist the Commission in carrying out more effectively what has been intended as its primary purpose within the organization of government.

CHAPTER XII

MISCELLANEOUS

The subjects covered herein do not warrant separate chapters.

1. Union Security

The Higgins Commission concluded that the most appropriate form of union security for the public service was that which combines the individual's freedom of association with the obligation owed by members of a bargaining unit to the certified bargaining agent, and that which is commonly referred to as the "Rand Formula" met these criteria.[1] Under the Rand formula type of union security, all members of a bargaining unit are required to pay the regular and reasonable dues of the bargaining agent whether or not they decide to become members of it.

When the Public Service Labour Relations Act was passed, Section 14 of the Act reflected a more liberal provision than the Higgins Commission had in mind. It gave bargaining agents a form of union security that closely resembled a union shop. While there are philosophical issues associated with compulsory union membership, the present arrangement has not created undue difficulties. Persons who were employees on the date of

---

[1] Higgins Report, p. 39.

bargaining agent certification were not required to become members of the bargaining agent; new employees, prior to accepting employment, are aware that they will be required to join a union, and Section 8 of the Act permits an employee to refrain from union membership on the grounds of religious conscience.

This Committee sees no need for it to recommend that any changes be made to the present form of union security.

2. Labour Relations Training for Management

The Higgins Commission expected problems to arise with the introduction of collective bargaining, and that the problems would be intensified in the absence of proficient persons within the service to deal with them. Therefore, it made a strong recommendation that a training programme in labour relations be established for management officials.[2] While some attempts were made to comply with the recommendation, no on-going programme as such has been established. The Public Service Commission did what it could do within budgetary restraints, but the objective of converting the outlook and approach of management officials towards a collective bargaining relationship has not been reached.

Because of the Committee's concern, and the fact that the

---

[2] Higgins Report, p. 66.

Government Employee Relations Bureau, by statute, is now designated as the agency responsible for labour relations training, the Committee met with the Chairman of the Bureau. The Chairman said that he had plans for the establishment of a training programme, not only to cover labour relations, but to cover all areas with which the Bureau is concerned. He went on to state, however, that his plans were being thwarted by staff restraints.

The Committee differs from the Chairman as to the form the training programme should take. It considers the present situation dictates that labour relations training should be given priority, and that it should be dealt with separately from training in classification and other aspects of the Bureau's function. In the Committee's opinion, the staff of the Bureau's labour relations division should carry out labour relations training by way of visits to ministries, both at headquarters and field levels, on a regular basis.

Nevertheless, implementation of the programme should not be impeded regardless of the form the programme may take. If the responsibility for organizational analysis, establishment control, etc. is transferred from the Government Employee Relations Bureau to the Budget Bureau, as recommended in the

chapter "Treasury Board", such transfer should have the effect of making Government Employee Relations Bureau staff available for training purposes.

> The Committee recommends that immediate action be taken by the Government Employee Relations Bureau to establish a training programme in labour relations for management officials.

3. Grievances

The Public Service Labour Relations Act makes the provision that every collective agreement shall contain a grievance procedure with final and binding resolution by arbitration. In keeping with a recommendation in the chapter "Public Service Adjudication Board" with regard to the role of the Board, a recommendation must be made on this subject.

> The Committee recommends that subsection (3) of Section 15 of the Public Service Labour Relations Act be amended to provide that all grievances defined under subsections (1)(a) and (1)(b) shall be submitted to the Public Service Adjudication Board for final and binding resolution, and that such be reflected in the revised Act.

4. Order-in-Council Requirement for Implementation of Collective Agreements

Subsection 1 of Section 27 of the Audit Act reads, in part, as follows:

"27. (1) The Comptroller General shall see that no cheque is issued for any salary or increase thereof

to any permanent officer, clerk or other person appointed to the Civil Service or employed by the Province unless

(a) the Deputy Provincial Secretary has notified the Comptroller General that an Order-in-Council has been approved by the Lieutenant-Governor in Council authorizing the same; and..."

That part of the Act has been interpreted to mean that the provisions of a collective agreement cannot be implemented until approved by the Lieutenant-Governor in Council. As a consequence, there have been numerous instances of delay between the time a collective agreement is signed by the parties and the time of its implementation. Delays of this nature only lead to discontent among employees and friction between the employer side and the employe· bargaining agents.

As the Treasury Board, by statute, is authorized to execute, on behalf of the government, collective agreements that may be concluded under the Public Service Labour Relations Act, this Committee must question the need for the Order-in-Council requirement.

The Committee recommends that subsection (1)(a) of Section 27 of the Audit Act be amended by inserting the following after the word "same", and that such be reflected in the new Financial Administration Act:

> "...or, the Chairman of the Government Employee Relations Bureau has transmitted to the Comptroller-General a copy of a signed collective agreement; and..."

5. Preservation of the Sanctity of Current Agreements

A number of recommendations in this report, if accepted, would have an effect on certain provisions of collective agreements presently in force. It is not the intention of this Committee that legislative amendment should be used to nullify the provisions of collective agreements.

The Committee therefore recommends that transitional provisions be included in the legislation to preserve the sanctity of collective agreements in effect upon enactment of revised legislation.

CHAPTER XIII

CONCLUSION

The preceding report is the result of the assignment given the Committee and described in the Preface. To review the recommendations of the Higgins Report, to assess the effectiveness of the legislation based thereon and to formulate changes or amendments to such legislation proved a more arduous task than was at first reckoned upon. The issues to be considered were numerous and complex, and during the course of the inquiry organizational problems and faults came to light.

As the inquiry progressed, it became obvious that any piece-meal amendment to the legislation would be unwise. Rather, the pertinent pieces of legislation would require complete rewriting to provide for the changes in procedures being recommended, to overcome the shortcomings in organization and to ensure that each of the various jurisdictions affected was identified with, and its functions clearly defined in, the appropriate piece of legislation. This would entail the rewriting of three Acts - the Public Service Act, the Public Service Labour Relations Act and the Audit Act, with the retitling of the latter Act to be known as the Financial Administration Act.

The Committee is fully aware that the recommendations contained in the report will stimulate some disagreement. It is to be hoped, however, that those who made submissions will appreciate the attempt made to take all views into account. The object of the Committee was a means of improving the present system, bearing in mind the interests of the government, the public service employees and the general public of the province.

Should all or part of its recommendations be accepted, the Committee hopes that it will be asked to assist the legislative draftsman when the legislation is in the process of being drafted. The need for this co-operation is vital so that the legislation will reflect the true intent of the recommendations. Of lesser significance, but of some consequence, nevertheless, are the minor word changes required in the existing legislation, primarily for clarification, and to which this Committee has made no reference.

Finally, the Committee considers the title of its report, "The Higgins Report Revisited", an apt one in view both of its terms of reference and of its association with the Higgins Report. The Committee, however, lays no claim for the origin of the title; the suggestion came from another source and is used with thanks.

SUMMARY OF RECOMMENDATIONS

Chapter II - Public Service Adjudication Board

1. If recommendations 2 to 7 inclusive, as set out below, are not accepted, immediate action be taken to proclaim that part of the Public Service Act (Part III) providing for a Public Service Adjudication Board and that the Board then be constituted.

2. The Public Service Adjudication Board be established under the revised Public Service Labour Relations Act and be the agency responsible for that Act.

3. With the exception of the matters of strikes and picketing, the Public Service Labour Relations Act be exclusive labour legislation for the public service, with the Labour Relations Board exercising jurisdiction over the public service only under Part V of the Labour Code of British Columbia and that jurisdiction should be subject to any specific provisions in the Public Service Labour Relations Act.

4. The part of the present Public Service Act (Part III) referring to the Public Service Adjudication Board be removed from that Act, and all reference to the Public Service Adjudication Board be contained in a revised Public Service Labour Relations Act.

5. The constitution of the Public Service Adjudication Board be the same as presently described in Part III of the Public Service Act, and the revised Public Service Labour Relations Act stipulate that the Public Service Adjudication Board be directly responsible to the Legislative Assembly.

6. The duties of the Public Service Adjudication Board be similar to those envisaged by the Higgins Commission, with the exception that the Board should not hear appeals by employees who consider they have been aggrieved by a decision of the Public Service Commission.

7. There be no right of appeal in law against the decisions of the Public Service Adjudication Board, but there should be access to the courts for the purpose of ensuring that the Board stays within its statutory jurisdiction and that it acts with procedural fairness.

Chapter III - Definition of Public Service

1. The Public Service be defined, under the revised Public Service Labour Relations Act, as the several positions in or under any department or ministry established under any Act of the Legislature, and any Board, Commission, Agency, Association or Organization of the Executive Government of British Columbia listed in an appendix to the Act.

2. The appendix to the revised Public Service Labour Relations Act be separated into two parts: Part I being the part of the Public Service for which the Treasury Board is designated as the employer and Part II being that part which would include agencies designated as separate employers.

3. The Lieutenant-Governor in Council be empowered to move segments of the Public Service from one part to the other, or out of the jurisdiction of the Public Service Labour Relations Act to the jurisdiction of the Labour Code or vice versa.

4. Provisions be established for successor rights for segments being placed under or removed from the jurisdiction of the Public Service Labour Relations Act.

5. The Public Service Adjudication Board be empowered to define bargaining units for separate employers under the Public Service Labour Relations Act.

Chapter IV - Definition of Employee

The revised Public Service Labour Relations Act contain a much more precise definition of "employee" than is contained in the present Act.

Chapter V - Exclusions

1. The revised Public Service Labour Relations Act contain the

following additions to Section 12:

(a) Negotiation between the parties to determine employees or classes of employees to be excluded from a collective agreement not be restricted to the time of the actual negotiations of a collective agreement, but may take place prior to the actual negotiations of a collective agreement, or at any time during the life of a collective agreement.

(b) If the parties cannot agree within a period of sixty days after an exclusion matter has been raised by either party, the area of disagreement must be placed before the Public Service Adjudication Board for a ruling.

2. Guidelines be set out in the revised Public Service Labour Relations Act to assist the parties and the Public Service Adjudication Board in the matter of exclusion designation.

Chapter VI - Treasury Board

1. The part of the present Public Service Act (Part II) referring to the Treasury Board and the Government Employee Relations Bureau be removed from said Act.

2. The Audit Act be revised and be more appropriately renamed the Financial Administration Act.

3. The Financial Administration Act contain a fuller description of the powers and duties of the Treasury Board.

4. The Financial Administration Act define specifically the respective duties and responsibilities of the Government Employee Relations Bureau and the Budget Bureau, and that such reflect the transfer of the responsibility for organizational analysis, establishment control and application of the classification system from the former to the latter.

5. The Financial Administration Act not specify that the Deputy Minister of Finance shall be ex officio Secretary to the Treasury Board, but that the pertinent section of the Act merely require that a senior official of the Treasury Board be Secretary.

Chapter VII - Employee Representation

1. The revised Public Service Labour Relations Act provide that there be one bargaining unit in that part of the public service for which the Treasury Board is designated as the employer.

2. When defining bargaining units for agencies designated as separate employers, the Public Service Adjudication Board be restricted to defining one bargaining unit for each separate employer, and that the revised Public Service Labour Relations Act so provide.

Chapter VIII - Scope of Bargaining

1. Section 13(a) of the Public Service Labour Relations Act be deleted and replaced in the revised Act with the following:

(a) the principle of merit and its application in appointments to and within the public service.

2. Section 13(e) of the Public Service Labour Relations Act be deleted and replaced in the revised Act with the following:

(e) training programmes sponsored by the Public Service Commission.

3. The Public Service Superannuation Act be amended to provide for the establishment of a joint committee composed of members, equal in number, from the employee organizations and the employer under the chairmanship of a neutral person. The joint committee should be responsible for making recommendations to the government, through the Provincial Secretary, on needed amendments to the superannuation plan.

4. The revised Public Service Labour Relations Act contain the following definition:

"system of classification" means the method of determining the relative placement of positions on the basis of the relative worth of duties and responsibilities.

Chapter IX - Bargaining Procedures

1. The present two-tier system of negotiations be modified to

to ensure that there is one agreement, and thereby eliminate the present two-tier ratification process; formal input at the occupational group level be allowed to remain; occupational group determination to remain with the parties but, where differences arise between the parties with regard to such determination, the area of disagreement to be ruled upon by the Public Service Adjudication Board. This to be facilitated by the deletion of Section 11 of the Public Service Labour Relations Act and replacement in the revised Act with the following:-

11. (1) Every collective agreement concluded under section 9 or 10 shall consist of two or more parts as follows:

(a) a master part including all the terms and conditions of employment that are common to all employees in the bargaining unit; and

(b) a subsidiary part for each occupational group including the terms and conditions of employment that apply only to employees in a specific occupational group in the bargaining unit.

(2) Specific occupational groups under clause (b) of subsection (1) shall be determined by negotiation between the parties.

(3) Where the parties are unable to reach agreement under the provisions of subsection (2) within thirty days of commencement of negotiations, the area of disagreement shall be placed before the

Public Service Adjudication Board for a ruling.

Chapter X - Dispute Settlement

1. The revised Public Service Labour Relations Act provide the following amendments to Section 17:

   (a) When either party requests the chairman of the board to appoint a mediator, the request shall be accompanied by a statement of matters upon which the parties have or have not agreed in the course of collective bargaining.

   (b) The mediator shall, within ten days of his initial meeting with the parties, or within twenty days of his appointment, whichever is the lesser, or within such longer period as may be agreed upon by both parties, submit a report to the chairman of the board setting out the matters upon which the parties have agreed and those matters upon which the parties are unable to agree.

   (c) No strike vote shall be conducted until after the mediator has submitted his report to the chairman of the board.

   (d) All reference to master agreement and subsidiary agreement be deleted.

   (e) That the time for notice of strike action and notice of lock out action be extended to ten days from the present three days.

2. The Chairman of the Public Service Adjudication Board be provided the right to appoint an Industrial Inquiry Commission when he deems such appointment necessary to maintain or secure labour peace and to promote conditions favourable to settlement of disputes within the public service, and the revised Public Service Labour Relations Act so provide.

3. The revised Public Service Labour Relations Act provide that, in a situation where a strike vote has been taken and strike notice has been served, the Lieutenant-Governor in Council may request the Chairman of the Public Service Adjudication Board to designate those facilities, production and services that he deems necessary to prevent the immediate and serious danger to life, health and safety in the public service.

Chapter XI - Public Service Commission

1. The revised Public Service Act be very clear in specifying that the Public Service Commission has exclusive jurisdiction over all appointments to and within that part of the public service for which the Treasury Board is the employer.

2. The membership of the Public Service Commission be changed as soon as possible.

3. The membership of the Public Service Commission be composed of three members; a full-time Chairman to be selected from

within the public service and two part-time members to be selected from the community.

4. All duties and responsibilities relating to discipline and employee benefits be transferred from the Public Service Commission to Treasury Board, and such be reflected in the revised Public Service Act and the new Financial Administration Act.

5. It be obligatory for the Public Service Commission to hear appeals placed before it, and such be reflected in the revised Public Service Act.

6. There be no right of appeal in law against the decisions of the Public Service Commission, but there should be access to the courts for the purpose of ensuring that the Commission stays within its statutory jurisdiction and that it acts with procedural fairness.

7. The revised Public Service Act contain the following amendment to Section 4(d):

   (d) to sponsor and administer training programmes, and to co-ordinate all programmes relating to employee training and safety.

8. The Public Service Commission give priority to the establishment of a committee to co-ordinate programmes relating to employee training and safety, and that such committee be composed of Public Service Commission, Government Employee Relations Bureau, Budget Bureau and ministerial officials.

9. The revised Public Service Act contain the following amendment to Section 20(3):

(3) The Commission shall from time to time consult with representatives of a bargaining agent certified under the Public Service Labour Relations Act and with the employer with respect to the procedures to be followed in considering the matters referred to in subsection (2).

10. The revised Public Service Act provide a certified employee bargaining agent the right to appoint an observer to the selection panels for all competitions for positions within the bargaining unit represented by that bargaining agent.

11. Order-in-Council 965/65 be rescinded as soon as possible and, in future, the Public Service Commission be very selective with respect to delegation of its duties to ministries.

Chapter XII - Miscellaneous

1. Immediate action be taken by the Government Employee Relations Bureau to establish a training programme in labour relations for management officials.

2. Subsection (3) of Section 15 of the Public Service Labour Relations Act be amended to provide that all grievances defined under subsections (1)(a) and (1)(b) shall be submitted to the Public Service Adjudication Board for final and binding resolution, and that such be reflected in the revised Act.

3. Subsection (1)(a) of Section 27 of the Audit Act be amended by inserting the following after the word "same", and that such be reflected in the new Financial Administration Act:

> "...or, the Chairman of the Government Employee Relations Bureau has transmitted to the Comptroller General a copy of a signed collective agreement; and..."

4. Transitional provisions be included in the legislation to preserve the sanctity of collective agreements in effect upon enactment of revised legislation.

STRUCTURE OF BARGAINING UNITS

DECEMBER, 1976

B. C. Government Employees' Union
Total Employees: 35,032

- Educational & Scientific Services — 772 Employees
- Social & Health Services — 1689 Employees
- Administrative, Fiscal & Regulatory — 1649 Employees
- Administrative Support — 8475 Employees
- Environment, Resources & Conservation — 2551 Employees
- Engineering, Technical & Inspectional — 2376 Employees
- Hospital & Allied Services — 4262 Employees
- Trades and Crafts — 1908 Employees
- Operational Services — 4731 Employees
- Correctional Services — 1246 Employees
- Marine Services - Licensed — 763 Employees
- Marine Services - Unlicensed — 2224 Employees
- Retail Stores & Warehouse — 2386 Employees

Registered Nurses Assn. & Registered Psychiatric Nurses Assn.
Total Employees: 2615

- Community Nurses — 428 Employees
- Hospital Nurses — 2187 Employees

B. C. Government Professional Employees Association
Total Employees: 985

- Accounting Officers — 16 Employees
- Agriculturists — 137 Employees
- Architects — 31 Employees
- Dental Officers — 12 Employees
- Engineers & Geologists — 382 Employees
- Forest Agrologists — 24 Employees
- Foresters — 262 Employees
- Veterinarians — 15 Employees
- Land Officers — 32 Employees
- Pharmacists — 25 Employees
- Physiotherapists — 35 Employees
- Surveyors — 14 Employees

Rizzo & Rizzo Shoes Ltd. (Re)

Supreme Court Reports

Supreme Court of Canada

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

1997: October 16 / 1998: January 22.

File No.: 24711.

[1998] 1 S.C.R. 27 | *[1998] 1 R.C.S. 27* | *[1998] S.C.J. No. 2* | *[1998] A.C.S. no 2*

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, appellants; v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, respondent, and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, party.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, *R.S.O. 1990, c. I.11, ss. 10*, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the Employment Standards Act ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to severance, termination or vacation pay under the ESA. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the ESA suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. 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. Moreover, s. 10 of Ontario's Interpretation Act provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the ESA and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the ESA and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbitrarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the Employment Standards Amendment Act, 1981 exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the ESA is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the ESA. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the Bankruptcy Act for termination and severance pay in accordance with ss. 40 and 40a of the ESA. It was not necessary to address the applicability of s. 7(5) of the ESA.

Cases Cited

Distinguished: Re Malone Lynch Securities Ltd., *[1972] 3 O.R. 725*; Re Kemp Products Ltd. *(1978), 27 C.B.R. (N.S.) 1*; Mills-Hughes v. Raynor *(1988), 63 O.R. (2d) 343*; referred to: U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) *(1989), 76 C.B.R. (N.S.) 86*; R. v. Hydro-Québec, *[1997] 1 S.C.R. 213*; Royal Bank of Canada v. Sparrow Electric Corp., *[1997] 1 S.C.R. 411*; Verdun v. Toronto-Dominion Bank, *[1996] 3 S.C.R. 550*; Friesen v. Canada, *[1995] 3 S.C.R. 103*; Machtinger v. HOJ Industries Ltd., *[1992] 1 S.C.R. 986*; Wallace v. United Grain Growers Ltd., *[1997] 3 S.C.R. 701*; R. v. TNT Canada Inc. *(1996), 27 O.R. (3d) 546*; Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1; R. v. Vasil, *[1981] 1 S.C.R. 469*; Paul v. The Queen, *[1982] 1 S.C.R. 621*; R. v. Morgentaler, *[1993] 3 S.C.R. 463*; Abrahams v. Attorney General of Canada, *[1983] 1 S.C.R. 2*; Hills v. Canada (Attorney General), *[1988] 1 S.C.R. 513*; British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) *(1996), 40 C.B.R. (3d) 25*; R. v. Z. (D.A.), *[1992] 2 S.C.R. 1025.*

Statutes and Regulations Cited

Bankruptcy Act, R.S.C., 1985, c. B-3 [now the Bankruptcy and Insolvency Act], s. 121(1). Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2). Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. ibid., s. 5(1)]. Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7). Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2. Interpretation Act, R.S.O. 1980, c. 219 [now *R.S.O. 1990, c. I.11*], ss. 10, 17. Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

Authors Cited

Christie, Innis, Geoffrey England and Brent Cotter. Employment Law in Canada, 2nd ed. Toronto: Butterworths, 1993. Côté, Pierre-André. The Interpretation of Legislation in Canada, 2nd ed. Cowansville, Que.: Yvon Blais, 1991. Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983. Ontario. Legislature of Ontario Debates, 1st sess., 32nd Parl., June 4, 1981, pp. 1236-37. Ontario. Legislature of Ontario Debates, 1st sess., 32nd Parl., June 16, 1981, p. 1699. Sullivan, Ruth. Driedger on the Construction of Statutes, 3rd ed. Toronto: Butterworths, 1994. Sullivan, Ruth. Statutory Interpretation. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal *(1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. par. 210-020, [1995] O.J. No. 586* (QL), reversing a judgment of the Ontario Court (General Division) *(1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. par. 14,013*, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.
Steven M. Barrett and Kathleen Martin, for the appellants. Raymond M. Slattery, for the respondent. David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto. Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto. Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

The judgment of the Court was delivered by

IACOBUCCI J.

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the Employment Standards Act, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the ESA.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought

leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the Bankruptcy Act (now the Bankruptcy and Insolvency Act) and the Employment Standards Act for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. --

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the Employment Standards Act.

40. -- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40a . . .

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, *R.S.O. 1990, c. I.11*

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) *(1991), 6 O.R. (3d) 441*

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the BA. Relying on U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) *(1989), 76 C.B.R. (N.S.) 86* (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the ESA such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the ESA is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the ESA is

remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the ESA.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the BA. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the BA.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the ESA termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the ESA. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the Employment Standards Amendment Act, 1981, S.O. 1981, c. 22 (the "ESAA"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the ESA. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal *(1995), 22 O.R. (3d) 385*

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the ESA. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the ESA, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited Re Malone Lynch Securities Ltd., *[1972] 3 O.R. 725* (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the ESA termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon Re Kemp Products Ltd. *(1978), 27 C.B.R. (N.S.) 1* (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the ESA, Austin J.A. rejected the trial judge's interpretation and found that the section does

not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the ESAA. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the ESA, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins with the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the ESA termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the ESA.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: R. v. Hydro-Québec, *[1997] 1 S.C.R. 213*;

Royal Bank of Canada v. Sparrow Electric Corp., *[1997] 1 S.C.R. 411*; Verdun v. Toronto-Dominion Bank, *[1996] 3 S.C.R. 550*; Friesen v. Canada, *[1995] 3 S.C.R. 103*.

22 I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In Machtinger v. HOJ Industries Ltd., *[1992] 1 S.C.R. 986*, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also Wallace v. United Grain Growers Ltd., *[1997] 3 S.C.R. 701*). It was in this context that the majority in Machtinger described, at p. 1003, the object of the ESA as being the protection of ". . . the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the ESA requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, Employment Law in Canada (2nd ed. 1993), at pp. 572-81.)

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In R. v. TNT Canada Inc. *(1996), 27 O.R. (3d) 546*, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, Construction of Statutes, supra, at p. 88).

28 The trial judge properly noted that, if the ESA termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the ESA would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the ESA to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the ESAA introduced s. 40a, the severance pay provision, to the ESA. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> 2. . . .
>
> (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the ESA. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., R. v. Vasil, *[1981] 1 S.C.R. 469*, at p. 487; Paul v. The Queen, *[1982] 1 S.C.R. 621*, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in Royal Dressed Meats Inc., supra. Having reviewed s. 2(3) of the ESAA, he commented as follows (at p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a

> bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the ESA. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in R. v. Morgentaler, *[1993] 3 S.C.R. 463*, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., Abrahams v. Attorney General of Canada, *[1983] 1 S.C.R. 2*, at p. 10; Hills v. Canada (Attorney General), *[1988] 1 S.C.R. 513*, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in Malone Lynch, supra. In Malone Lynch, Houlden J. held that s. 13, the group termination provision of the former ESA, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the ESA then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after Malone Lynch was decided, the 1970 ESA termination pay provisions were amended by The Employment Standards Act, 1974, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 ESA eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination

pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the Malone Lynch decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 ESA have no application to a bankrupt employer. For this reason, I do not accept the Malone Lynch decision as persuasive authority for the Court of Appeal's findings. I note that the courts in Royal Dressed Meats, supra, and British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) *(1996), 40 C.B.R. (3d) 25* (B.C.S.C.), declined to rely upon Malone Lynch based upon similar reasoning.

39 The Court of Appeal also relied upon Re Kemp Products Ltd., supra, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the ESA. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on Mills-Hughes v. Raynor *(1988), 63 O.R. (2d) 343* (C.A.), which cited the decision in Malone Lynch, supra, with approval.

40 As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see R. v. Z. (D.A.), *[1992] 2 S.C.R. 1025*). I also note that the intention of the Legislature as evidenced in s. 2(3) of the ESAA, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim ESA termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the ESA, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the ESA. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the ESA.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the ESA underwent another amendment. Sections 74(1) and 75(1) of the Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the Interpretation Act directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would

order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

End of Document

Reference re: Residential Tenancies Act 1979 (Ontario)

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: Laskin C.J. and Martland, Ritchie, Dickson, Estey, McIntyre and Lamer JJ.

1980: November 25, 26 / 1981: May 28.

[1981] S.C.J. No. 57 | *[1981] A.C.S. no 57* | *[1981] 1 S.C.R. 714* | *[1981] 1 R.C.S. 714* | *123 D.L.R. (3d) 554* | *37 N.R. 158* | *J.E. 81-567* | *9 A.C.W.S. (2d) 59* | *1981 CanLII 24*

IN THE MATTER OF a Reference to the Court of Appeal pursuant to The Constitutional Questions Act, R.S.O. 1970, Chapter 79, by Order in Council No. 2089/79, respecting The Residential Tenancies Act, 1979

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Constitutional law — Courts — Landlords and tenants — Provincial commission empowered to evict tenants and to enforce obligations of landlords and tenants — Whether or not grant of powers to Commission ultra vires — The Residential Tenancies Act. 1979, 1979 (Ont.), c. 78 — British North America Act, R.S.C. 1970. s. 96.

The Ontario Legislature enacted The Residential Tenancies Act, 1979, to come into effect on proclamation. The Act contained a legislative code to govern landlords and tenants and established the Residential Tenancy Commission to oversee and enforce the newly enunciated rights and obligations. The Executive Council, responding to questions concerning the authority of the Legislature to make orders evicting tenants from residential premises and to require landlords and tenants to comply with obligations imposed under the Act, referred two questions dealing with those issues to the Ontario Court of Appeal. That Court concluded that it was not within the legislative authority of Ontario to make eviction orders and compliance orders as provided in The Residential Tenancies Act, 1979. This Court was only concerned with the constitutional validity of two powers, the subject matter of the reference, and not with the soundness of the overall legislative scheme.

Held: The appeal should be dismissed.

Royal Commission Reports and Reports of Parliamentary Committees made prior to the passing of a statute were admissible to show the factual context and purpose of the legislation. The practice adopted in the Anti-Inflation Reference of giving timely directions establishing the extraneous materials to be admitted should be followed. Material relevant to the issues before the Court and not inherently unreliable or offending against public policy should be admissible, subject to the provision that such extrinsic materials are not available for the purpose of aiding in statutory construction.

Section 96 of the British North America Act limited provincial competence to make appointments to a tribunal exercising s. 96 judicial powers and implicitly limited provincial competence to endow a provincial tribunal with such powers. That section, however, could no longer be construed as a bar to a province seeking to vest an administrative tribunal with ancillary "judicial" powers formerly exercised by s. 96 courts, subject to the qualification that the judicial function not be isolated from the rest of the administrative structure of the legislation.

The test was to be formulated in three steps. The first involved consideration, in light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The matter ended there if the power was not broadly conformable to the jurisdiction formerly exercised by s. 96 courts. If, however, the power were identical or analogous to a power exercised by a s. 96 court at Confederation it became necessary to proceed

to step two. The second step involved consideration of the function within its institutional setting to determine whether the function was still "judicial". The subject matter rather than the apparatus of adjudication was determinative and only if the power could still be characterized as judicial was it necessary to proceed to the third step--a review of the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context. A provincial scheme was only invalid where the adjudicative function was a sole or central function of the tribunal so that it could be said to be operating like a s. 96 court.

Applying step one the Court found that the powers conferred on the Commission were in broad conformity with those historically exercised by the s. 96 courts before and after Confederation. The argument that the power to order eviction had been conferred before Confederation on County Court judges as persona designata, and that that power and by analogy the power to make orders of compliance were therefore outside the superior or county court structure, went too far. The jurisdiction over overholding tenants in pre-confederation legislation was merely a modification of the traditional jurisdiction on ejectment exercised by the superior courts. The County Court judges acting under the overholding tenants provisions were acting qua judge rather than as persona designata. The submission that the Commission's jurisdiction was analogous to that exercisable by courts of summary jurisdiction rather than by s. 96 courts was misconceived. Provinces could not avoid the limitations of s. 96 by taking a function of a s. 96 court, simplifying procedural matters, and then transferring the jurisdiction to a non s. 96 tribunal.

Proceeding to step two the Court found that the impugned power to order eviction or compliance, viewed in its institutional setting, remained essentially a "judicial power" exercised in all cases in the context of a lis between parties. The Commission in deciding contractual and property rights as between individual landlords and tenants also determined rights other than those relating to land and property. Each case involved analysis of law, an application of law to the facts, and a judicial decision and subsequent order.

The third step examined the inter-relationship between the impugned "judicial" powers and other powers under the Act. The central function of the Commission was the resolution of disputes, in the final form by a judicial form of hearing between landlords and tenants. The Commission's other functions were either ancillary to this central function, or were separate and distinct from it and bore no relation to it. There was no broad legislative scheme to subsume the Commission's judicial functions. The whole of s. 96 court's jurisdiction in a certain area, however limited, was transferred to provincially appointed officials.

Cases Cited

Walker's Case (1587), 76 E.R. 676; Attorney-General for Manitoba v. Manitoba Egg and Poultry Association, *[1971] S.C.R. 689*; Attorney General of Canada v. Readers Digest Association (Canada) Ltd., *[1961] S.C.R. 775*; Home Oil Distributors, Limited v. Attorney General of British Columbia, *[1940] S.C.R. 444*; Attorney-General for British Columbia v. Attorney General for Canada, *[1937] A.C. 368*; Ladore and Others v. Bennett and Others, *[1939] A.C. 468*; Reference re Eskimos, *[1939] S.C.R. 104*; Swait v. Board of Trustees of Maritime Transportation Unions *(1966), 61 D.L.R. (2d) 317*; Reference re Anti-Inflation Act, *[1976] 2 S.C.R. 373*; Attorney-General for Alberta v. Attorney-General for Canada and Others, *[1939] A.C. 117*; Letang v. Cooper, [1965] 1 Q.B. 232; Pillai v. Mudanayake and Others, [1953] A.C. 514; Edwards and Others v. Attorney-General for Canada and Others, *[1930] A.C. 124*; Laidlaw v. The Municipality of Metropolitan Toronto, *[1978] 2 S.C.R. 736*; Re Apogee Investments Ltd. and Saber *(1978), 21 O.R. (2d) 663*; Re Blok-Glowczynski et al. and Stanga et al. *(1978), 22 O.R. (2d) 376*; Toronto Corporation v. York Corporation, *[1938] A.C. 415*; Reference re Adoption Act and Other Acts, *[1938] S.C.R. 398*; Labour Relations Board of Saskatchewan v. John East Iron Works, Limited, *[1949] A.C. 134*; Tomko v. Labour Relations Board (Nova Scotia) et al., *[1977] 1 S.C.R. 112*; The Corporation of the City of Mississauga v. The Regional Municipality of Peel et al., *[1979] 2 S.C.R. 244*; Attorney General of Quebec et al. v. Farrah, *[1978] 2 S.C.R. 638*; Re Pepita and Doukas *(1979), 101 D.L.R. (3d) 577*; Dupont et al. v. Inglis et al., *[1958] S.C.R. 535*; Pong v. Quong and Chong, *[1927] S.C.R. 271*; Pajelle Investments Ltd. v. Herbold and Herbold, *[1976] 2 S.C.R. 520*; Herman et al. v. Deputy Attorney General of Canada, *[1979] 1 S.C.R. 729*; Ross v. The York, Newcastle & Berwick Railway Company (1849), 18 L.J.Q.B. 199; R. v. McIntosh (1869), 12 N.B.R. 372; Reference Re Proposed Legislation Concerning Leased Premises and Tenancy Agreements *(1978), 89 D.L.R. (3d) 460*, referred to; Reference Re Validity of Wartime Leasehold Regulations, *[1950] S.C.R. 124*, not followed.

APPEAL from a decision of the Court of Appeal for Ontario [*(1980), 26 O.R. (2d) 609*; *(1980), 105 D.L.R. (3d) 193*], finding the grant of certain powers ultra vires the Ontario Legislature. Appeal dismissed.

Counsel

Supporting the legislation:

D.W. Mundell, Q.C. John Cavarzan, Q.C., and Lorraine E. Weinrib, for the Attorney General of Ontario. William J. Atkinson, Henri Brun and Jean-François Jobin, for the intervener the Attorney General of Quebec. Reinhold M. Endres and Linda Garber, for the intervener the Attorney General of Nova Scotia. E. Robert A. Edwards, for the intervener the Attorney General of British Columbia. Brian F. Squair, for the intervener the Attorney General of Manitoba. D.A. McKillop, for the intervener the Attorney General of Saskatchewan. William Henkel, Q.C., for the intervener the Attorney General of Alberta.

Opposing the legislation:

John J. Robinette, Q.C., and Peter Atkinson. T.B. Smith, Q.C., and J.M. Mabbutt, for the intervener the Attorney General of Canada. Ian Scott, Q.C., and Mary Hogan, for the intervener Federation of Metro Tenants Association et al. J.H. Melnitzer, for the intervener London Property Management Association et al. Lawrence Greenspon, on his own behalf.

Solicitor for the appellant the Attorney General of Ontario: H. Allan Leal, Toronto. Solicitor for the Attorney General of Quebec: René Dussault, Quebec. Solicitor for the Attorney General of Nova Scotia: Gordon F. Coles, Halifax. Solicitor for the Attorney General of British Columbia: Richard Vogel, Victoria. Solicitor for the Attorney General of Manitoba: Gordon F. Pilkey, Winnipeg. Solicitor for the Attorney General of Saskatchewan: Richard Gosse, Regina. Solicitor for the Attorney General of Alberta: Ross Paisley, Edmonton. Counsel appointed by the Court to present arguments opposed to the validity of the Legislation: John J. Robinette, (McCarthy & McCarthy), Toronto. Solicitor for the Deputy Attorney General of Canada: Roger Tassé, Ottawa. Solicitors for the Federation of Metro Tenants Association et al.: Cameron, Brewin & Scott, Toronto. Solicitors for the Committee of Concern for Rental Housing in Ontario et al.: Cohen, Melnitzer, Toronto. Solicitors for Lawrence A. Greenspon: Karam, Tannis, Ottawa. Solicitor for the Attorney General of Newfoundland: G.B. MacAulay, St. John's. Solicitor for the Law Union of Ontario: Paul H. Reinhardt, Toronto. Solicitor for R.S. Bentley: R.S. Bentley, Barrie, Ontario. Solicitor for Peter Lamont: Peter Lamont, Ottawa.

The judgment of the Court was delivered by

DICKSON J.

DICKSON J.:— The resolution of disputes between landlords and tenants has long been a central preoccupation of the common law courts. As early as 1587, Lord Coke observed that the law of landlord and tenant was vital since, "for the most part, every man is a lessor or a lessee". (Walkers Case [(1587), 76 E.R. 676] at p. 680.)

Within the past few years the Province of Ontario, in common with a number of other provinces, has enacted legislation to redress what was perceived to be an imbalance, in favour of landlords, in the landlord and tenant relationship. On June 21, 1979, the Legislative Assembly of Ontario enacted The Residential Tenancies Act, 1979, 1979 (Ont.), c. 78, to come into effect on proclamation. The Act contains a detailed legislative code to govern landlords and tenants and establishes a tribunal, bearing the name the Residential Tenancy Commission, to oversee and enforce the newly enunciated rights and obligations. Questions having been raised as to the authority of the Legislative Assembly of Ontario to empower the Commission to make orders evicting tenants from residential premises and to require landlords and tenants to comply with obligations imposed under the Act, the Executive Council of the Province, pursuant to s. 1 of The Constitutional Questions Act, R.S.O. 1970, c. 79, referred the following questions to the Court of Appeal of Ontario for hearing and consideration:

1. Is it within the legislative authority of the Legislative Assembly of Ontario to empower the Residential Tenancy Commission to make an order evicting a tenant as provided in The Residential Tenancies Act, 1979?

2. Is it within the legislative authority of the Legislative Assembly of Ontario as provided in The Residential Tenancies Act, 1979 to empower the Residential Tenancy Commission to make orders requiring landlords and tenants to comply with obligations imposed under that Act?

The Court of Appeal delivered a careful and scholarly unanimous judgment in which each of these questions was answered in the negative. The court concluded it was not within the legislative authority of Ontario to empower the Residential Tenancy Commission to make eviction orders and compliance orders as provided in The Residential Tenancies Act, 1979. The importance of the issue is reflected in the fact that five judges of the court, including the Chief Justice and Associate Chief Justice, sat on the appeal.

The Attorney General of Ontario appealed to this Court as of right, under s. 37 of the Supreme Court Act, R.S.C. 1970, c. S-19, as amended. The Attorneys General of Quebec, Nova Scotia, British Columbia, Manitoba, Saskatchewan and Alberta intervened to support the validity of the legislation. Mr. John J. Robinette, Q.C., was invited by the Court of Appeal of Ontario, when the matter came before that court, to argue against the validity of the provisions that were the subject of the reference. Mr. Robinette assisted this Court in like manner during argument of the present appeal.

The Attorney General of Canada intervened to oppose the legislation as did a number of property management associations. The legislation also came under attack from independent community-based legal service clinics and from the Federation of Metro Tenants Association. The Federation is an "umbrella" organization for Metropolitan Toronto, composed of nearly one hundred affiliated tenant associations and some individual tenant members who support and participate in the work of organizing tenants and lobbying in their interests. Owners and tenants alike made common cause in assailing the impugned provisions.

It should be noted that the Court is concerned in this appeal only with the constitutional validity of two powers, the subject matter of the reference, and not with the soundness of the overall legislative scheme or the wisdom of the Legislative Assembly in enacting it. The general subject matter of landlord and tenant rights and obligations is unquestionably within provincial legislative competence and no part of The Residential Tenancies Act, 1979, other than those sections empowering the Commission to issue compliance orders and eviction orders, is in issue.

I

In advance of the hearing before the Ontario Court of Appeal, the Attorney General of Ontario filed with the court the 1968 report of the Ontario Law Reform Commission entitled "Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies"; the 1972 report of the Commission on Part IV of The Landlord and Tenant Act; the 1976 report of the Commission entitled "Report on Landlord and Tenant Law"; and a Green Paper published in 1978 by the Ministry of Consumer and Commercial Relations entitled "Policy Options for Continuing Tenant Protection". In the Court of Appeal, a question was raised as to whether, and the extent to which, this material was properly before the court. Although there was some argument, it was not pressed to the point where the Court of Appeal felt called upon to rule on it. The court was content to receive the material for whatever assistance it might afford as "background", and to leave its relevance and weight until the conclusion of the submissions advanced during the hearing. In the outcome the Court of Appeal was persuaded that little, if anything, turned on the reception of this material.

The same four documents were before us, and it seems appropriate at this time to rule whether properly so. There is little authority to guide decision.

Professors Whyte and Lederman correctly point out in chapter 4 of their work on Canadian Constitutional Law that a classification process is at the heart of judicial determination of the distribution or limitation of primary legislative powers. That process joins logic with social fact, value decisions and the authority of precedents. A court faces particular difficulty in a constitutional reference when only the bare bones of the statute arrive for consideration. The Chief Justice of this Court made this point in the "chicken and egg" reference, Attorney-General for Manitoba v. Manitoba Egg and Poultry Association [*[1971] S.C.R. 689*]. There is normally a dearth of relevant

facts from which to draw logical inferences, determine social impact, make value decisions and select governing precedents. As Whyte and Lederman note, p. 229, "... the challenge of ultra vires raises a need for evidence of facts of social context and legislative effect ...".

In my view a court may, in a proper case, require to be informed as to what the effect of the legislation will be. The object or purpose of the Act in question may also call for consideration though, generally speaking, speeches made in the Legislature at the time of enactment of the measure are inadmissible as having little evidential weight.

It now seems reasonably clear that Royal Commission Reports and the Reports of Parliamentary committees made prior to the passing of a statute are admissible to show the factual context and purpose of the legislation although Cartwright J., as he then was, said in Attorney General of Canada. v. Reader's Digest Association (Canada) Ltd. [*[1961] S.C.R. 775*], that the general rule is that if objected to they should be excluded. If the reports are relevant it is not entirely clear why they should be excluded upon objection of one of the parties.

In Home Oil Distributors, Limited v. Attorney-General of British Columbia [*[1940] S.C.R. 444*], Kerwin J., with the concurrence of Rinfret J., took into consideration a report of a Commission under the circumstances there existing, for showing what was in the mind of Parliament. The same course was adopted by the Privy Council in Attorney-General for British Columbia v. Attorney-General for Canada [*[1937] A.C. 368*] and in Ladore and Others v. Bennett and Others [*[1939] A.C. 468*]. In Reference re Eskimos [*[1939] S.C.R. 104*], in preliminary proceedings, this Court appointed the Registrar to hold hearings and take evidence as to whether Eskimos were "Indians" within the meaning of the B.N.A. Act. In Swait v. Board of Trustees of Maritime Transportation Unions [*(1966), 61 D.L.R. (2d) 317*], the Quebec Court of Queen's Bench, Appeal Side, admitted the Norris Report on Disruption of Shipping in the Great Lakes for the purpose of establishing the facts upon which Parliament based the purpose and object of an Act passed essentially to put an end to a danger threatening the national interest.

Although admittedly a far different case from the present, in Reference re Anti-Inflation Act [(1976] 2 S.C.R. 373], this Court admitted extrinsic evidence relating to the then prevailing level of inflation, including the White Paper tabled in the House by the Minister of Finance. I think it can be taken from the conduct of the Anti-Inflation Reference and the use of extrinsic materials by the members of the Court in that case that the exclusionary rule expressed in obiter by Rinfret C.J. in Reference Re Validity of Wartime Leasehold Regulations [*[1950] S.C.R. 124*], can no longer be taken as a correct statement of the law. We should be loathe, it seems to me, to enunciate any inflexible rule governing the admissibility of extrinsic materials in constitutional references. The effect of such a rule might well be to exclude logically relevant and highly probative evidence. It is preferable, I think, to follow the practice adopted in the Anti-Inflation Reference and give timely directions establishing the evidence or extraneous materials to be admitted to serve the ends of the Court in the particular reference.

Generally speaking, for the purpose of constitutional characterization of an act we should not deny ourselves such assistance as Royal Commission reports or Law Reform Commission reports underlying and forming the basis of the legislation under study, may afford. The weight to be given such reports is, of course, an entirely different matter. They may carry great, little, or no weight, but at least they should, in my view, generally be admitted as an aid in determining the social and economic conditions under which the Act was enacted. See Attorney-General for Alberta v. Attorney-General for Canada and Others [*[1939] A.C. 117*] (Alberta Bank Taxation case). The mischief at which the act was directed, the background against which the legislation was enacted and institutional framework in which the act is to operate are all logically relevant. See Letang v. Cooper [[1965] 1 Q.B. 232], at p. 240 and Pillai v. Mudanayake and Others [[1953] A.C. 514], at p. 528.

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 [*[1930] A.C. 124*]. 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. See Laidlaw v. The Municipality of Metropolitan Toronto [*[1978] 2 S.C.R. 736*] at p. 743 and generally, Strayer, judicial Review of Legislation in Canada (1968), c. 6; Hogg, "Proof of Facts in Constitutional Cases" (1976), 26 U. of T.L.J. 386; Buglass, "The Use of Extrinsic Evidence and the Anti-Inflation Act Reference" (1977), 9 Ottawa L. Rev. 183.

II

In 1964, the Legislature of Ontario enacted The Ontario Law Reform Commission Act, 1964 (Ont.), c. 78, R.S.O. 1970, c. 321, establishing the Ontario Law Reform Commission. The Commission was to inquire into and consider any matter relating to reform of the law having regard to the statute law, the common law and judicial decisions. On December 10, 1968, the Law Reform Commission submitted to the Attorney General of Ontario an Interim Report on Landlord and Tenant Law applicable to Residential Tenancies in which the Commission recommended substantial changes in matters of substantive law governing the relations of landlord and tenant relating to residential tenancies. Following thereon The Landlord and Tenant Act, 1968-69 (Ont.), c. 58, was enacted. This Act added a new Part IV entitled "Residential Tenancies" to The Landlord and Tenant Act. Part IV contained provisions on most of the matters recommended by the Law Reform Commission and some additional matters. Section 106(1) provided:

> 106. (1) Unless a tenant has vacated or abandoned rented premises, the landlord shall not regain possession of the premises on the grounds he is entitled to possession except under the authority of a writ of possession obtained under section 105 or under Part III.

Thus the landlord's right of self-help, through direct repossession, was abolished. It became necessary for a landlord to bring proceedings by way of writ to recover possession except in cases where the tenant had given it up. The Act also provided for the establishment of Landlord and Tenant Advisory Bureaux by the councils of municipalities to receive complaints and mediate disputes between landlords and tenants.

The reform in the law of landlord and tenant in 1968-69 preserved the constitutional authority of s. 96 courts to terminate tenancies, issue writs of possession, and enforce compliance.

In 1972 the Law Reform Commission reported upon a review which the Commission had made, at the request of the Attorney General, on certain provisions of the new Part IV of The Landlord and Tenant Act applying to residential tenancies. The Commission made a number of recommendations directed at shortening the time for taking steps in the proceedings for eviction and providing for the entry by the clerk of the court of default judgments where a landlord's application for a writ of possession was not contested. The Landlord and Tenant Amendment Act, 1972, 1972 (Ont.), c. 123, was enacted amending the procedure for applying for writs of possession and providing for default proceedings in the manner recommended by the Law Reform Commission.

In 1975 the Legislature of Ontario introduced The Residential Premises Rent Review Act, 1975, 1975 (Ont.), c. 12, to establish rent control. The ability of the province to administer a rent review system, of course, in no way encroached on the traditional jurisdiction of the s. 96 courts to order termination, eviction and compliance. A companion Act, 1975, (Ont.), c. 13, amended The Landlord and Tenant Act to make substantial changes in the substantive law of landlord and tenant. This latter Act established security of tenure for tenants by providing for automatic renewal of tenancy agreements upon expiration of the term, unless the agreement had been lawfully terminated in accordance with the Act. A tenant might terminate it by agreement or by giving notice in the form and at the time prescribed by the statute. A landlord might terminate only for specified causes and at specified times. The rules for proceedings by the county or district judge were relaxed and simplified. The powers of these judges were expanded to cover most of the issues that might arise between a landlord and a tenant, including power to declare a tenancy agreement terminated. After the 1975 statutes were passed the courts continued to exercise the functions traditionally performed by s. 96 courts since Confederation, and to the present time, to order termination of leases, make eviction orders and compel compliance with the provisions of a lease of residential premises. See, as examples, Re Apogee Investments Ltd. and Saber [*(1978), 21 O.R. (2d) 663*] and Re Blok-Glowczynski et al. and Stanga et al. [*(1978), 22 O.R. (2d) 376*].

On February 10, 1978 a Government Green Paper was released relating to policy options for continuing tenant protection. The Green Paper made reference to the very large number of Ontario citizens whose lives are governed in part by the law of landlord and tenant. From 1961 to 1971 the number of tenants grew by 70 per cent from 483,500 to 825,000. It was estimated that there were more than one million rental households in Ontario constituting about 36 per cent of all households.

A reading of the Green Paper would suggest that at least three factors led to the establishment of the Residential Tenancy Commission. First, the legislature had removed the landlord's traditional right to employ 'self-help' remedies (i.e. repossession) and now required a landlord to apply for an order of eviction. It was felt that the demands of this "new business" would clog an already overburdened court system. A specialized Commission was seen as a convenient method for ensuring prompt and efficient resolution of landlord-tenant disputes. A second major factor was the belief that the regular court system was too formal in structure for the resolution of landlord and tenant disputes; that such disputes could best be adjudicated in an informal, summary proceeding before a tribunal where individual complainants would feel less inhibited in presenting their own cases. Third, the Green Paper saw the creation of a Tenancy Commission as a convenient method of consolidating functions which had previously been performed by different organizations. The new tribunal would be a centralized body which could provide authoritative advice to landlords and tenants. By combining administrative functions with judicial functions, the tribunal would be able to offer a wider range of remedies to individuals than the regular court system. The Paper noted that a while many had hailed the development of tenancy boards and tribunals as an effective means of realizing the rights embodied in the residential tenancy legislation, others had pointed out that such "rough justice" might run counter to well-established principles of procedure. The Green Paper recommended a "mediation-adjudication" approach under which authority to mediate would be combined with jurisdiction to adjudicate a dispute. In this approach, an official would listen to both sides of the case and attempt to guide the parties toward a mutually agreeable solution. If agreement could not be reached, the official would convene a hearing with the parties present, hear evidence and arrive at a determination according to the law. The decision would be legally enforceable.

The Residential Tenancies Act was enacted to implement the recommendations of the Green Paper. As I have said, the Act set up a new tribunal, the Residential Tenancy Commission, to oversee and enforce the obligations of landlords and tenants in Ontario. The tribunal is given wide-ranging powers and functions. Some of these are purely administrative in nature, for example, the Commission is charged with the obligation of informing members of the public as to their rights under the legislation. But by far the most significant role to be played is in the resolution of disputes between landlords and tenants. The mechanism for dispute resolution is triggered 'upon application' by either the landlord or the tenant. In one or two circumstances the process is put in motion by application by a third party--e.g. a neighbouring tenant.

The Residential Tenancies Act is not directed solely to low rental housing. It applies to every residential tenancy, including the most expensive housing, and leases of great value, and any length of term, in city or country.

III

As Professor Hogg has noted in his work on Constitutional Law of Canada (1977), p. 129, there is no general "separation of powers" in the British North America Act, 1867. Our Constitution does not separate the legislative, executive, and judicial functions and insist that each branch of government exercise only its own function. Thus it is clear that the Legislature of Ontario may confer non-judicial functions on the courts of Ontario and, subject to s. 96 of the B.N.A. Act, which lies at the heart of the present appeal, confer judicial functions on a body which is not a court.

Under s. 92(14) of the B.N.A. Act the provincial legislatures have the legislative power in relation to the administration of justice in the province. This is a wide power but subject to subtraction of ss. 96 to 100 in favour of the federal authority. Under s. 96 the Governor General has the sole power to appoint the judges of the Superior, District and County Courts in each province. Under s. 97 the judges who are to be appointed to the Superior, District and County Courts are to be selected from the respective bars of each province. Under s. 100 the Parliament of Canada is obliged to fix and provide for their salaries. 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. Section 96 has thus come to be regarded as limiting provincial competence to make appointments to a tribunal exercising s. 96 judicial powers and therefore as implicitly limiting provincial competence to endow a provincial tribunal with such powers.

IV

The belief that any function which in 1867 had been vested in a s. 96 court must forever remain in that court reached its apogee in the judgment of Lord Atkin in Toronto Corporation v. York Corporation [*[1938] A.C. 415*]. Describing s. 96 as one of the "three principal pillars in the temple of justice ... not to be undermined", Lord Atkin held that the p Ontario Municipal Board could not validly receive "judicial authority". At the same time, he held that the Municipal Board was in 'pith and substance' an administrative body, and the impugned 'judicial functions' were severable from the administrative powers given to the Board under its enabling legislation. There was no analysis of the inter-relationship between the judicial and administrative features of the legislative scheme; the assumption was that any attempt to confer a s. 96 function on a provincially-appointed tribunal was ultra vires the legislature.

This sweeping interpretation of s. 96, with its accompanying restrictive view of provincial legislative authority under s. 92, was limited almost immediately by the judgment of this Court in the Reference re Adoption Act and Other Acts [*[1938] S.C.R. 398*]. Chief Justice Duff held that the jurisdiction of inferior courts was not "fixed forever as it stood at the date of Confederation". On his view, it was quite possible to remove jurisdiction from a Superior Court and vest it in a court of summary jurisdiction. The question which must be asked was whether "the jurisdiction conferred upon magistrates under these statutes broadly conform[s] 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". In the Adoption Reference, Duff C.J. looked to the historical practice in England and concluded that the jurisdiction conferred" on magistrates under the legislation before the Court in the Reference was analogous to the jurisdiction under the English Poor Laws, a jurisdiction which had belonged to courts of summary nature rather than to Superior Courts. On this basis, the legislation was upheld. The Adoption Reference represented a liberalization of the view of s. 96 adopted by the Privy Council in Toronto v. York, at least in the context of a transfer of jurisdiction from a Superior Court to an inferior Court.

The same process of liberalization, this time in the context of a transfer of jurisdiction from a Superior Court to an administrative tribunal, was initiated by the Privy Council in Labour Relations Board of Saskatchewan v. John East Iron Works, Limited [*[1949] A.C. 134*]. Lord Simonds proposed a two-fold test. The first limb of the test is to ask whether the board or tribunal exercises "judicial power". Lord Simonds did not propose a 'final' answer to the definition of "judicial power", but he suggested that,

> ... the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings. [p. 149]

If the answer to the initial question as to "judicial power" is in the negative, then that concludes the matter in favour of the provincial board. If, however, the power is in fact a judicial power, then it becomes necessary to ask a second question: in the exercise of that power, is the tribunal analogous to a superior, district or county court?

This formulation represented a subtle modification of the test proposed by Duff C.J. in the Adoption Reference. Duff C.J. had suggested it was necessary to determine whether the impugned jurisdiction was more analogous to a summary type of jurisdiction exercised at the time of confederation rather than to a jurisdiction traditionally exercised by s. 96 courts. The formulation of Duff C.J. froze the provincial jurisdiction to that of summary courts. Lord Simonds in John East suggested that it was not absolutely necessary to consider whether there was a true analogy between the impugned jurisdiction and the jurisdiction of summary courts; it would be sufficient, for constitutional purposes, to establish that the power or jurisdiction was not one traditionally falling within s. 96. Lord Simonds makes this clear in the following passage:

> At this stage their Lordships reach the conclusion that the jurisdiction exercisable by the board is not such as to constitute it a court within s. 96 of the British North America Act. They do not think it necessary to consider whether it is a jurisdiction more nearly analogous to that exercised at the time of confederation by justices of the peace--a matter to which much argument was directed--nor would they pursue the comparison with the jurisdiction of the Workmen's Compensation Board, which was also pressed on them by counsel. It is sufficient to say that it is not, in their opinion, analogous to that of a superior, district or county court. [p. 152]

In John East, the Privy Council did not find it necessary to give any final answer to the initial question, namely, whether the power in issue was 'judicial'. The case was resolved solely on the ground that, in exercising the power, the tribunal was not analogous to a superior, county or district court.

It is apparent that John East represented a break with the line of jurisprudence developed in Toronto v. York. The approach of Toronto v. York, in which the sole issue was whether the tribunal was being clothed with a s. 96 'judicial power', had been effectively, though not expressly, repudiated.

In Tomko v. Labour Relations Board (Nova Scotia) et al. [[1977]] S.C.R. 112], the issue was the validity of the Nova Scotia Labour Relations Board's authority to issue a "cease and desist" order. It was argued that this jurisdiction was analogous to the jurisdiction of s. 96 courts to issue mandatory injunctions to halt illegal activity. The Chief Justice, speaking for eight members of the Court, held that this consideration was not conclusive, since "... 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". A consideration of the 'institutional setting' indicated that the power to make cease and desist orders was merely one aspect of a broad legislative scheme for the peaceful regulation of collective bargaining, an area which the courts had not entered. Thus, the Labour Board had been validly clothed with the power impugned.

The recent decision of this Court, The Corporation of the City of Mississauga v. The Regional Municipality of Peel et al. [*[1979] 2 S.C.R. 244*], is, in the words of the Chief Justice in that case, "... a prime illustration of the proposition laid down in Tomko". In Mississauga, the Ontario Municipal Board had been given certain powers to resolve disputes over assets between amalgamating municipalities. Noting that Toronto v. York must be viewed with 'considerable qualification', it was stated that the power to adjudicate was merely one" ... incident ... in the over-all picture of the general restructuring of the municipalities in which the Municipal Board is given an important part to play...". Viewed in their "institutional setting, the 'judicial powers' to determine rights and liabilities under provincial legislation had been validly granted to the Municipal Board".

I do not think it can be doubted that the courts have applied an increasingly broad test of constitutional validity in upholding the establishment of administrative tribunals within provincial jurisdiction. In general terms it may be said that it is now open to the provinces to invest administrative bodies with 'judicial functions' as part of a broader policy scheme. There will still be situations, however, as in Attorney General of Quebec et al. v. Farrah [*[1978] 2 S.C.R. 638*], where a s. 96 'judicial function' is isolated from the rest of the administrative structure of the relevant legislation. In Farrah, a Transport Tribunal was given appellate jurisdiction over the Quebec Transport Commission. The Tribunal performed no function other than deciding questions of law. Since this function was normally performed by s. 96 courts and divorced from the broader institutional framework of the Act, the impugned sections were held to be unconstitutional. Subject to this type of situation, s. 96 can no longer be construed as a bar to a province seeking to vest an administrative tribunal with ancillary 'judicial' powers formerly exercised by s. 96 courts.

The teaching of John East, Tomko, and Mississauga is that one must look to the 'institutional setting' in order to determine whether a particular power or jurisdiction can validly be conferred on a provincial body. But these cases are merely the starting point, rather than the conclusion, of the inquiry in the present case. As the British Columbia Court of Appeal noted in its consideration of s. 96 in Re Pepita and Doukas [*(1979), 101 D.L.R. (3d) 577*], at p. 582.

> ... It is notable that no general tests are offered or established in the Tomko judgment for the characterization of the function, the characterization of the institutional arrangements, and the examination of their interrelationship. Instead the judgment continues with a consideration of the particular function in its context ....

The Privy Council in John East suggested that the application of s. 96 required a determination as to whether or not the powers being exercised were judicial or administrative and if judicial, whether or not the administrative body was "broadly analogous" to a Superior, District or County Court. Tomko added a further dimension. An administrative tribunal may be clothed with power formerly exercised by s. 96 courts, so long as that power is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure. If, however, the impugned power forms a dominant aspect of the function of the tribunal, such that the tribunal itself must be considered to be acting 'like a court', then the conferral of the power is ultra vires.

The jurisprudence since John East leads one to conclude that the test must now be formulated in three steps. The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or

jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. This temporary segregation, or isolation, of the impugned power is not for the purpose of turning back the clock and restoring Toronto v. York as the governing authority, an approach deplored in Mississauga. It is rather the first step in a three step process.

If the historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 courts, that is the end of the matter. As Rand J. noted in Dupont et al. v. Inglis et al. [*[1958] S.C.R. 535*], "Judicial power not of that type, [i.e. that exercised by s. 96 courts at Confederation] such as that exercised by inferior courts, can be conferred on a provincial tribunal whatever its primary character" (p. 542). If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 courts at Confederation, then one must proceed to the second step of the inquiry.

Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a 'judicial' function? In addressing the issue, it is important to keep in mind the further statement by Rand J. in Dupont v. Inglis that "... it is the subject-matter rather than the apparatus of adjudication that is determinative". Thus the question of whether any particular function is 'judicial' is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'. To borrow the terminology of Professor Ronald Dworkin, the judicial task involves questions of 'principle', that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of 'policy' involving competing views of the collective good of the community as a whole. (See Dworkin, Taking Rights Seriously (Duckworth, 1977) pp. 82-90.)

If, after examining the institutional context, it becomes apparent that the power is not being exercised as a "judicial power" then the inquiry need go no further for the power, within its institutional context, no longer conforms to a power or jurisdiction exercisable by a s. 96 court and the provincial scheme is valid. On the other hand, if the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the third and final step in the analysis and review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context. The phrase--'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'--is the central core of the judgment in Tomko. It is no longer sufficient simply to examine the particular power or function of a tribunal and ask whether this power or function was once exercised by s. 96 courts. This would be examining the power or function in a 'detached' manner, contrary to the reasoning in Tomko. What must be considered is the 'context' in which this power is exercised. Tomko leads to the following result: it is possible for administrative tribunals to exercise powers and jurisdiction which once were exercised by the s. 96 courts. It will all depend on the context of the exercise of the power. It may be that the impugned 'judicial powers' are merely subsidiary or ancillary to general administrative functions assigned to the tribunal (John East; Tomko) or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature (Mississauga). In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (Farrah) so that the tribunal can be said to be operating 'like a s. 96 court'.

The matter was well expressed in the Ontario Court of Appeal:

> Where judicial powers are conferred by a provincial Legislature on a provincially constituted and appointed tribunal, the fact that the tribunal may not be curial in its essential functions but rather an administrative tribunal entrusted with the making of decisions that are primarily of an administrative nature will not, of itself, insulate the judicial powers from a finding that the legislation conferring them is, to that extent, invalid. Whether such a finding may be escaped will tend to depend on whether the judicial powers are seen to be merely incidents of, or adjuncts to, a scheme for the administration of a matter that is otherwise within provincial legislative competence, albeit that as incidents of or adjuncts to the scheme they may be necessary for its effective functioning ....

Step one, the historical inquiry. The Residential Tenancy Commission is given a broad range of powers under the Act: in this reference, as I have noted, we are concerned with only two, power to make an eviction order and power to make a 'compliance' order. These powers recur constantly throughout the Act; there are nineteen separate provisions which empower the Commission to make an eviction order and seventeen separate provisions empowering the Commission to make a compliance order. Illustrations of the former are found in s. 36(2)(c) (eviction for non-payment of rent); s. 38(3)(d) (eviction for interference with safety or enjoyment of landlord or other tenants); s. 41(2)(c) (eviction for carrying on of illegal activity); and s. 51(1) (eviction where landlord requires premises for own use or for sale). Illustrations of the latter power are found in s. 28(4)(a) (landlord may be ordered to comply with obligation to repair); s. 29(2)(a) (obligation to supply vital services); s. 37(2)(a) (tenant to repair damage wilfully or negligently caused by him). In contrast, the impugned power in Tomko to issue "cease and desist" orders was found in one subs., 49(2), forming part of a legislative scheme of some 103 sections.

Section 84(1) of The Residential Tenancies Act, subject to certain exceptions, gives the Commission "exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Act and as to any matter or thing in respect of which any power, authority or discretion is conferred upon the Commission". Section 116(1) permits the filing of a Commission order evicting a tenant in the County or District Court and states that such order once filed: "has the same force and effect and all proceedings may be taken on it, as if it were an order of that court, and the clerk of the court shall issue a writ of possession".

The Ontario Court of Appeal held that the power to order eviction was analogous to the traditional power of the courts to order the ejectment of a tenant, while the power to order compliance was analogous to the power of the courts to award damages or specific performance or to grant injunctive relief. This finding was not challenged on the hearing of this appeal. The Attorney-General for Ontario conceded that the powers given to the Residential Tenancy Commission "... are not merely analogous to those [pre-1867] powers but are the same powers".

We start therefore with the proposition that the power to order eviction in the 1979 Act is broadly conformable to pre-1867 jurisdiction in ejectment, and the power to order compliance is broadly conformable to the pre-1867 jurisdiction to award damages or specific performance. It is true that the Tenancy Commission ordering an eviction in 1981 would look to different considerations than a court ordering an ejectment in 1867, the rules surrounding the granting of these remedies having altered somewhat since 1867, but mere alteration in rules cannot change the substance of things or prevent the drawing of analogies. In an ejectment in 1867 a landlord was asserting a right of re-entry to his property and was seeking the removal of a tenant from his land. These remain the essentials of an eviction application by a landlord in 1981. Similarly, a landlord seeking an injunction against a tenant in pre-Confederation times is in substantially the same position as a modern landlord seeking compliance under the Act.

The question whether the powers or jurisdiction conferred by the statute are analogous to, in broad conformity with, the kind of powers or jurisdiction historically exercised by the superior, county or district courts admits of only one answer--yes.

It is clear, as appears from the judgment of the Court of Appeal, that prior to 1867 in Upper Canada the only tribunals which could make ejectment orders were the Court of Queen's Bench, the Court of Common Pleas, and the County Court in limited situations, and that only the Court of Chancery could make orders of specific performance or issue mandatory or prohibitory injunction orders. The settlement of disputes between landlords and tenants, including the termination of tenancies and eviction of tenants, has thus always been within the exclusive jurisdiction of the Superior, District and County Court judges both before and after Confederation.

The Attorney General advances two submissions for the purpose of refuting this conclusion:

1. The power to order eviction of overholding tenants was conferred on County Court judges as persona designata, outside the structure of the Superior or County Courts. Thus this power was recognized as not exclusively a power of the Superior, District or County Courts within the intendment of section 96. By analogy, the power to make orders of compliance is not a power exclusively within the jurisdiction of such Superior, District or County Courts.

2. Even if jurisdiction over landlord and tenant matters was exercised by s. 96 courts in 1867, the jurisdiction conferred on the Residential Tenancy Commission is analogous to "a type of jurisdiction

> generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of section 96".

The Attorney General offers a number of authorities in support of his first submission, including two decisions of this Court, which establish, it is argued, that the jurisdiction of county judges with respect to overholding tenants was exercised as persona designata. The first case cited, Pong v. Quong and Chong [*[1927] S.C.R. 271*], does not really assist appellant. In Pong a County Court judge acting under the Overholding Tenants legislation had dealt with a number of collateral matters as to the relationship between two tenants. On appeal, the Court noted that, "It is perfectly manifest that he [the County Judge] had no jurisdiction to do so--no jurisdiction subject to appeal; that he could entertain such collateral matter only either as persona designata or as arbitrator". From the context it is clear that this comment was directed to the judge's possible status as a persona designata by the consent of the parties and not under The Landlord and Tenant Act.

In the more recent case of Pajelle Investments Limited v. Herbold and Herbold [*[1976] 2 S.C.R. 520*], this Court was concerned with the interpretation of The Landlord and Tenant Act, R.S.O. 1970, c. 236, and the powers of a judge under that Act. Mr. Justice Spence, opening his judgment, and without elaboration, said "The matter came on for hearing before His Honour Judge MacRae acting as a persona designata under the provisions of The Landlord and Tenant Act". A passing reference of this nature cannot be considered to be conclusive, particularly in light of the recent extensive consideration of the concept of persona designata by this Court, in a case in which persona designata was directly in issue, Herman et al. v. Deputy Attorney General of Canada [*[1979] 1 S.C.R. 729*]. In Herman, the issue was whether a Superior Court judge acting under s. 232 of the Income Tax Act 1970-71-72 (Can.), c. 63, did so qua judge or as 'persona designata'. Noting that the concept of persona designata is "little better than a trap for the unwary" and that there is a need for a "greater element of certainty in the application of the notion of persona designata" the Court laid down the following general proposition:

> Prima facie, Parliament should be taken to intend a judge to act qua judge whenever by statute it grants powers to a judge. He who alleges that a judge is acting in the special capacity of persona designata must find in the specific legislation provisions which clearly evidence a contrary intention on the part of Parliament. The test to be applied in considering whether such a contrary intention appears in the relevant statute can he cast in the form of a question: is the judge exercising a peculiar, and distinct, and exceptional jurisdiction, separate from and unrelated to the tasks which he performs from day-to-day as a judge, and having nothing in common with the court of which he is a member?

Applying this test, the Court in Herman held that a Superior Court judge deciding a question of solicitor-client privilege under the Income Tax Act did so qua judge and not as persona designata.

The Court of Appeal in the instant case applied the test in Herman, concluding that the County Court judges were acting qua judge under the overholding tenants provisions. The Court was fortified by the fact that the concept of persona designata as applied to judicial powers was not coined until 1849, in Ross v. The York, Newcastle & Berwick Railway Company [(1849), 18 L.J.Q.B. 199] and it was not until 1869 that the principle was applied in Canada: R. v. McIntosh [(1869), 12 N.B.R. 372]. With respect, I agree with the Court of Appeal. The jurisdiction over overholding tenants contained in the 1864 Act was merely a modification of the traditional jurisdiction in ejectment exercised by the Superior Courts.

In any event, as was pointed out in argument, the persona designata argument could not be applicable to the jurisdiction of the Supreme Court of Ontario to make orders requiring landlords and tenants to comply with obligations under leases. The point was also made that whether or not the County Court judge was acting as persona designata in eviction proceedings, the power he exercised was broadly analogous to that of the Superior Court and accordingly, even if the powers of the Commission are seen in terms of powers of pre-1867 County Court judges acting as persona designata, they nonetheless remain broadly analogous to those of pre-1867 Superior Courts. Accordingly the first submission of the Attorney General for Ontario on this point must be rejected.

The second submission, as I understand it, relies on the reasoning elaborated by Chief Justice Duff in the Reference re Adoption Act (supra). This Court held that the jurisdiction of the inferior courts could be enlarged, both as to subject matter and as to pecuniary limits, as long as the new jurisdiction "broadly conform[ed] 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". It is urged that the powers conferred on the Residential Tenancy Commission conform

to a type of jurisdiction generally exercisable by courts of summary jurisdiction. As to the question of subject matter, the appellant relies on the form and language in which the statute is enacted. The statute contains non-technical language and its application involves questions of fact or involves the exercise of discretionary factual judgments expressed in ordinary language. It is submitted that no significant jurisprudential questions are involved. As to pecuniary limits, the Residential Tenancy Commission is empowered to make an order for the payment of money only where the amount claimed does not exceed $3,000. The suggestion seems to be that, since the Residential Tenancy Commission proceeds in a summary manner under a statute drafted in 'layman's' language, its jurisdiction is, for constitutional purposes, analogous to the jurisdiction of a summary court. This submission misconceives the import of the reasoning in the Adoption Reference. Provinces cannot avoid the limitations of s. 96 simply by taking a traditional s. 96 function, simplifying procedural matters, and then transferring the jurisdiction to a non-section-96 tribunal. If this could be done, s. 96 would be stripped of all force and effect.

Even putting aside these assumptions, the argument of the appellant on this point cannot be accepted. As to the question of subject matter, I have noted that the Act applies to leases of any value and any term. Moreover, the $3,000 limitation on jurisdiction only applies when a sum of money is being claimed; in all other cases, there will be no pecuniary limit. Thus a landlord may incur costs far in excess of $3,000 in order to 'comply' with the Act or with an order of the Commission. As to the submission that the Commission will simply be deciding questions of fact, I would adopt the following comments made by the Court of Appeal:

> Clearly, more will be involved than the finding of facts, and the ascertainment of their "real substance", on the basis of which the next step to be taken will usually be apparent. The law will need to be interpreted in accordance with the accepted rules of law for that purpose, and the proper law will need to he applied, including, where relevant, the proper principles of contract, tort, and real and personal property law, notwithstanding the statutory "codification" earlier mentioned. In at least some cases the issue of the legality or illegality of activities carried on by tenants will arise, and in many cases assessments will have to be made of compensation for loss or injury of various kinds. In the making of orders for the evictions of tenants and requiring compliance with obligations imposed under the legislation, the task of the Commission will be of basically the same complexity and degree of difficulty as the task which has hitherto engaged the attention of the Courts in this Province.

The second submission of the Attorney General for Ontario also fails.

VI

We pass now to the second step of the inquiry, to consideration of the impugned powers within their institutional setting. Is the power to order eviction or compliance when so viewed still a 'judicial power'? I have already indicated that the hallmark of a judicial power is a lis between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.

With very few exceptions, the Residential Tenancy Commission is not free to intervene of its own motion in disputes between landlords and tenants. Virtually all of the provisions of the Act require that either a landlord or a tenant apply to the Commission before any action be taken. Moreover, the power to order eviction or compliance will, in all case, be exercised in the context of a lis between parties. This is so even where a. third party may invoke the Commission's intervention. Under s. 29, for example, a Public Utility may notify the Commission that its service has been or is likely to be stopped, and the Commission may intervene. But s. 29 goes on to provide that the Commission shall determine whether a particular landlord is breaching his obligation to supply vital services to his tenants. Thus there will clearly be a lis between parties and an issue to be resolved.

When confronted with a lis, the task of the Commission will be to determine the respective rights and obligations of the parties according to the terms of the legislation. The Commission does not have an untrammelled discretion to 'set matters right'. The powers which it may invoke and the remedies which it may award are circumscribed by the terms of the Act. At no point is the individual's right at law surrendered for the benefit of a common group or policy. The Commission deals exclusively with matters of contract and land law as they arise between landlords and tenants.

It is true that the Commission is given a certain degree of discretion when performing its adjudicative function. Under s. 93(1) for example, the Commission is instructed to decide "upon the real merits and justice of the case"; s. 93(2) provides that the Commission "shall ascertain the real substance of all transactions and activities ..."; s. 110(3) states that the Commission "may include in any order terms and conditions it considers proper in all the circumstances". Yet such terminology is certainly not foreign to courts within the purview of s. 96. The County Court under The Landlord and Tenant Act has the power to "make such further or other order as the judge considers appropriate" (s. 96); to make an order "granting relief against forfeiture on such terms and conditions as the judge may decide" (s. 106(1)), and to "refuse to grant the application [for possession] unless he is satisfied, having regard to all the circumstances, that it would be unfair to do so". (s. 107(2)).

The Commission has authority to hear and determine disputes in accordance with rules of law, and by the authority of the law. It authorizes actions for which application is made. It has the power to impose penalties and sanctions and to award remedies for the infringement of rights. Disobedience of an order of the Commission is a penal offence. The Commission decides contractual and property rights between individual landlords and tenants and in so doing determines not only the right to land and property, but also other rights. In each case, there is an analysis of the law," an application of the applicable law to the particular facts, and then a judicial decision and a consequent order. It is difficult to conceive that when so acting the Commission acts otherwise than as a curial tribunal. In substance the tribunal is exercising judicial powers roughly in the same way as they are exercised by the courts.

Section 105 is also important. It provides that The Statutory Powers Procedure Act, 1971, applies to proceedings by the Commission in the exercise of a statutory power of decision. That Act assures the right to counsel, the right to call and examine witnesses and present argument and the right to conduct cross-examination of witnesses. The Statutory Powers Procedure Act, 1971, also requires that the tribunal give its final decision and order in writing and shall give reasons in writing if requested by a party. The Commission, at the hearing, is required to question the parties who are in attendance at the hearing and any witnesses with a view to determining the truth concerning the matters in dispute. Apart from this inquisitional feature, there is little to distinguish the hearing from a hearing conducted by a Superior Court. An appeal lies to the Commission from the decision or order of a Commissioner and a further appeal from the Commission on a question of law, to the Supreme Court of Ontario.

I conclude that the impugned powers, when viewed in their institutional setting, remain essentially 'judicial powers'.

VII

We now face the most difficult aspect of this appeal--an examination of the inter-relationship between the Commission's impugned 'judicial powers' and the other powers and jurisdiction conferred under the Act.

Prior to 1979, three broad functions were exercised by three separate bodies. The function of giving advice, mediating and educating was handled by the Landlord and Tenant Advisory Bureaux. The function of administering rent review was handled by the Residential Premises Rent Review Board. The function of adjudicating disputes between landlords and tenants was handled by s. 96 courts. The 1979 Act effected relatively minor changes in the substantive law of landlord and tenant. The primary change introduced in 1979 was to transfer the separate and distinct functions of the Advisory Bureaux, the Rent Review Board and the courts to the Residential Tenancy Commission.

The Attorney General for Ontario argues that the Commission is essentially an administrative body charged with "supervising and regulating" the relationship of landlord and tenant in the Province of Ontario. The function of adjudicating disputes, it is contended, is merely a subsidiary or ancillary aspect of the Commission's role.

The Attorney General must look to s. 81, defining the powers of the Commission to sustain his argument of an overall supervisory and regulatory role in the field of landlord and tenant relations. Section 81 lends little support to the argument. It reads:

> 81. The Commission shall,
>
> (a) perform the duties assigned to it by or under this Act and shall administer this Act and the regulations;

(b) periodically review this Act and the regulations and recommend from time to time amendments or revisions thereof:

(c) advise and assist the public on all residential tenancy matters including referral where appropriate to social services and public housing agencies;

(d) take an active role in ensuring that landlords and tenants are aware of the benefits and obligations established by this Act;

(e) periodically prepare and publish a summary of significant decisions of the Commission and the reasons therefor.

It appears upon reading the Act as a whole that the central function of the Commission is that of resolving disputes, in the final resort by a judicial form of hearing between landlords and tenants. The bulk of the Act is taken up with defining the rights and obligations of landlords and tenants and with prescribing a method for resolving disputes over those obligations. Dispute resolution is achieved through application to the Commission. It is true that the Commission is granted the power to mediate the dispute before it is obliged to hold a hearing, but the Commission will ordinarily have no right or duty to act as mediator unless invited to do so by one of the parties. If one party does not wish to settle, then a judicial hearing must be held and a judgment rendered. The other functions of the Commission are either ancillary to this function (i.e. the power to recommend policy or to advise the parties) or are separate and distinct from this core power, and bear no relation to it (i.e. the power over rent review).

There is no broad legislative scheme as there was in Mississauga, supra, to subsume the judicial functions of the Commission. It was argued that the powers vested in the Residential Tenancy Commission were merely incidental or ancillary to the policy of "security of tenure" for tenants. This submission is unconvincing. The primary purpose and effect of the 1979 Act was to transfer jurisdiction over a large and important body of law, affecting landlords and tenants of one million rental units, from the s. 96 courts where it has been administered since Confederation to a provincially appointed tribunal.

Here the chief role of the Commission is not to administer a policy or to carry out an administrative function. Its primary role is to adjudicate. The administrative features of the legislation can be characterized as ancillary to the main adjudicative function. The power of the Commission to mediate disputes is aimed at the speedy resolution of differences between the parties. So too is the informal nature of the proceedings. The goal of these provisions is to enable the Commission to 'process' controversies in an expeditious manner. As such, they are merely incidental to the main purpose of the legislation.

In the case at bar, as the Court of Appeal observed, powers until now exercised by the courts have simply been transferred to the Commission as the "chosen vehicle for their exercise". In the instant case the impugned powers are the nuclear core around which other powers and functions are collected. In Tomko the tribunal was composed of persons familiar with labour relations matters and presumably better able than the courts to weigh the interests involved and to assess the implications of cease and desist orders upon the parties. In the present case the Act imposes no particular qualifications or experience as essential to appointment to the Commission. There is no requirement of legal training or occupational experience for any member of the Commission and the process of selection is not based on any bipartite or tripartite principle. The Commission is in no way a specialized agency. In the instant case the whole of a s. 96 court's jurisdiction in a certain area, however limited, has been transferred to provincially appointed officials. The provincial legislature has sought to withdraw historically entrenched and important judicial functions from the superior court and vest them in one of its own tribunals. Although the legislature may undoubtedly contract, as well as enlarge, court jurisdiction it cannot lift wholesale from the superior courts and bestow on a tribunal of its own making the resolution of disputes theretofore handled by superior courts in respect of rights and obligations in the nature of eviction orders and orders for compliance with contractual mandates.

The Residential Tenancy Commission is charged with the function of interpreting contracts and enforcing contractual rights through the exercise of the impugned powers. The Commission is to be empowered to do what a superior court has always done. It is clearly a Superior Court quoad those powers. The statutory provisions conferring those powers are therefore invalid. In Farrah the jurisdiction which the statute sought to transfer was, in the words of Pigeon J. at pp. 656-7 "precisely the same as that which was previously exercised by the Quebec

Court of Appeal". In the present case the jurisdiction sought to be transferred is precisely the same as that which was previously, and is presently, exercised by the courts.

The Attorney General of Ontario in a supplementary factum submitted that the test implicit in the Tomko case may be expressed in this way: where the Legislature enacts legislation that in its "pith and substance" establishes a scheme of substantive law and a scheme for its administration to meet some real social problem within its legislative competence, the Legislature may, as an integral part of the scheme for administration of the statute, confer s. 96 court powers on a non-section-96 tribunal (whether a specialized tribunal or a nonsection-96 court) if the conferring of such powers is rationally justifiable or functionally appropriate as part of the scheme. In such case, the statute is characterized as a whole as being in pith and substance in relation to the provincial legislative subject matter. The contention seems to be that if the legislature sets up a social agency to meet a social problem, as seen by the legislature, then that determines the validity of a conferral of s. 96 judicial power upon the agency. If the legislation is not aimed at evasion, it cannot be attacked. Such a contention goes too far and is not supported on the authorities.

Implicit throughout the argument advanced on behalf of the Attorney General of Ontario is the assumption that the court system is too formal, too cumbersome, too expensive and therefore unable to respond properly to the social needs which The Residential Tenancies Act is intended to meet. All statutes respond to social needs. The courts are not unfamiliar with equity and the concepts of fairness, justice, convenience, reasonableness. Since the enactment in 1976 of the legislation assuring "security of tenure" the County Court judges of Ontario have been dealing with matters arising out of that legislation, apparently with reasonable despatch, as both landlords and tenants in the present proceedings have spoken clearly against transfer of jurisdiction in respect of eviction and compliance orders from the courts to a special commission. It is perhaps also of interest that there is no suggestion in the material filed with up that the Law Reform Commission favoured removal from the courts of the historic functions performed for over one hundred years by the courts.

I am neither unaware of, nor unsympathetic to, the arguments advanced in support of a view that s. 96 should not be interpreted so as to thwart or unduly restrict the future growth of provincial administrative tribunals. Yet, however worthy the policy objectives, it must be recognized that we, as a Court, are not given the freedom to choose whether the problem is such that provincial, rather than federal, authority should deal with it. We must seek to give effect to the Constitution as we understand it and with due regard for the manner in which it has been judicially interpreted in the past. If the impugned power is violative of s. 96 it must be struck down.

I conclude by noting that two provincial Courts of Appeal, in addition to the Ontario Court of Appeal, have had occasion recently to consider provincial power to vest jurisdiction over landlord and tenant matters in a specialized tribunal. The Alberta Court of Appeal in Reference Re Proposed Legislation Concerning Leased Premises and Tenancy Agreements [*(1978), 89 D.L.R. (3d) 460*] decided that a province could not authorize a provincially appointed tribunal to grant orders for possession to a landlord or to grant orders for specific performance of a tenancy agreement. The difficulty facing the Court, as Morrow J.A. noted in his reasons, was that the questions were referred to the court without any accompanying institutional setting. Accordingly, the reasons of the Court of Appeal must of necessity be of limited application for future cases. The British Columbia Court of Appeal, in Re Pepita and Doukas, supra, held that legislation empowering a 'rentalsman' to make an order for possession was intra vires the province. The Ontario Court of Appeal, in its judgment in the instant case, elaborated a number of distinctions between the Ontario and British Columbia legislation; these distinctions, it was said, justified the different conclusions reached by the two courts. While noting that such distinctions are indeed possible, this Court need not, on this occasion, express any opinion as to the validity of the British Columbia legislation.

In the result, I would dismiss the appeal, and answer in the negative the constitutional questions which have been posed by the Executive Council of the Province of Ontario. No question of costs arises.

Appeal dismissed.

End of Document

Canada (Minister of Citizenship and Immigration) v. Vavilov

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, C. Gascon, S. Côté, R. Brown, M. Rowe and S.L. Martin JJ.

Heard: December 4, 5, 6, 2018;

Judgment: December 19, 2019.

File No.: 37748.

[2019] S.C.J. No. 65 | *[2019] A.C.S. no 65* | *2019 SCC 65* | *[2019] 4 S.C.R. 653* | *2020EXP-27* | *441 D.L.R. (4th) 1* | *59 Admin. L.R. (6th) 1* | *69 Imm. L.R. (4th) 1* | *EYB 2019-335761* | *2019 CarswellNat 7883*

Minister of Citizenship and Immigration, Appellant; v. Alexander Vavilov, Respondent, and Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Council for Refugees, Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario Securities Commission, British Columbia Securities Commission, Alberta Securities Commission, Ecojustice Canada Society, Workplace Safety and Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers' Compensation, Workers' Compensation Appeals Tribunal (New Brunswick), British Columbia International Commercial Arbitration Centre Foundation, Council of Canadian Administrative Tribunals, National Academy of Arbitrators, Ontario Labour- Management Arbitrators' Association, Conférence des arbitres du Québec, Canadian Labour Congress, National Association of Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the Rule of Law, Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada, Interveners

(343 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Administrative law — Judicial review and statutory appeal — Standard of review — Reasonableness — Appeal from Federal Court of Appeal judgment setting aside decision of Canadian Registrar of Citizenship (Registrar) cancelling Vavilov's certificate of citizenship, dismissed — Revised framework for determining standard of review began with presumption that reasonableness was applicable standard in all cases — Reviewing courts should derogate from this presumption only where required by clear indication of legislative intent or by rule of law — In conducting reasonableness review, court had to consider outcome of administrative decision in light of its underlying rationale to ensure transparency, intelligibility and justification — Section 3 of Citizenship Act did not intend s. 3(2)(a) to apply to children of individuals who had not been granted diplomatic privileges and immunities — Registrar's failure to justify decision with respect to these constraints rendered interpretation unreasonable — No purpose would be served by remitting this matter to Registrar — Vavilov was Canadian citizen.

Immigration law — Naturalization or citizenship — Right to citizenship — Persons born in Canada — Loss of or disqualification from citizenship — Appeals and judicial review — Citizenship Act and Regulations — Interpretation — Appeal from Federal Court of Appeal judgment setting aside decision of Canadian Registrar of Citizenship (Registrar) cancelling Vavilov's certificate of citizenship, dismissed — Revised framework for determining standard of review began with presumption that reasonableness was applicable standard in all cases — Reviewing courts should derogate from this presumption only where required by clear indication of legislative intent or by rule of law — In conducting reasonableness review, court had to consider outcome of administrative decision in light of its underlying rationale to ensure transparency, intelligibility and justification — Section 3 of Citizenship Act did not intend s. 3(2)(a) to apply to children of individuals who had not been granted diplomatic privileges and immunities — Registrar's failure to justify decision with respect to these constraints rendered interpretation unreasonable — No purpose would be served by remitting this matter to Registrar — Vavilov was Canadian citizen.

Appeal from a judgment of the Federal Court of Appeal setting aside a decision of the Canadian Registrar of Citizenship (Registrar) cancelling Vavilov's certificate of citizenship. Vavilov was born in Canada and his parents were later revealed to be Russian spies. The Registrar found, on the basis of an interpretation of s.á3(2)(a) of the Citizenship Act, that Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the Citizenship Regulations. The Court viewed the appeal as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in Dunsmuir and subsequent cases.
HELD: Appeal dismissed.

Reasonableness review was an approach meant to ensure that courts intervene in administrative matters only where it was truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point was the principle of judicial restraint and respect for the distinct role of administrative decision makers. However, it was not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remained a robust form of review. In conducting a reasonableness review, a court had to consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole was transparent, intelligible and justified. The Court should focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place. The standard of review analysis required courts to give effect to the legislature's institutional design choices to delegate authority through statute. There was no convincing reason to presume that legislatures meant something different when they used the word "appeal" in an administrative law statute than they did in a criminal or commercial law context. Respect for the rule of law required courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. Written reasons were the means by which the decision maker communicated the rationale for its decision. A principled approach to reasonableness review was one which put those reasons first. To be reasonable, a decision had to be based on reasoning that was both rational and logical. A failure in this respect could lead a reviewing court to conclude that a decision must be set aside. The decision also had to be justified in relation to the relevant constellation of law and facts. Whether an interpretation was justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. Where the reasonableness standard was applied in conducting a judicial review, the choice of remedy had to be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature had entrusted the matter to the administrative decision maker, and not to the court, to decide. Applying this analysis, the standard to be applied in reviewing the merits of the Registrar's decision in this case was reasonableness. The Registrar failed to justify her interpretation of s.á3(2)(a) of the Citizenship Act in light of the constraints imposed by the text of s.á3 as a whole, by other legislation and international treaties that informed the purpose of s. 3, by the jurisprudence on the interpretation of s.á3(2)(a), and by the potential consequences of her interpretation. It was unreasonable for the Registrar to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" applied to individuals who had not been granted diplomatic privileges and immunities in Canada. Vavilov's parents had not been granted such privileges and immunities. Rules concerning citizenship

required a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations. Since Vavilov's parents, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. As a person who was born in Canada after February 14, 1977, Vavilov's status was governed only by the general rule set out in s. 3(1)(a) of the Citizenship Act. He was a Canadian citizen.

Statutes, Regulations and Rules Cited:

Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of QuÚbec with respect to applications for appeal, Bill 32, 1st Sess., 42nd Leg., Quebec, 2019,

Administrative Tribunals Act, S.B.C. 2004, c.á45, s. 58, s. 59

Canadian Charter of Rights and Freedoms 1982, s. 1

Canadian Citizenship Act, R.S.C. 1970, c.áC19, s. 5(3)

Citizenship Act, *R.S.C. 1985, c. C29, s. 3*, s. 10, s. 22.1-22.4

Citizenship Regulations, SOR/93246, s. 26

Constitution Act, 1867, s. 96

Constitution Act, 1982, s. 35

Federal Courts Act, R.S.C. 1985, c.áF7, s. 18-18.2, s. 18.4, s. 27, s. 28

Foreign Missions and International Organizations Act, S.C. 1991, c.á41, s. 3, s. 4, Sch. I,II s. 1, Sch. I,II s. 41, Sch. I,II s. 43, Sch. I,II s. 49, Sch. I,II s. 53

Human Rights Code, R.S.B.C. 1996, c.á210, s. 32

Immigration and Refugee Protection Act, S.C. 2001, c.á27, s. 35-37

Interpretation Act, R.S.C. 1985, c.áI21, s. 35(1)

Municipal Government Act, R.S.A. 2000, c.áM26, s. 470

Ontario Human Rights Code, 196162, S.O. 196162, c.á93, s. 3

Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality, 500 U.N.T.S. 223, art. II

Vienna Convention on Consular Relations, Can. T.S. 1974 No.á25,

Vienna Convention on Diplomatic Relations, Can. T.S. 1966 No.á29,

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Administrative law -- Judicial review -- Standard of review -- Proper approach to judicial review of administrative decisions -- Proper approach to reasonableness review.

Citizenship -- Canadian citizens -- Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies -- Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen -- Exception stating that Canadian-born child is not citizen if either parent was representative or employee in Canada of foreign government at time of child's birth -- Whether Registrar's decision to cancel certificate of citizenship was reasonable -- Citizenship Act, R.S.C. 1985, c. 29, s. 3(2)(a).

Court Summary:

V was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

Per **Wagner** C.J. and **Moldaver, Gascon, Côté, Brown, Rowe** and **Martin** JJ.: The Registrar's decision to cancel V's certificate of citizenship was unreasonable, and the Court of Appeal's decision to quash it should be upheld. It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

More generally, this appeal and its companion cases (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66) provide an opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and subsequent cases. The submissions presented to the Court have highlighted two aspects of the current framework which need clarification. The first aspect is the analysis for determining the standard of review. The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard.

It has become clear that *Dunsmuir*'s promise of simplicity and predictability has not been fully realized. Certain aspects of the current standard of review framework are unclear and unduly complex. The former contextual analysis has proven to be unwieldly and offers limited practical guidance for courts attempting to determine the standard of review. The practical effect is that courts struggle in conducting the analysis, and debates surrounding the appropriate standard and its application continue to overshadow the review on the merits, thereby undermining access to justice. A reconsideration of the Court's approach is therefore necessary in order to bring greater coherence and predictability to this area of law. A revised framework to determine the standard of review where a court reviews the merits of an administrative decision is needed.

In setting out a revised framework, this decision departs from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to fulfill its mandate and interpret the law applicable to all issues that come before it. Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. Thus, whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. Conclusively closing the door on the application of a contextual analysis to determine the applicable standard streamlines and simplifies the standard of review framework. As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.

The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. This will be the case where it has explicitly prescribed the applicable standard of review. Any framework rooted in legislative intent must respect clear statutory language. The legislature may also direct that derogation from the presumption is appropriate by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. Second, there is no satisfactory justification for the recent trend in the Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature's institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. First, questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Second, the rule of law requires courts to have the final word with regard to general questions of law that are of central importance to the legal system as a whole because they require uniform and consistent answers. Third, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another since the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. The possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case is not definitively foreclosed. However, any new basis for correctness review would be exceptional and would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism. Similarly, a new correctness category based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in this decision.

For example, the Court is not persuaded that it should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. A lack of unanimity within an administrative tribunal is the price to pay for decision-making freedom and independence. While discord can lead to legal incoherence, a more robust form of reasonableness review is capable of guarding against such threats to the rule of law. As well, jurisdictional questions should no longer be recognized as a distinct category subject to correctness review; there are no clear markers to distinguish such questions from other questions related to interpreting an administrative decision maker's enabling statute. A proper application of the reasonableness standard will enable courts to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment on jurisdictional issues and without having to apply the correctness standard.

Going forward, a court seeking to determine what standard of review is appropriate should look to this decision first in order to determine how the general framework applies. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance and will continue to apply essentially without modification, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between administrative bodies. On other issues, such as the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis, certain cases will necessarily have less precedential force.

There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified.

In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

In cases where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable. Reasons are the means by which the decision maker communicates the rationale for its decision: they explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against arbitrariness. A principled approach to reasonableness review is therefore one which puts those reasons first. This enables a reviewing court to assess whether the decision as a whole is reasonable. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process.

In many cases, formal reasons for a decision will not be given or required. Even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant factual and legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. A failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies, are all elements that will generally be relevant in evaluating whether a given decision

is reasonable. Such elements are not a checklist; they may vary in significance depending on the context and will necessarily interact with one another.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. A proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.

Both statutory and common law will also impose constraints on how and what an administrative decision maker can lawfully decide. Any precedents on the issue before the administrative decision maker or on a similar issue, as well as international law in some administrative decision making contexts, will act as a constraint on what the decision maker can reasonably decide. Whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

Furthermore, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. The reasons must also meaningfully account for the central issues and concerns raised by the parties, even though reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis.

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

The question of the appropriate remedy -- specifically, whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons - - is multi-faceted. The choice of remedy must be guided by the rationale for applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. However, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative decision maker decide the matter at first

instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements -- viewed individually and cumulatively -- strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and immunities in some form for the exception to apply. Second, the Registrar disregarded compelling submissions that s. 3(2) is a narrow exception consistent with established principles of international law and with the leading international treaties that extend diplomatic privileges and immunities to employees and representatives of foreign governments. Third, it was a significant omission to ignore the relevant cases that were before the Registrar which suggest that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities. Finally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include all individuals who have not been granted diplomatic privileges and immunities. Rules concerning citizenship require a high degree of interpretive consistency in order to shield against arbitrariness. The Registrar's interpretation cannot be limited to the children of spies -- its logic would be equally applicable to other scenarios. As well, provisions such as s. 3(2)(a) must be given a narrow interpretation because they potentially take away rights which otherwise benefit from a liberal and broad interpretation. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation, or whether, in light of those potential consequences, Parliament would have intended s. 3(2)(a) to apply in this manner. Although the Registrar knew her interpretation was novel, she failed to provide a rationale for her expanded interpretation.

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

Per **Abella** and **Karakatsanis** JJ.: There is agreement with the majority that the appeal should be dismissed. The Registrar's decision to cancel V's citizenship certificate was unreasonable and was properly quashed by the Court of Appeal.

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and "true questions of

jurisdiction" should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority's framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to administrative decision-makers. The majority's presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for deference. By dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis, the majority's framework fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers and reads out the foundations of the modern understanding of legislative intent. Instead of understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the interpretative upper hand on questions of law. Specialized expertise has become the core rationale for deference. Giving proper effect to the legislature's choice to delegate authority to an administrative decision-maker requires understanding the advantages that the decision-maker may enjoy in exercising its mandate. Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

In the majority's framework, deference gives way whenever the rule of law demands it. This approach, however, flows from a court-centric conception of the rule of law. The rule of law means that administrative decision-makers make legal determinations within their mandate; it does not mean that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review. The majority's approach not only erodes the presumption of deference; it erodes confidence in the fact that law-making and legal interpretation are shared enterprises between courts and administrative decision-makers. Moreover, access to justice is at the heart of the legislative choice to establish a robust system of administrative law. This goal is compromised when a narrow conception of the rule of law is invoked to impose judicial hegemony over administrative decision-makers, which adds unnecessary expense and complexity. Authorizing more incursions into the administrative system by judges and permitting *de novo* review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument -- i.e., that the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term "appeal" cannot be imbued with

the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the Court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine of *stare decisis*. A nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision. Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. Reviewing courts must pay respectful attention to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the

decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Third, deferential review impacts how a reviewing court evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

As well, a court conducting deferential review must view claims of error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised to ensure they go to the reasonableness of the decision rather than representing a mere difference of opinion. Courts must also consider the materiality of any alleged errors. An error that is peripheral to the reasoning process is not sufficient to justify quashing a decision. The same deferential approach must apply with equal force to statutory interpretation cases. In such cases, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach imperils deference. A *de novo* interpretation of a statute necessarily omits the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question. By placing that perspective at the heart of the judicial review inquiry, courts display respect for specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies. Conversely, by imposing their own interpretation of a statute, courts undermine legislative intent.

In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

Cases Cited

By Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.

Considered: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6; *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52; *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559, 64 Imm. L.R. (3d) 67; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204; *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 294, 310 F.T.R. 169; **explained:** *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; **discussed:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Bernard*, [1988] 2 S.C.R. 833; *Queensland v. Commonwealth* (1977), 139 C.L.R. 585; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795; *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Québec (Procureure générale) v. Montréal (Ville)*, 2016 QCCA 2108, 17 Admin. L.R. (6th) 328; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14; *R. v. Robinson*, [1996] 1 S.C.R. 683; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R.

458; *Barreau du Québec v. Quebec (Attorney General)*, *2017 SCC 56*, *[2017] 2 S.C.R. 488*; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, *2011 SCC 59*, *[2011] 3 S.C.R. 616*; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, *2000 SCC 14*, *[2000] 1 S.C.R. 360*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, *2004 SCC 39*, *[2004] 2 S.C.R. 185*; *Quebec (Attorney General) v. Guérin*, *2017 SCC 42*, *[2017] 2 S.C.R. 3*; *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013); *Green v. Law Society of Manitoba*, *2017 SCC 20*, *[2017] 1 S.C.R. 360*; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, *2018 SCC 22*, *[2018] 1 S.C.R. 635*; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, *[1993] 2 S.C.R. 756*; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, *2001 SCC 4*, *[2001] 1 S.C.R. 221*; *Knight v. Indian Head School Division No. 19*, *[1990] 1 S.C.R. 653*; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, *2004 SCC 48*, *[2004] 2 S.C.R. 650*; *R. v. Sheppard*, *2002 SCC 26*, *[2002] 1 S.C.R. 869*; *Suresh v. Canada (Minister of Citizenship and Immigration)*, *2002 SCC 1*, *[2002] 1 S.C.R. 3*; *Catalyst Paper Corp. v. North Cowichan (District)*, *2012 SCC 2*, *[2012] 1 S.C.R. 5*; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, *[1997] 3 S.C.R. 3*; *Delios v. Canada (Attorney General)*, *2015 FCA 117*, *472 N.R. 171*; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, *2012 SCC 10*, *[2012] 1 S.C.R. 364*; *Canada (Attorney General) v. Igloo Vikski Inc.*, *2016 SCC 38*, *[2016] 2 S.C.R. 80*; *Law Society of British Columbia v. Trinity Western University*, *2018 SCC 32*, *[2018] 2 S.C.R. 293*; *Komolafe v. Canada (Minister of Citizenship and Immigration)*, *2013 FC 431*, *16 Imm. L.R. (4th) 267*; *Petro-Canada v. British Columbia (Workers' Compensation Board)*, *2009 BCCA 396*, *276 B.C.A.C. 135*; *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, *2014 FC 750*, *27 Imm. L.R. (4th) 151*; *Wright v. Nova Scotia (Human Rights Commission)*, *2017 NSSC 11*, *23 Admin. L.R. (6th) 110*; *Sangmo v. Canada (Citizenship and Immigration)*, *2016 FC 17*; *Blas v. Canada (Citizenship and Immigration)*, *2014 FC 629*, *26 Imm. L.R. (4th) 92*; *Reid v. Criminal Injuries Compensation Board*, *2015 ONSC 6578*; *Lloyd v. Canada (Attorney General)*, *2016 FCA 115*, *2016 D.T.C. 5051*; *Taman v. Canada (Attorney General)*, *2017 FCA 1*, *[2017] 3 F.C.R. 520*; *Roncarelli v. Duplessis*, *[1959] S.C.R. 121*; *Montréal (City) v. Montreal Port Authority*, *2010 SCC 14*, *[2010] 1 S.C.R. 427*; *Canada (Attorney General) v. Almon Equipment Limited*, *2010 FCA 193*, *[2011] 4 F.C.R. 203*; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, *2013 SCC 64*, *[2013] 3 S.C.R. 810*; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, *2014 FCA 56*, *[2015] 2 F.C.R. 1006*; *R. v. Hape*, *2007 SCC 26*, *[2007] 2 S.C.R. 292*; *R. v. Appulonappa*, *2015 SCC 59*, *[2015] 3 S.C.R. 754*; *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*; *Canada Trustco Mortgage Co. v. Canada*, *2005 SCC 54*, *[2005] 2 S.C.R. 601*; *Construction Labour Relations v. Driver Iron Inc.*, *2012 SCC 65*, *[2012] 3 S.C.R. 405*; *IWA v. Consolidated-Bathurst Packaging Ltd.*, *[1990] 1 S.C.R. 282*; *Chieu v. Canada (Minister of Citizenship and Immigration)*, *2002 SCC 3*, *[2002] 1 S.C.R. 84*; *D'Errico v. Canada (Attorney General)*, *2014 FCA 95*; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, *[1994] 1 S.C.R. 202*; *Renaud v. Quebec (Commission des affaires sociales)*, *[1999] 3 S.C.R. 855*; *Groia v. Law Society of Upper Canada*, *2018 SCC 27*, *[2018] 1 S.C.R. 772*; *Sharif v. Canada (Attorney General)*, *2018 FCA 205*, *50 C.R. (7th) 1*; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, *2017 FCA 45*, *411 D.L.R. (4th) 175*; *Gehl v. Canada (Attorney General)*, *2017 ONCA 319*; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, *2010 SCC 2*, *[2010] 1 S.C.R. 6*; *GreCon Dimter inc. v. J.R. Normand inc.*, *2005 SCC 46*, *[2005] 2 S.C.R. 401*; *B010 v. Canada (Citizenship and Immigration)*, *2015 SCC 58*, *[2015] 3 S.C.R. 704*; *India v. Badesha*, *2017 SCC 44*, *[2017] 2 S.C.R. 127*; *Office of the Children's Lawyer v. Balev*, *2018 SCC 16*, *[2018] 1 S.C.R. 398*; *Benner v. Canada (Secretary of State)*, *[1997] 1 S.C.R. 358*; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, *[1997] 3 S.C.R. 391*; *Brossard (Town) v. Québec (Commission des droits de la personne)*, *[1988] 2 S.C.R. 279*.

By Abella and Karakatsanis JJ.

Considered: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, *[1979] 2 S.C.R. 227*; *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 ; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, *[1998] 1 S.C.R. 982*; *Canada (Attorney General) v. Igloo Vikski Inc.*, *2016 SCC 38*, *[2016] 2 S.C.R. 80*; *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); **discussed:** *Dunsmuir v. New Brunswick*, *2008 SCC 9*, *[2008] 1 S.C.R. 190*; **referred to:** *Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267*; *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, *[1970] S.C.R. 425*; *Bell v. Ontario Human Rights Commission*, *[1971] S.C.R. 756*; *Canada (Attorney General) v. Public Service Alliance*

of Canada, [1991] 1 S.C.R. 614; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 ; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 ; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 ; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 ; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 ; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 ; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 ; *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 ; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 , [2009] 2 S.C.R. 764; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157 ; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 , [2011] 3 S.C.R. 708; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 ; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220 ; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66; *Canada v. Craig*, 2012 SCC 43 , [2012] 2 S.C.R. 489; *Kimble v. Marvel Entertainment, LLC.*, 135 S. Ct. 2401 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014); *Fitzleet Estates Ltd. v. Cherry* (1977), 51 T.C. 708; *R. v. Taylor*, [2016] UKSC 5, [2016] 4 All E.R. 617; *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383; *Knauer v. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897 ; *Couch v. Attorney-General (No. 2)*, [2010] NZSC 27, [2010] 3 N.Z.L.R. 149; *Lee v. New South Wales Crime Commission*, [2013] HCA 39, 302 A.L.R. 363; *Camps Bay Ratepayers' and Residents' Association v. Harrison*, [2010] ZACC 19, 2011 (4) S.A. 42; *Buffalo City Metropolitan Municipality v. Asla Construction Ltd.*, [2019] ZACC 15, 2019 (4) S.A. 331; *Payne v. Tennessee*, 501 U.S. 808 (1991); *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 ; *R. v. Bernard*, [1988] 2 S.C.R. 833; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518; *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014); *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465; *Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981); *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019); *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132 ; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195 ; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 , [2009] 2 S.C.R. 678; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438 ; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 ; *Binus v. The Queen*, [1967] S.C.R. 594; *Bilski v. Kappos, Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, 561 U.S. 593 (2010); *Bowles, Price Administrator v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997); *Baker v. Campbell*, [1983] HCA 39, 153 C.L.R. 52; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 ; *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842; *R. v. Kang-Brown*, 2008 SCC 18 , [2008] 1 S.C.R. 456; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178; *Mason v. Minister of Citizenship*

and Immigration, 2019 FC 1251; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83 ; *Mission Institution v. Khela*, 2014 SCC 24 , [2014] 1 S.C.R. 502; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 ; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 ; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 , [2018] 1 S.C.R. 6; *Mills v. Workplace Safety and Insurance Appeals Tribunal (Ont.)*, 2008 ONCA 436, 237 O.A.C. 71; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 S.C.R. 108 ; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293; *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539; *Greco v. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (QL); *R. v. Bonadie* (1996), 109 C.C.C. (3d) 356; *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559, 64 Imm. L.R. (3d) 67 .

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, ss. 58, 59.

An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal, Bill 32, 1st Sess., 42nd Leg., Quebec, 2019.

Canadian Charter of Rights and Freedoms, s. 1.

Canadian Citizenship Act, R.S.C. 1970, c. C-19, s. 5(3).

Citizenship Act, R.S.C. 1985, c. C-29, ss. 3, 10, 22.1 to 22.4.

Citizenship Regulations, SOR/93-246, s. 26.

Constitution Act, 1867, s. 96.

Constitution Act, 1982, s. 35.

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 18 to 18.2, 18.4, 27, 28.

Foreign Missions and International Organizations Act, S.C. 1991, c. 41, ss. 3, 4, Schs. I, II, arts. 1, 41, 43, 49, 53.

Human Rights Code, R.S.B.C. 1996, c. 210, s. 32.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 35 to 37.

Interpretation Act, R.S.C. 1985, c. I-21, s. 35(1).

Municipal Government Act, R.S.A. 2000, c. M-26, s. 470.

Ontario Human Rights Code, 1961-62, S.O. 1961-62, c. 93, s. 3.

Treaties and Other International Instruments

Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality, 500 U.N.T.S. 223, art. II.

Vienna Convention on Consular Relations, Can. T.S. 1974 No. 25.

Vienna Convention on Diplomatic Relations, Can. T.S. 1966 No. 29.

Authors Cited

Arthurs, H. W. "Protection against Judicial Review" (1983), 43 *R. du B.* 277.

Barak, Aharon. "Overruling Precedent" (1986), 21 *Is.L.R.* 269.

Biddulph, Michelle. "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 Alta. L.R. 119.

Bingham, Tom. *The Rule of Law*. London: Allen Lane, 2010.

Brouwer, Andrew. *Statelessness in Canadian Context: A Discussion Paper*, July 2003 (online: https://www.unhcr.org/protection/statelessness/40629ffc7/ statelessness-canadian-context-discussion-paper.html[superscript ;] archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC65_1_eng.pdf).

Brown, Donald J. M., and John M. Evans, with the assistance of David Fairlie. *Judicial Review of Administrative Action in Canada*. Toronto: Thomson Reuters, 2013 (loose-leaf updated December 2018, release 4).

Brownlie, Ian. *Principles of Public International Law*, 5th ed. Oxford: Clarendon Press, 1998.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, Respecting Bill C-20, An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, 34:23.

Coady, Jonathan M. "The Time Has Come: Standard of Review in Canadian Administrative Law" *(2017), 68 U.N.B.L.J. 87*.

Cohen-Eliya, Moshe, and Iddo Porat. "Proportionality and Justification" *(2014), 64 U.T.L.J. 458*.

Cromwell, Thomas A. "What I Think I've Learned About Administrative Law" (2017), 30 *C.J.A.L.P.* 307.

Daly, Paul. "Deference on Questions of Law" (2011), 74 *Mod. L. Rev.* 694.

Daly, Paul. "Unreasonable Interpretations of Law" *(2014), 66 S.C.L.R. (2d) 233*.

Daly, Paul. "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" *(2016), 62 McGill L.J. 527*.

Daly, Paul. "The Signal and the Noise in Administrative Law" *(2017), 68 U.N.B.L.J. 68*.

DeMarco, Jerry V. "Seeking Simplicity in Canada's Complex World of Judicial Review" (2019), 32 *C.J.A.L.P.* 67.

Dicey, Albert Venn. *Introduction to the Study of the Law of the Constitution*, 10th ed. London: Macmillan, 1959.

Duxbury, Neil. *The Nature and Authority of Precedent*. Cambridge: Cambridge University Press, 2008.

Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart, 1997, 279.

Dyzenhaus, David. "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 Rev. Const. Stud. 87 .

Evans, John M. "Standards of Review in Administrative Law" (2013), 26 *C.J.A.L.P.* 67.

Evans, John M. "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.* 101.

Frankfurter, Felix. "Some Reflections on the Reading of Statutes" (1947), 47 *Colum. L. Rev.* 527.

Garner, Bryan A., et al. *The Law of Judicial Precedent*. St. Paul, Minn.: Thomson Reuters, 2016.

Gerhardt, Michael J. *The Power of Precedent*. New York: Oxford University Press, 2008.

Grant, Angus, and Lorne Sossin. "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context*, 3rd ed. Toronto: Emond, 2018, 341.

Green, Andrew. "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" *(2014), 47 U.B.C. L. Rev. 443*.

Hall, Geoff R. "Two Unsettled Questions in the Law of Contractual Interpretation: A Call to the Supreme Court of Canada" (2011), 50 *Can. Bus. L.J.* 434.

Iacobucci, Frank. "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" *(2002), 27 Queen's L.J. 859*.

Laskin, Bora. "Collective Bargaining in Ontario: A New Legislative Approach" (1943), 21 *Can. Bar Rev.* 684.

Lewans, Matthew. *Administrative Law and Judicial Deference*. Portland, Or.: Hart Publishing, 2016.

Lewans, Matthew. "Renovating Judicial Review" *(2017), 68 U.N.B.L.J. 109*.

Macdonald, R. A. "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307.

Macdonald, Roderick A., and David Lametti. "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123.

Macklin, Audrey. "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" *(2014), 40 Queen's L.J. 1*.

Macklin, Audrey. "Standard of Review: Back to the Future?", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context*, 3rd ed. Toronto: Emond, 2018, 381.

Madden, Mike. "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *Adv. Q.* 269.

Makela, Finn. "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345.

McLachlin, Beverley. "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171.

McLachlin, Beverley. *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online: https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx[superscript ;] archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC65_2_eng.pdf).

McLachlin, Beverley. "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016), 29 *C.J.A.L.P.* 127.

McLachlin, Beverley. "The Role of the Supreme Court of Canada in Shaping the Common Law", in Paul Daly, ed., *Apex Courts and the Common Law*. Toronto: University of Toronto Press, 2019, 25.

Morissette, Yves-Marie. "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225.

Mullan, David. "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action -- The Top Fifteen!" (2013), 42 *Adv. Q.* 1.

Munro, Katherine. "A 'Unique Experiment': The Ontario Labour Court, 1943-1944" (2014), 74 *Labour/Le travail* 199.

Pape, Paul J., and John J. Adair. "Unreasonable review: The losing party and the palpable and overriding error standard" (2008), 27 *Adv. J.* 6.

Perell, Paul M. "The Standard of Appellate Review and The Ironies of Housen v. Nikolaisen" (2004), 28 *Adv. Q.* 40.

Powell, Lewis F., Jr. "*Stare Decisis* and Judicial Restraint" (1990), 47 *Wash. & Lee L. Rev.* 281.

Régimbald, Guy. *Canadian Administrative Law*, 2nd ed. Markham, Ont.: LexisNexis, 2015.

Robertson, Joseph T. "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" *(2014), 66 S.C.L.R. (2d) 1*.

Robertson, Joseph T. "Identifying the Review Standard: Administrative Deference in a Nutshell" *(2017), 68 U.N.B.L.J. 145*.

Robertson, Joseph T. *Administrative Deference: The Canadian Doctrine that Continues to Disappoint*, April 18, 2018 (online: https://poseidon01.ssrn.com/delivery.php?ID=025078121121077073088100069023108009116008031085056044126101104009101077075091124065033020049102118033018088023122126069087098105041060022013112086123073102103009066006050071070102011006127090124116080089064120081125100127104100026094125015101089105111&EXT=pdf[superscript ;] archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC65_3_eng.pdf).

Sharpe, Robert J. *Good Judgment: Making Judicial Decisions*. Toronto: University of Toronto Press, 2018.

Stacey, Jocelyn, and Alice Woolley. "Can Pragmatism Function in Administrative Law?" *(2016), 74 S.C.L.R. (2d) 211.*

Stack, Kevin M. "Overcoming Dicey in Administrative Law" *(2018), 68 U.T.L.J. 293*.

Stratas, David. "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" *(2016), 42 Queen's L.J. 27*.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6thed. Markham, Ont.: LexisNexis, 2014.

Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016.

Van Harten, Gus, et al. *Administrative Law: Cases, Text, and Materials*, 7th ed. Toronto: Emond, 2015.

Waldron, Jeremy. "Stare Decisis and the Rule of Law: A Layered Approach" (2012), 111 *Mich. L. Rev.* 1.

Willes, John A. *The Ontario Labour Court: 1943-1944*. Kingston, Ont.: Industrial Relations Centre, Queen's University, 1979.

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Stratas, Webb and Gleason JJ.A.), *2017 FCA 132*, *[2018] 3 F.C.R. 75*, *52 Imm. L.R. (4th) 1*, *30 Admin. L.R. (6th) 1*, *[2017] F.C.J. No. 638* (QL), *2017 CarswellNat 2791* (WL Can.), setting aside a decision of Bell J., *2015 FC 960*, *[2016] 2 F.C.R. 39*, *38 Imm. L.R. (4th) 110*, *[2015] F.C.J. No. 981* (QL), *2015 CarswellNat 3740* (WL Can.). Appeal dismissed.

Counsel

Marianne Zoriae, for the appellant.

Hadayt Nazami, *Barbara Jackman* and *Sujith Xavier*, for the respondent.

Sara Blake and *Judie Im*, for the intervener the Attorney General of Ontario.

Stéphane Rochette, for the intervener the Attorney General of Quebec.

J. Gareth Morley and *Katie Hamilton*, for the intervener the Attorney General of British Columbia.

Kyle McCreary and *Johnna Van Parys*, for the intervener the Attorney General of Saskatchewan.

Jamie Liew, for the intervener the Canadian Council for Refugees.

Karen Andrews, for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program.

Matthew Britton and *Jennifer M. Lynch*, for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission.

Laura Bowman and *Bronwyn Roe*, for the intervener the Ecojustice Canada Society.

David Corbett and *Michelle Alton*, for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick).

Written submissions only by *Gavin R. Cameron* and *Tom Posyniak*, for the intervener the British Columbia International Commercial Arbitration Centre Foundation.

Terrence J. O'Sullivan and *Paul Michell*, for the intervener the Council of Canadian Administrative Tribunals.

Written submissions only by *Susan L. Stewart*, *Linda R. Rothstein*, *Michael Fenrick*, *Angela E. Rae* and *Anne Marie*

Heenan, for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec.

Steven Barrett, for the intervener the Canadian Labour Congress.

Written submissions only by *William W. Shores, Q.C.*, and *Kirk N. Lambrecht, Q.C.*, for the intervener the National Association of Pharmacy Regulatory Authorities.

Brendan Van Niejenhuis and *Andrea Gonsalves*, for the intervener the Queen's Prison Law Clinic.

Adam Goldenberg, for the intervener the Advocates for the Rule of Law.

Toni Schweitzer, for the intervener Parkdale Community Legal Services.

Paul Warchuk and *Francis Lévesque*, for the intervener the Cambridge Comparative Administrative Law Forum.

James Plotkin and *Alyssa Tomkins*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Guy Régimbald, for the intervener the Canadian Bar Association.

Audrey Macklin and *Anthony Navaneelan*, for the intervener the Canadian Association of Refugee Lawyers.

Written submissions only by *David Cote* and *Subodh Bharati*, for the intervener the Community & Legal Aid Services Programme.

Guillaume Cliche-Rivard and *Peter Shams*, for the intervener Association québécoise des avocats et avocates en droit de l'immigration.

Nicholas McHaffie, for the intervener the First Nations Child & Family Caring Society of Canada.

Daniel Jutras and *Audrey Boctor*, as *amici curiae*, and *Olga Redko* and *Edward Béchard Torres*.

The following is the judgment delivered by

1 THE CHIEF JUSTICE R. WAGNER AND M.J. MOLDAVER, C. GASCON, S. COTÉ, R. BROWN, M. ROWE AND S.L. MARTIN JJ. This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, *2019 SCC 66*), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

2 In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, *2008 SCC 9*, *[2008] 1 S.C.R. 190*: that judicial review functions to maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

3 We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a)

115 Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

116 Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

117 A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, *[1998] 1 S.C.R. 27*, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, *2002 SCC 42*, *[2002] 2 S.C.R. 559*, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, *R.S.C. 1985, c. I-21*.

118 This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law -- whether courts or administrative decision makers -- will do so in a manner consistent with this principle of interpretation.

119 Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

120 But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, *2005 SCC 54*, *[2005] 2 S.C.R. 601*, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

121 The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior -- albeit plausible -- merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

122 It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

123 There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

124 Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

(d) *Evidence Before the Decision Maker*

125 It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

126 That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

(e) *Submissions of the Parties*

127 The principles of justification and transparency require that an administrative decision maker's reasons

TELUS Communications Inc. v. Wellman

Supreme Court Reports

Supreme Court of Canada

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

Heard: November 6, 2018;

Judgment: April 4, 2019.

File No.: 37722.

[2019] 2 S.C.R. 144 | *[2019] 2 R.C.S. 144* | *[2019] S.C.J. No. 19* | *[2019] A.C.S. no 19* | *2019 CSC 19*

TELUS Communications Inc. Appellant; v. Avraham Wellman Respondent, and Attorney General of British Columbia ADR Chambers Inc., Canadian Chamber of Commerce, Public Interest Advocacy Centre Consumers Council of Canada, Canadian Federation of Independent Business, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic and Consumers' Association of Canada Interveners

(172 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Catchwords:

Civil procedure — Stay — Class actions — Consumer and non-consumer claims — Arbitration clause — Customer filing class action for damages alleging cell phone service provider engaged in deceptive practices — Class consisting of both consumers and non-consumers — Cell phone service provider's standard terms and conditions containing mandatory arbitration clause — Arbitration clause invalidated by provincial consumer protection legislation with respect to claims by consumers — Cell phone service provider relying on arbitration clause to seek stay of proceedings with respect to non-consumers' claims — Whether provincial statute governing arbitration grants court discretion to refuse to stay non-consumers' claims — Arbitration Act, 1991, S.O. 1991, [page145] c. 17, s. 7 — Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A.

Summary:

W filed a proposed class action for damages against TELUS on behalf of about two million Ontario residents who entered into mobile phone service contracts with TELUS during a specified timeframe. The class consists of both consumers and non-consumers (business customers). W alleges that TELUS engaged in an undisclosed practice of rounding up calls to the next minute such that customers were overcharged and were not provided the number of minutes to which they were entitled. The standard terms and conditions of the service contracts included an arbitration clause stipulating that all claims arising out of or in relation to the contract, apart from the collection of accounts, must be determined through mediation and, failing that, arbitration. This clause was invalidated by the *Consumer Protection Act* to the extent that it would otherwise prevent class members who qualify as consumers from pursuing their claims in court. However, since the business customers do not benefit from this protection, TELUS sought to have the proceeding stayed with respect to the business customer claims, relying on the arbitration clause. The motions judge dismissed TELUS's motion for a stay and certified the action. She held that s. 7(5) of the *Arbitration Act, 1991* grants the courts discretion to refuse a stay where it would not be reasonable to

separate the matters dealt with in the arbitration agreement from the other matters, thereby allowing all of the matters to proceed in court. She was of the view that this discretion may be exercised to allow non-consumer claims that are otherwise subject to an arbitration clause to participate in a class action, where it is reasonable to do so. The Court of Appeal dismissed TELUS's appeal.

Held (Wagner C.J. and Abella, Karakatsanis and Martin JJ. dissenting): The appeal should be allowed and the claims of the business customers stayed.

[page146]

Per Moldaver, Gascon, Côté, Brown and Rowe JJ.: Section 7(5) of the *Arbitration Act, 1991* does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement. The protections afforded by the *Consumer Protection Act* allow the consumers to pursue their claims in court, but the business customers remain bound by the arbitration agreements into which they entered. Accordingly, the latter are exposed to a stay under s. 7(1) of the *Arbitration Act, 1991*. Since the only potential exception to the general rule under s. 7(1) relied on by W does not apply, the business customer claims should be stayed.

In keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts, s. 6 of the *Arbitration Act, 1991* signals that courts are generally to take a hands off approach to matters governed by that statute. Section 7(1) of the *Arbitration Act, 1991* establishes the general rule that where a party to an arbitration agreement commences a proceeding in respect of a matter dealt with in the agreement, the court shall, on the motion of another party to the agreement, stay the court proceeding in favour of arbitration. This general rule reaffirms the concept of party autonomy and upholds the policy underlying the *Arbitration Act, 1991* that parties to a valid arbitration agreement should abide by their agreement. Section 7(2) lists five exceptions to the general rule under s. 7(1) where it would be either unfair or impractical to refer the matter to arbitration. Section 7(5) provides a further exception to the general rule under s. 7(1) and consists of two main components. First, s. 7(5)(a) and (b) set out two preconditions. The first precondition is met if the agreement deals with only some of the matters in respect of which the proceeding was commenced. That is, the proceeding must involve at least one matter that is dealt with in the arbitration agreement and at least one matter that is not dealt with in the arbitration agreement. The second precondition is met if it is reasonable to separate the matters dealt with in the agreement from the other matters. Second, if both preconditions are satisfied, then instead of ordering a full stay, the court may allow the matters that are not dealt with in the arbitration agreement to proceed in court, though it must nonetheless stay the court proceeding in respect of the matters that are dealt with in the agreement. If the preconditions are not met, then the discretionary exception under s. 7(5) is not triggered as s. 7(5) can have effect only if the two preconditions are satisfied. At that point, unless one of the exceptions listed [page147] in s. 7(2) applies, the general rule under s. 7(1) would apply, meaning that the proceeding must be stayed.

Policy considerations cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make s. 7(5) say something it does not. While policy analysis has a legitimate role in the interpretive process, the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. This is particularly so given that the Ontario legislature has already spoken to some of these policy concerns by shielding consumers from the potentially harsh results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts, through the *Consumer Protection Act*. The legislature made a careful policy choice to exempt consumers -- and only consumers -- from the ordinary enforcement of arbitration agreements. That choice must be respected, not undermined by reading s. 7(5) in a way that permits courts to treat consumers and non-consumers as one and the same.

While there can be no doubt as to the importance of promoting access to justice, this objective cannot, absent express direction from the legislature, be permitted to overwhelm the other important objectives pursued by the *Arbitration Act, 1991*. To do so would undermine the legislature's stated objective of ensuring parties to a valid arbitration agreement abide by their agreement, reduce the degree of certainty and predictability associated with

arbitration agreements, and weaken the concept of party autonomy in the commercial setting. It would expand the opportunities for parties to a valid arbitration agreement to avoid their agreement and seek relief in court. Furthermore, this case is not about debating the merits and demerits of enforcing arbitration clauses contained in standard from contracts. Rather, it is about the proper interpretation of s. 7(5) of the *Arbitration Act, 1991*. And, while distinguishing between consumers and non-consumers may be a difficult exercise in certain cases, that difficulty does not bear on the proper interpretation of s. 7(5). Sorting between consumers and non-consumers may be cumbersome in certain cases, but this inconvenience does not permit the [page148] court to recast the legislation as it sees fit in order to avoid such difficulties. Permitting non-consumers to tag along with consumers on the basis that it would be cumbersome to sort between the two would also allow commercial entities to find the inside of a courtroom despite having agreed to arbitration, even where the arbitration agreement was fully negotiated. This would reduce the degree of certainty and predictability associated with arbitration agreements and permit parties to those agreements to piggyback onto the claims of others. Lastly, where the application of an Ontario statute, properly interpreted, leads to a multiplicity of proceedings, the court must give effect to the will of the legislature. Section 7(5) of the *Arbitration Act, 1991* expressly contemplates bifurcation of proceedings, as it permits the court to order a partial stay, thereby potentially resulting in concurrent arbitration and court adjudication.

The sole matter at issue in the proceeding commenced by W is alleged overbilling. This matter is dealt with in the arbitration agreements into which the consumers and business customers entered. Therefore, because there is at least one matter in the proceeding that is dealt with in the arbitration agreements, the general rule under s. 7(1) of the *Arbitration Act, 1991* would ordinarily require a stay of the proceeding as a whole, leaving both consumers and business customers locked out of court. But, s. 7(5) of the *Consumer Protection Act* renders the arbitration agreements entered into by the consumers invalid to the extent that they would otherwise prevent the consumers from commencing or joining a class action of the kind commenced by W. The business customers, however, do not qualify as consumers and as such they cannot invoke the protections that the consumers enjoy.

The only potential exception to s. 7(1) of the *Arbitration Act, 1991* sought to be invoked on behalf of the business customers in this case, the partial stay provision under s. 7(5), offers no assistance. This is because the sole matter at issue in the proceeding is dealt with in the arbitration agreements into which the consumers and business customers entered, such that the first precondition set out in s. 7(5)(a) is not met. Consequently, the general rule under s. 7(1) is left intact insofar as the business customers are concerned and the proceeding must be stayed. However, [page149] this stay must be restricted to the parties who are legally bound by an arbitration agreement -- namely, TELUS and the business customers. In sum, the motions judge and the Court of Appeal erred in law by interpreting s. 7(5) of the *Arbitration Act, 1991* incorrectly and refusing to order a stay that, under s. 7(1), was mandatory. Section 7(5) of the *Arbitration Act, 1991* does not permit the court to ignore a valid and binding arbitration agreement.

Per Wagner C.J. and Abella, Karakatsanis and Martin JJ. (dissenting): The appeal should be dismissed. Where a proceeding includes matters covered by an arbitration agreement and other matters that are not, s. 7(5) of the *Arbitration Act, 1991* gives a judge discretion to allow the entire proceeding to continue in court, even if some parties would otherwise be subject to an arbitration clause.

Section 7(5) of the *Arbitration Act, 1991* reflects an explicit legislative intention to override an otherwise applicable arbitration clause. The words of the provision state that "the court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters". This means that the court can either stay the arbitrable matters before it or allow them to proceed. Logically, a discretionary ability to grant a partial stay also includes the power to refuse a partial stay. The only interpretation that gives meaningful effect to the discretionary language of s. 7(5) is one that confers on judges the ability to allow both arbitrable and non-arbitrable disputes to proceed in court. An assertion that a court can never stay arbitrable matters under s. 7(5) renders the opening phrase --"may stay the proceeding with respect to the matters dealt with in the arbitration agreement" -- superfluous. By interpreting the provision to apply only to non-arbitrable matters, s. 7(5) adds nothing to a judge's existing discretion.

Ontario's *Arbitration Act, 1991* was enacted to allow parties to design their own settlement processes and resolve

their disputes outside the courts. It anticipated two or more parties freely negotiating their arbitral process. To ensure expedient resolution and lower litigation costs, the *Arbitration Act, 1991* limited court intervention in [page150] arbitrable disputes. But it also gave judges discretion to permit court proceedings in certain limited circumstances, such as where the arbitration agreement was manifestly unfair. Where a proceeding includes both matters covered by an arbitration agreement and other matters that are not, s. 7(5) gives a judge discretion to allow the entire proceeding to continue in court, even if some parties would otherwise be subject to an arbitration clause. Since 2002, the Ontario Court of Appeal has interpreted s. 7(5) as granting the discretion to stay matters that would otherwise be subject to arbitration. Similarly, for nearly a decade, the Ontario Court of Appeal has interpreted s. 7(5) as permitting otherwise arbitrable matters to be joined with class actions in the public interests of avoiding duplicative proceedings, increased costs, and the risk of inconsistent results. This interpretation aligns with the text and scheme of the provisions and is consistent not only with the purposes motivating the enactment of the *Arbitration Act, 1991* but also with the purpose of s. 7(5) itself.

The overall purpose of the *Arbitration Act, 1991* was to promote access to justice. Its chosen means of achieving that goal was to promote accessibility by giving parties the choice of resolving disputes outside the court system. The reason for creating this option was a recognition that the court system could be costly and slow. The courts' discretion to intervene in arbitrable matters was therefore narrowed to further the goals of expedient dispute resolution.

Arbitration was intended to be a means by which parties on a relatively equal bargaining footing chose to design an alternative dispute mechanism. One cannot talk about "equal bargaining power" and "party autonomy" if the very nature of the contract reveals that one party has exclusive contractual authority. Parties to mandatory individual arbitration clauses cannot reasonably be said to have "come to the table" and bargained, since there is no bargaining table. That individuals and companies sign these contracts is a function not of bargaining choices, but of an *absence* of choice. All of TELUS's clients -- both business and consumer -- signed the same, non-negotiable standard form agreement. TELUS's individualized arbitration clause effectively precludes access to justice for business clients when a low-value claim does not justify [page151] the expense. And its mandatory nature illustrates that the animating rationales of party autonomy and freedom of contract are nowhere to be seen.

By inserting the reasonableness requirement in s. 7(5)(b) of the *Arbitration Act, 1991*, the provincial legislature clearly contemplated that in certain circumstances, it would be unreasonable to separate the matters dealt with in the arbitration agreement from the other matters. The availability of judicial discretion in s. 7(5) does not require judges to allow a class action including arbitrable claims to proceed: it simply lets them decide when it is reasonable to do so. Eliminating judicial discretion, on the other hand, effectively eliminates access to justice. In this light, s. 7(5) must be interpreted to give judges the discretion to refuse to stay arbitrable claims if it is unreasonable to separate them from non-arbitrable claims. This interpretation applies with equal force whether the proceeding is between two or more named parties, or is a class action. An interpretation of s. 7(5) of the *Arbitration Act, 1991* which permits otherwise arbitrable matters to be joined with class actions in the public interest of avoiding duplicative proceedings, increased costs, and the risk of inconsistent results aligns with the text and scheme of the provisions and is consistent not only with the purposes motivating the enactment of the *Arbitration Act, 1991* but also with the purpose of s. 7(5) itself.

TELUS's interpretation would result in costly and time-consuming factual inquiries on how to divide the arbitrable and non-arbitrable claims even where the substance of both claims is identical, as in this case. Both parties acknowledged the potential difficulties associated with drawing the line between a "consumer" as defined by the *Consumer Protection Act*, who is exempt from arbitration, and a business customer, who is not. This distinction may be especially difficult to determine for those individuals who use their cell phone for both personal and business purposes. For these individuals, determining whether they fall within the scope of the exception in the *Consumer Protection Act* adds unnecessary complexity.

[page152]

The purpose of the *Arbitration Act, 1991*, was to facilitate the ability of parties to negotiate their own process for

resolving disputes outside of the courts, on the premise that access to justice had as much to do with access to a result as with access to a judge. To impose arbitration on unwilling parties violates the spirit of the *Arbitration Act, 1991* and the arbitral process. This operates as an invisible but formidable barrier to a remedy and presumptively immunizes wrongdoing from accountability contrary to our most fundamental notions of civil justice. Section 7(5)(b) of the *Arbitration Act, 1991* gave the motions judge discretion to consider whether it was reasonable to separate the matters dealt with in the agreement (claims of business customers) from the other matters (the consumer claims). The discretion was properly exercised in this case to allow the business claims to be joined with the consumer class action dealing with the same issues.

Cases Cited

By Moldaver J.

Considered: *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; **referred to:** *Corless v. Bell Mobility Inc.*, 2015 ONSC 7682; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 CanLII 23358, aff'd 2007 ONCA 721; *Johnston v. Goudie* (2006), 212 O.A.C. 79; *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation* (2007), 66 C.L.R. (3d) 78, aff'd 2008 ONCA 768, 76 C.L.R. (3d) 1; *Frambordeaux Developments Inc. v. Romandale Farms Ltd.*, 2007 CanLII 55364; *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280, 357 A.R. 184; *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Re Rootes Motors (Canada) Ltd. and Wm. Halliday Contracting Co.*, [1952] 4 D.L.R. 300; *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497; [page153] *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (1962); *Re Arbitration Act* (1964), 47 W.W.R. 544; *Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1; *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161; *Alberici Western Constructors Ltd. v. Saskatchewan Power Corp.*, 2016 SKCA 46, 476 Sask. R. 255; *Briones v. National Money Mart Co.*, 2013 MBQB 168, 295 Man. R. (2d) 101, aff'd 2014 MBCA 57, 306 Man. R. (2d) 129; *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656, 92 O.R. (3d) 4; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Heller v. Uber Technologies Inc.*, 2019 ONCA 1.

By Abella and Karakatsanis JJ. (dissenting)

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481; *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158; *Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 CanLII 23358, aff'd 2007 ONCA 721; *Johnston v. Goudie* (2006), 212 O.A.C. 79; *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation* (2007), 66 C.L.R. (3d) 78, aff'd 2008 ONCA 768, 76 C.L.R. (3d) 1; *Frambordeaux Developments Inc. v. Romandale Farms Ltd.*, 2007 CanLII 55364; *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280, 245 D.L.R. (4th) 107; *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967; *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 O.R. (3d) 776; *Brown v. Murphy* (2002), 59 O.R. (3d) 404; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531.

Statutes and Regulations Cited

Arbitration Act, 1991, S.O. 1991, c. 17, ss. 1 "arbitration agreement", 6, 7.

Class Proceedings Act, 1992, S.O. 1992, c. 6.

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, ss.1 "consumer", "consumer agreement", "supplier", 7, 8.

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 106, 138.

Interpretation Act, R.S.O. 1990, c. I.11, s. 10.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 1.03(1) "proceeding".

Authors Cited

Alberta. Institute of Law Research and Reform. Report No. 51. *Proposals for a New Alberta Arbitration Act*. Edmonton: Institute of Law Research and Reform, 1988.

[page154]

Alberta Law Reform Institute. Final Report No. 103. *Arbitration Act: Stay and Appeal Issues*. Edmonton: Alberta Law Reform Institute, 2013.

Casey, J. Brian. *Arbitration Law of Canada: Practice and Procedure*, 3rd ed. Huntington, N.Y.: Juris, 2017.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Estlund, Cynthia. "The Black Hole of Mandatory Arbitration" (2018), 96 N.C. L. Rev. 679.

McEwan, J. Kenneth, and Ludmila B. Herbst. *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*. Aurora, Ont.: Canada Law Book, 2004 (loose-leaf updated December 2018, release 16).

McGill, Shelley. "The Conflict Between Consumer Class Actions and Contractual Arbitration Clauses" (2006), 43 *Can. Bus. L.J.* 359.

Ontario. Legislative Assembly. *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., March 27, 1991, pp. 245, 256.

Ontario. Legislative Assembly. *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., November 5, 1991, p. 3384.

Pavloviae, Marina, and Anthony Daimsis. "Arbitration", in John C. Kleefeld et al., eds., *Dispute Resolution: Readings and Case Studies*, 4th ed. Toronto: Emond Montgomery, 2016.

Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

Uniform Law Conference of Canada. *Arbitration Amendment Act (2002)* (online: https: //www.ulcc.ca/en/uniform-acts-new-order/drafting-conventions/117-josetta-1-en-gb/uniform-actsa/arbitration- act/1108-arbitration-act-amendment; archived version: https: //www.scc-csc.ca/cso-dce/2019SCC-CSC19_2_eng.pdf).

Uniform Law Conference of Canada. *Uniform Arbitration Act* (1990) (online: https: //www.ulcc.ca/images/stories/Uniform_Acts_EN/Arbitrat_En. pdf; archived version: https: //www.scc-csc.ca/cso-dce/2019SCC-CSC19_1_eng.pdf).

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Weiler, Blair and van Rensburg JJ.A.), 2017 ONCA 433,

138 O.R. (3d) 413, 413 D.L.R. (4th) 684, 100 C.P.C. (7th) 1, [2017] O.J. No. 2800 (QL), 2017 CarswellOnt 8100 (WL Can.), [2017] AZ-51397363, affirming a decision of Conway J., 2014 ONSC 3318, 63 C.P.C. (7th) 50, [2014] O.J. No. 5613 (QL), 2014 CarswellOnt 16562 (WL Can.). [page155] Appeal allowed, Wagner C.J., Abella, Karakatsanis and Martin JJ. dissenting.

Counsel

D. Geoffrey G. Cowper, Q.C., Andrew D. Borrell, Alexandra Mitretodis and *Alan Dabb*, for the appellant.

Joel P. Rochon, Peter R. Jervis, Golnaz Nayerahmadi and *Eli Karp*, for the respondent.

Jonathan Eades and *James L. Maxwell*, for the intervener the Attorney General of British Columbia.

Michael Eizenga, Andrew Little, Ranjan Agarwal and *Charlotte Harman*, for the intervener ADR Chambers Inc.

Brandon Kain, Adam Goldenberg and *Ljiljana Staniae*, for the intervener the Canadian Chamber of Commerce.

Mohsen Seddigh and *Daniel Hamson*, for the interveners the Public Interest Advocacy Centre and the Consumers Council of Canada.

Anthony Daimsis, for the intervener the Canadian Federation of Independent Business.

Marina Pavloviae and *Cynthia Khoo*, for the intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Daniel E. H. Bach, Tyler J. Planeta and *Michael Sobkin*, for the intervener the Consumers' Association of Canada.

The judgment of Moldaver, Gascon, Côté, Brown and Rowe JJ. was delivered by

MOLDAVER J.

I. Overview

1 This appeal requires the Court to decide what happens when a series of arbitration agreements, the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17 [page156] ("*Arbitration Act*"),[1] the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A ("*Consumer Protection Act*"), and a consumer/non-consumer class action collide.

2 This collision occurred when the respondent, Avraham Wellman, filed a proposed class action in Ontario against the appellant, TELUS Communications Inc. ("TELUS"), on behalf of about two million Ontario residents who entered into mobile phone service contracts with the company during a specified timeframe. The class consists of both consumers and non-consumers, the latter being business customers. The action centres on the allegation that TELUS engaged in an undisclosed practice of "rounding up" calls to the next minute such that customers were overcharged and were not provided the number of minutes to which they were entitled.

3 The contracts in question, which were not negotiated, contain standard terms and conditions drafted by TELUS, including an arbitration clause which, broadly speaking, stipulates that all claims arising out of or in relation to the contract, apart from the collection of accounts by TELUS, shall be determined through mediation and, failing that, arbitration.

4 By virtue of the *Consumer Protection Act*, however, this arbitration clause is invalid to the extent that it would otherwise prevent class members who qualify as "consumers" from commencing or joining a class action of the kind

commenced by Mr. Wellman. Indeed, as we shall see, the *Consumer Protection Act* expressly shields consumers from a stay of proceedings under the *Arbitration Act*. Consequently, they are free to pursue their claims in court. The business customers, however, do not benefit from these protections. So where does this leave them?

[page157]

5 The answer, Mr. Wellman says, lies in s. 7(5) of the *Arbitration Act* which, read alongside s. 7(1), provides as follows:

> **Stay**
>
> **7** (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> ...
>
> **Agreement covering part of dispute**
>
> **(5)** The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
>
> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
>
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

6 In Mr. Wellman's submission, s. 7(5) grants the court discretion to allow *all* of the class members, consumers and business customers alike, to pursue their claims together in court, provided it would not be reasonable to separate their claims. This is so, Mr. Wellman maintains, despite the fact that the business customers contracted to resolve their claims through arbitration and would otherwise be bound by that agreement. The courts below, following *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481, leave to appeal refused, [2010] 1 S.C.R. viii, agreed with Mr. Wellman.

7 TELUS sees things differently. It contends that under s. 7(5), a court has no authority to refuse to [page158] stay claims that are subject to an otherwise valid and enforceable arbitration agreement. Rather, it says that the only exceptions to the general stay provision under s. 7(1) are found in s. 7(2), and unless one of those exceptions applies, claims that are subject to arbitration *must* be stayed - full stop. It submits that since none of these exceptions applies, the business customer claims must be stayed.

8 For reasons that follow, I am of the view that s. 7(5) of the *Arbitration Act* does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement. To borrow the language from this Court's decision in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, it is not "a legislative override of the parties' freedom to choose arbitration" (para. 40). Instead, as I will develop, when the s. 7 framework is considered along with the protections afforded by the *Consumer Protection Act*, it becomes clear that while the consumers remain free to pursue their claims in court, the business customers do not. Rather, they remain bound by the arbitration agreements into which they entered, thereby leaving them exposed to a stay under s. 7(1) of the *Arbitration Act*. The only potential exception to s. 7(1) sought to be invoked on behalf of the business customers in this case, the partial stay provision under s. 7(5), offers no assistance. This is because the sole "matter" at issue in the proceeding - alleged overbilling - is dealt with in the arbitration agreements into which the consumers and business customers entered, such that the first precondition set out in s. 7(5)(a) is not met. Consequently, the general rule under s. 7(1) is left intact insofar as the business customers are concerned.

9 I would therefore allow the appeal and stay the business customer claims accordingly.

[page159]

II. Background

A. *TELUS Mobile Phone Service Contracts*

10 Mobile phone services arrived in Canada in the mid-1980s. For about a decade, the main service providers, including TELUS, billed customers on a per-minute basis. TELUS then started offering per-second billing but returned to per-minute billing in 2002.

11 Throughout the relevant period, TELUS's monthly plans included a fixed number of minutes for a set fee, with additional charges for excess usage. For example, TELUS offered a plan giving customers 50 minutes of service plus 50 local minutes for $30, with a charge of 30 cents for each additional local minute. Usage was calculated by rounding up call length to the next minute. So, for example, a call lasting one minute and one second was rounded up to two minutes.

12 Each customer who signed up for a per-minute plan entered into a written contract incorporating TELUS's standard terms and conditions, including an arbitration clause which, broadly speaking, stipulates that all claims arising out of or in relation to the contract, apart from the collection of accounts by TELUS, must be determined by private and confidential mediation and, failing that, private, confidential, and binding arbitration.

B. *Mr. Wellman's Class Action*

13 In 2006, Mr. Wellman entered into a per-minute plan with TELUS. Years later, he filed a proposed class action in Ontario against TELUS[2] alleging that between 2002 and 2010, TELUS's standard terms [page160] and conditions made no mention of the practice of rounding up. The action consists of some two million Ontario residents who entered into per-minute plans with TELUS between August 2006 and July 2010. Seventy percent of the class members (about 1,400,000) are consumers who purchased plans for personal use, while 30 percent (about 600,000) are non-consumers who purchased plans for business use.

14 Mr. Wellman, who pleads that he qualifies as a consumer, alleges that TELUS's undisclosed practice of rounding up accelerated the depletion of the fixed number of minutes class members purchased and prematurely subjected them to excess usage charges. Consequently, he says, class members were overcharged and were not provided the number of minutes to which they were entitled. On this basis, he asserts three causes of action: breach of contract, breach of the *Consumer Protection Act*, and unjust enrichment. He claims $500 million in damages and $20 million in punitive damages on behalf of the class.

15 Mr. Wellman brought a motion to have the action certified as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*"Class Proceedings Act"*).[3] In response, TELUS brought a motion to have the proceeding stayed with respect to the non-consumer claims, relying on the arbitration clause contained in its standard terms and conditions.

III. Statutory Provisions

16 Two statutes lie at the heart of this appeal: the *Arbitration Act* and the *Consumer Protection [page161] Act*. The key sections of these two pieces of legislation are set out below. As it happens, there is some overlap in terms of section numbers, so care must be taken to keep in mind which statute is being discussed when a section number is referred to in these reasons.

Arbitration Act, 1991, S.O. 1991, c. 17

Definitions

1 In this Act,

"arbitration agreement" means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them;

...

COURT INTERVENTION

Court intervention limited

6 No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
3. To prevent unequal or unfair treatment of parties to arbitration agreements.
4. To enforce awards.

Stay

7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

[page162]

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

Effect of refusal to stay

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

Agreement covering part of dispute

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

[page163]

No appeal

(6) There is no appeal from the court's decision.

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A

No waiver of substantive and procedural rights

7 (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

Limitation on effect of term requiring arbitration

(2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.

...

Non-application of *Arbitration Act, 1991*

(5) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

Class proceedings

8 (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

[page164]

IV. Decisions Below

A. *Ontario Superior Court (Conway J.), 2014 ONSC 3318, 63 C.P.C. (7th) 50*

17 Before the motions judge, Conway J., TELUS conceded that s. 7(2) of the *Consumer Protection Act* shielded the consumers from the effect of the arbitration clause. It maintained, however, that the claims of the business customers, who enjoy no protection under the *Consumer Protection Act*, had to be stayed because they were subject to a valid and binding arbitration agreement.

18 The motions judge disagreed. Relying on the Ontario Court of Appeal's decision in *Griffin*, she held that s. 7(5) of the *Arbitration Act* grants the courts discretion to refuse a stay where it would not be reasonable to separate the matters dealt with in the arbitration agreement from the other matters, thereby allowing *all* of the matters to proceed in court. She added that pursuant to *Griffin*, "this discretion may be exercised to allow non-consumer claims (that are otherwise subject to an arbitration clause) to participate in a class action, where it is reasonable to do so" (para. 89). She rejected TELUS's contention that *Griffin* had been overruled by this Court's decision in *Seidel*.

19 She then turned to the application of s. 7(5) of the *Arbitration Act*. She found that it would not be reasonable to separate the consumer claims from the business customer claims, observing that:

* the consumer claims represented 70 percent of all claims;
* the liability and damage issues for both consumers and business customers were the same;

[page165]

* group arbitration was not permitted for the business customer claims; and
* separating the two proceedings could lead to inefficiency, risk inconsistent results, and create a multiplicity of proceedings.

20 Given her finding that it would not be reasonable to separate the consumer claims from the business customer claims, the motions judge declined to stay the business customer claims. Further, she applied the five-part test for

certification and concluded that it had been met, certifying the action accordingly. TELUS appealed her dismissal of the stay application.[4]

B. *Ontario Court of Appeal (Weiler, Blair and van Rensburg JJ.A.), 2017 ONCA 433, 138 O.R. (3d) 413*

(1) Majority Reasons (van Rensburg J.A., Weiler J.A. Concurring)

21 Justice van Rensburg, writing for herself and Justice Weiler, stated that the "sole issue" on appeal was whether *Griffin* had been overtaken by *Seidel* (para. 97). She answered "no". She considered that *Griffin* was "consistent in principle with *Seidel* but was decided in a different legislative context" (para. 59), adding that "[t]he outcomes in the two cases were driven, not by competing attitudes toward arbitration as a dispute resolution mechanism, but by the specific legislative framework in each jurisdiction respecting arbitration and consumer protection" (para. 60). She reasoned that while *Seidel* recognizes the value and importance of private arbitration and affirms that arbitration clauses will generally be upheld, *Griffin*"does not contradict the general principle that contractual [page166] arbitration clauses presumptively will be enforced" (para. 62).

22 Having determined that *Griffin* remained good law, she described the s. 7 regime as follows:

> While s. 7(1) of Ontario's *Arbitration Act* provides that a court "shall" stay a court proceeding commenced by a party to an arbitration agreement on the motion of another party to the agreement, this is subject to the exceptions set out in s. 7(2). The exceptions confer a discretion on the court to intervene (1) where a party entered into the agreement while under a legal incapacity, (2) where the arbitration agreement is invalid, (3) where the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law, (4) where the motion was brought with undue delay and (5) where the matter is a proper one for default or summary judgment ... .
>
> Section 7(5) of the *Arbitration Act* is an extension of the court's discretion and operates where an action has been commenced and the arbitration agreement covers some, but not all, claims. In such a case, the court may grant a partial stay, but only where it is "reasonable to separate the matters dealt with in the agreement from the other matters". Section 7(5) anticipates that when an action contains claims that are subject to an arbitration agreement and claims that are not, bifurcated proceedings will result when it is reasonable to impose a partial stay. When a partial stay is not reasonable, the proceedings will not be bifurcated.
>
> In Ontario, accordingly, courts have the discretion to refuse to enforce an arbitration clause that covers some claims in an action when other claims are not subject to domestic arbitration. It is this legislative choice that drives the analysis. [paras. 71-73]

23 She went on to consider two further arguments advanced by TELUS. First, relying on this Court's decision in *Bisaillon v. Concordia University*, *2006 SCC 19*, *[2006] 1 S.C.R. 666*, TELUS maintained [page167] that the procedural device of a class action proceeding does not alter the parties' substantive right to choose arbitration. Second, TELUS claimed that s. 7(5) cannot be read as conferring jurisdiction over claims that the parties have agreed to submit to arbitration and that such claims are subject to the mandatory stay under s. 7(1).

24 Justice van Rensburg rejected both of these arguments. She stated that TELUS had misinterpreted *Seidel* and ignored its main teaching: "... the enforceability of an arbitration clause depends on the legislative context and whether the legislature intended to limit the freedom to arbitrate" (para. 81). She added that *Seidel* did not characterize the issue as one of jurisdiction, nor did it speak in terms of procedural versus substantive rights. Instead, the issue was one of statutory interpretation. She also saw nothing in the *Arbitration Act* suggesting that an arbitration clause removes or ousts the court's jurisdiction over a dispute, adding that "injecting the question of jurisdiction into the discussion of whether a partial stay of proceedings can be granted under Ontario's *Arbitration Act* is both unnecessary and misleading" (para. 86).

25 In the result, the Court of Appeal dismissed the appeal and upheld the motions judge's decision to refuse a stay.

(2) Concurring Reasons (Blair J.A.)

26 In brief concurring reasons, Blair J.A. agreed in the result but arrived at this outcome "on a more restricted basis" (para. 100). He agreed that *Griffin* had not been overtaken by *Seidel* and that *Griffin* was dispositive of the issue before the court. However, he expressed "reservations about the correctness of the decision in *Griffin* as it relates to a partial stay of the non-consumer claims" (para. 101). In particular, he raised two questions which he said were not [page168] addressed in *Griffin* but which "may warrant further consideration" (para. 103).

27 First, he asked, "as a matter of statutory interpretation, may the words 'other matters' in s. 7(5) of the *Arbitration Act, 1991* - when considered in the context of s. 7 as a whole and the purposes of that Act - be read in a way that cross-pollinates the partial-refusal-to-stay power from a single arbitration agreement context to other arbitration agreements involving different parties and containing arbitration clauses that are otherwise valid and enforceable? Or do 'other matters' refer to other matters arising between the same contracting parties but that are not covered by the arbitration agreement between them?" (para. 104). He observed that s. 7 of the *Arbitration Act* "appears to address circumstances relating to a single arbitration agreement, and not the interconnection between a number of such agreements involving different parties" (para. 104).

28 Second, he asked, "more generally, ought litigants be entitled to sidestep what would otherwise be substantive and statutory impediments to proceeding in court with an arbitral claim by the simple expedient of adding consumer claims (which cannot be stayed, by virtue of the *Consumer Protection Act*), to non-consumer claims (which generally are subject to a mandatory stay) and wrapping all claims in the cloak of a class proceeding? Put another way, may the *Class Proceedings Act* (a procedural rights statute) be used to override the provisions of the *Arbitration Act, 1991* affording contractual parties the right to agree to binding arbitration (a substantive right)?" (para. 105).

[page169]

V. Issue

29 In the context of a proposed consumer/non-consumer class action where only the non-consumer claims are subject to an otherwise valid and binding arbitration agreement, does s. 7(5) of the *Arbitration Act* grant the court discretion to refuse to stay the non-consumer claims?

VI. Analysis

A. *Standard of Review*

30 The issue on appeal is one of statutory interpretation and is therefore properly characterized as a question of law (see *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 33). As such, the standard of review is correctness (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8).

B. *Key Precedents*

31 The two main jurisprudential pillars on which the parties' arguments rest are *Griffin* and *Seidel*. The relationship between these two decisions was at the heart of the courts' decisions below. Accordingly, as a preliminary matter, it will be useful to provide a brief overview of these two key decisions.

(1) *Griffin*

32 *Griffin* involved a proposed class action brought in Ontario on behalf of purchasers - both consumers and non-consumers[5] - of allegedly defective Dell computers. Dell's standard form agreement contained a mandatory arbitration clause. The plaintiff brought a motion to certify the action as a class proceeding, to which Dell responded with a [page170] motion for a stay under s. 7 of the *Arbitration Act*. The motions judge refused Dell's request for a stay and granted certification. Dell appealed.

33 Justice Sharpe, writing for a unanimous five-member panel, dismissed the appeal. First, he held that s. 7(2) of

the *Consumer Protection Act* applied such that the arbitration clause did not bar the consumer claims from proceeding in court. He then considered whether a stay of the non-consumer claims should be granted. He set out the general approach to the enforceability of arbitration agreements as follows:

> Contracting parties often specify that any disputes arising from their relationship are to be arbitrated rather than litigated in the courts. When they do, they are ordinarily entitled to have their chosen method of dispute resolution respected by the courts. The modern approach, reflected by [*Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801], is to require parties to adhere to their choice and to view arbitration as an autonomous, self-contained and self-sufficient process, presumptively immune from judicial intervention: [*Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161], at para. 14. [para. 28]

34 Turning to the relevant statutory provisions, Sharpe J.A. interpreted s. 7(5) of the *Arbitration Act* as "confer[ring] a discretion to grant a partial stay where an action involves some claims that are subject to an arbitration and some claims that are not" (para. 45). He stated that such an order may be made where it would be reasonable to separate the matters dealt with in the arbitration agreement from the other matters. He also referred to a line of cases in which courts refused a stay and allowed the action to proceed on the basis that only some of the litigants were bound by an arbitration clause and the claims were so closely related that it would be unreasonable to separate them (see *Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 CanLII 23358 (S.C.J.), aff'd 2007 ONCA 721; *Johnston v. Goudie* (2006), 212 O.A.C. 79; *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation* (2007), 66 C.L.R. (3d) 78 (S.C.J.), aff'd 2008 ONCA 768, 76 C.L.R. (3d) 1; [page171] *Frambordeaux Developments Inc. v. Romandale Farms Ltd.*, 2007 CanLII 55364 (Ont. S.C.J.); *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280, 357 A.R. 184 (involving a provision in the corresponding Alberta legislation that is equivalent to s. 7(5) of the *Arbitration Act*)).

35 On the facts, he concluded that it would not be reasonable to separate the consumer claims from the non-consumer claims, noting (among other things) that: (1) 70 percent of the claims were consumer claims and would be litigated in the class proceeding; (2) the liability and damages issues were the same for consumers and non-consumers; and (3) group arbitration was not permitted, so the non-consumer claims would have to be arbitrated on an individual basis. He considered that granting a stay would lead to inefficiency, a potential multiplicity of proceedings, and added cost and delay. He also stressed that it was clear on the record that staying any claims would not result in those claims being arbitrated because, as the motions judge put it, it was "fanciful to think that any claimant could pursue an individual claim in a complex products liability case" (para. 1, citing *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (Ont. S.C.J.), at para. 92). Thus, he stated, "[t]he choice is not between arbitration and class proceeding; the real choice is between clothing Dell with immunity from liability for defective goods sold to non-consumers and giving those purchasers the same day in court afforded to consumers by way of the class proceeding" (para. 57).

[page172]

36 In the result, the Court of Appeal dismissed the appeal. This Court denied Dell's application for leave to appeal.

(2) *Seidel*

37 *Seidel*, which came not long after *Griffin*, involved a proposed class action filed in British Columbia against TELUS. As in the present case, the dispute arose out of mobile phone service contracts containing an arbitration clause. The representative plaintiff, a consumer, asserted a variety of claims, including (but not limited to) statutory causes of action under the B.C. *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), alleging that TELUS falsely represented to her and other consumers how it calculates air time for billing purposes. Section 172 of the *BPCPA* contains a remedy whereby a person other than a supplier may bring an action to enforce the statute's consumer protection standards, while s. 3 stipulates that any agreement between the parties that would waive or release the protections afforded by the *BPCPA* is void.

38 The plaintiff brought an application to have the action certified as a class proceeding. In response, TELUS applied for a stay, relying on the arbitration clause and s. 15 of the B.C. *Commercial Arbitration Act*, R.S.B.C. 1996,

c. 55 (now the *Arbitration Act*), which provides that if a party to an arbitration agreement commences proceedings against another party to the agreement in respect of a matter to be submitted to arbitration, then a party to the proceeding may apply for a stay, and the court must grant that stay unless the agreement is void, inoperative, or incapable of being performed.

39 The application judge denied TELUS's application for a stay, holding that it would be premature to determine whether the action should be stayed before dealing with the certification application. The B.C. Court of Appeal allowed TELUS's [page173] appeal, staying the action in its entirety. The plaintiff appealed.

40 Justice Binnie, writing for a five-justice majority, allowed the appeal in part and lifted the stay in relation to the plaintiff's claims under s. 172 of the *BPCPA*. At the outset of his reasons, he described the proper approach to determining the validity and enforceability of arbitration clauses contained in commercial contracts:

> The choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause. The important question raised by this appeal, however, is whether the *BPCPA* manifests a legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to "private and confidential" mediation/arbitration and, if so, under what circumstances.
>
> ... Respectfully, I believe the Court's job is neither to promote nor detract from private and confidential arbitration. The Court's job is to give effect to the intent of the legislature as manifested in the provisions of its statutes. [paras. 2-3]

41 Justice Binnie acknowledged that "[t]he virtues of commercial arbitration have been recognized and indeed welcomed by our Court" (para. 23, citing *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921; *Bisaillon*; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178). He noted, however, that from the perspective of the *BPCPA*, private, confidential, and binding arbitration would "almost certainly inhibit rather than promote wide publicity (and thus deterrence) of deceptive and/or unconscionable commercial conduct" (para. 24), and several provincial legislatures had intervened by placing limitations on arbitration clauses contained in consumer contracts. [page174] Accordingly, he stated, the substantive question on appeal was "whether, as a matter of statutory interpretation, s. 172 of the *BPCPA* contains such a limitation and, if so, its extent and effect on Ms. Seidel's action" (para. 26).

42 After performing a textual, contextual, and purposive interpretation of s. 172 of the *BPCPA*, Binnie J. concluded that the provision "constitutes a legislative override of the parties' freedom to choose arbitration" (para. 40), emphasizing that it "stands out as a public interest remedy" (para. 36). He observed, however, that this "legislative override" was incomplete - unlike in certain other provinces, "the B.C. legislature sought to ensure only that certain claims proceed to the court system, leaving others to be resolved according to the agreement of the parties" (para. 40). He stressed that it was "incumbent on the courts to give effect to that legislative choice" (para. 40).

43 He further clarified that this result was not inconsistent with *Dell* and *Rogers*, where the Court denied an attempt by consumers in Quebec to pursue class actions arising out of product supply contracts in the face of arbitration clauses. In those cases, he said, "[t]he outcome turned on the terms of the Quebec legislation" (para. 41); the B.C. legislation was different and supported a different result. In this regard, he stated that "the relevant teaching of *Dell* and *Rogers Wireless* is simply that whether and to what extent the parties' freedom to arbitrate is limited or curtailed by legislation will depend on a close examination of the law of the forum where the irate consumers have commenced their court case. *Dell* and *Rogers Wireless* stand ... for the enforcement of arbitration clauses *absent legislative language to the contrary*" (para. 42 (emphasis in original)).

44 In the result, the majority allowed the appeal in part, permitting the plaintiff to pursue her claims under s. 172 of the *BPCPA* but upholding the stay of her other claims pursuant to s. 15 of the *Commercial [page175] Arbitration Act*. While Binnie J. recognized that this could lead to bifurcated proceedings in the event the claims falling outside

the scope of s. 172 proceed to arbitration, he noted that "[s]uch an outcome ... is consistent with the legislative choice made by British Columbia in drawing the boundaries of s. 172 as narrowly as it did" (para. 50).

45 Justices LeBel and Deschamps, writing on behalf of four dissenting justices, were not persuaded that s. 172 of the *BPCPA* constituted a legislative override of the parties' freedom to choose arbitration (para. 161).

46 The central theme emerging from *Seidel*, consistent with its predecessors *Dell* and *Rogers*, is that arbitration clauses, even those contained in adhesion contracts (at para. 2), will generally be enforced "absent legislative language to the contrary" (para. 42 (emphasis deleted)). Accordingly, this Court's task is to apply the relevant principles of statutory interpretation and determine whether s. 7(5) of the *Arbitration Act*, which has no equivalent in the B.C. legislation at issue in *Seidel*, contains language overriding the principle that arbitration clauses will generally be enforced.

C. *Interpretation of Section 7 of the Arbitration Act*

47 The proper interpretation of s. 7 of the *Arbitration Act* falls to be determined by applying the modern approach to statutory interpretation: "... 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 the Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26). To be clear, while my colleagues Abella and Karakatsanis JJ. maintain that the following analysis "represents the return of textualism" (para. 109), I respectfully disagree. Rather, the approach set out below starts with the [page176] purpose and scheme of the *Arbitration Act* and reads the text of s. 7 in light of its full context, in a way that is both conscious of and consistent with the policy choices made by the legislature in the *Arbitration Act* itself and in other relevant statutes such as the *Consumer Protection Act* and the *Class Proceedings Act*. This is no "return to textualism"; instead, it is a careful reading of the statute, considered in its full context. With that in mind, I turn to the purpose and scheme of the Act.

(1) Purpose and Scheme of the *Arbitration Act*

48 Throughout the better part of the 20th century, Canadian courts displayed "overt hostility" to arbitration, treating it as a "second-class method of dispute resolution" (*Seidel*, at para. 89, per LeBel and Deschamps JJ., dissenting (but not on this point)). Courts guarded their jurisdiction jealously and "did not look with favour upon efforts of the parties to oust it by agreement" (*Seidel*, at para. 93, citing *Re Rootes Motors (Canada) Ltd. and Wm. Halliday Contracting Co.*, [1952] 4 D.L.R. 300 (Ont. H.C.J.), at p. 304). The prevailing view was that only the courts were capable of granting remedies for legal disputes and that, as a result, any agreement by the parties to oust the courts' jurisdiction was contrary to public policy, regardless of the nature of the substantive legal issues (see *Seidel*, at para. 96). This judicial hostility, coupled with a lack of modern legislation supporting arbitration, inhibited the growth of arbitration in Canada (see *Seidel*, at para. 89, citing J. B. Casey and J. Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), at pp. 2-3).

49 It was against this backdrop that, in 1991, the Ontario legislature enacted the *Arbitration Act*, which was based on the *Uniform Arbitration Act* adopted by the Uniform Law Conference of Canada a year earlier (online) (see J. K. McEwan and [page177] L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at pp. 1-9 to 1-15). The purpose and underlying philosophy of the *Arbitration Act* was discussed by Blair J. (as he then was) in *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497 (WL Can.) (Gen. Div.):

> The *Arbitration Act, 1991* came into effect on January 1, 1992. It repealed the former *Arbitrations Act*, R.S.O. 1980 c. 25, and enacted a new regime for the conduct of arbitrations in Ontario ... . It is designed, in my view, to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so.
>
> In this latter respect, the new *Act* entrenches the primacy of arbitration proceedings over judicial proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene, and by establishing a "presumptive" stay of court proceedings in favour of arbitration. [paras. 8-9]

50 During legislative debate on the bill that later became the *Arbitration Act*, the Attorney General of Ontario stated that one of the "guiding principles" of the *Arbitration Act* is that "the parties to a valid arbitration agreement should abide by their agreements" (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., March 27, 1991, at p. 256). He later emphasized that under the new legislation, "the law and the courts will ensure that the parties stick to their agreement to arbitrate" (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., November 5, 1991, at p. 3384).

51 Issuing a stay of court proceedings is one of the ways in which courts may give effect to the policy that the parties to a valid arbitration agreement should abide by their agreement. As the authors of *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* explain, a stay of court proceedings is simply "an indirect [page178] method of enforcing an arbitration agreement" (McEwan and Herbst, at p. 3-29). They continue:

> Traditionally it has been said that the courts will not order specific performance of arbitration agreements, in the sense that they will not order parties to proceed to arbitration. Courts do not compel arbitration; enforcement is negative in that they stay the court proceedings in specified circumstances ... . A party is refused the alternative of having the disputes settled by a court of law, *i.e.*, that party is left in the position of having no remedy other than to proceed by arbitration. [Footnotes omitted; p. 3-29.]

52 The policy that parties to a valid arbitration agreement should abide by their agreement gives effect to the concept of party autonomy - which, in the arbitration context, stands for the principle that parties should generally be allowed to craft their own dispute resolution mechanism through consensual agreement (see J. B. Casey, *Arbitration Law of Canada: Practice and Procedure* (3rd ed. 2017), at pp. 49, 51 and 195; Alberta Law Reform Institute, Final Report No. 103, *Arbitration Act: Stay and Appeal Issues* (2013), at para. 10). Consensual arbitration and party autonomy are inseparable - an arbitration agreement is "a product of party autonomy ... [and] crystallizes the parties' consent" to private dispute resolution (M. Pavloviae and A. Daimsis, "Arbitration", in J. C. Kleefeld et al., eds., *Dispute Resolution: Readings and Case Studies* (4th ed. 2016), at p. 485). It "is essentially a creature of contract, a contract in which the parties themselves charter a private tribunal for the resolution of their disputes" (*Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), at p. 87, as quoted in *Re Arbitration Act* (1964), 47 W.W.R. 544 (Alta. S.C.), at p. 555).

53 Of course, the concept of party autonomy, which is always engaged to at least some extent where arbitration agreements are involved, may speak more or less forcefully depending on the context. For example, party autonomy has weaker force in the context of non-negotiated, "take it or leave [page179] it" contracts than it does in the context of fully negotiated agreements. It is not surprising, therefore, that legislatures across Canada have put in place various statutes shielding consumers - the weakest and most vulnerable contracting parties (*Dell*, at para. 90) - from the potentially harsh results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts.

54 That said, in the years since the *Arbitration Act* was passed, the jurisprudence - both from this Court and from the courts of Ontario - has consistently reaffirmed that courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting. For example, in *Desputeaux*, LeBel J. observed "the trend in the case law and legislation ... to accept and even encourage the use of civil and commercial arbitration" (para. 38). In *Seidel*, Binnie J. noted that "[t]he virtues of commercial arbitration have been recognized and indeed welcomed by our Court" (para. 23), and he stated that "absent legislative language to the contrary" (para. 42 (emphasis deleted)), "the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause" (para. 2). More recently, the Ontario Court of Appeal observed that "[t]he law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence" (*Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1, at para. 10).

55 The policy that parties to a valid arbitration agreement should abide by their agreement goes hand in hand with the principle of limited court intervention in arbitration matters. This latter principle finds expression throughout modern Canadian arbitration legislation (see McEwan and Herbst, at pp. 10-7 to 10-11; Casey, at p. 319) and has been described as a "fundamental principle underlying modern arbitration law" (Alberta Law Reform Institute, at

para. 19). This principle is embedded most visibly in ss. 6 and 7 of the *Arbitration Act*, which are [page180] both contained in the part of the Act labelled "Court Intervention". Section 6 reads:

> **Court intervention limited**
>
> **6** No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:
>
> 1. To assist the conducting of arbitrations.
> 2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
> 3. To prevent unequal or unfair treatment of parties to arbitration agreements.
> 4. To enforce awards.

56 Stated succinctly, s. 6 signals that courts are generally to take a "hands off" approach to matters governed by the *Arbitration Act*. This is "in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts" (*Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161, at para. 14).

57 This brings us to the focal point of this appeal: s. 7 of the *Arbitration Act*.

(2) Section 7 of the *Arbitration Act*

(a) *Text*

58 The text of s. 7 of the *Arbitration Act*, which governs stays, is reproduced above in the "Statutory Provisions" section of these reasons. It is also worth noting that the term "arbitration agreement" is defined in s. 1 as "an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them". The words "matter" and "proceeding" are left undefined, though [page181] "proceeding" is defined in r. 1.03(1) of the Ontario *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194*, as "an action or application".

(b) *Parties' Positions*

59 TELUS takes the position that s. 7(1) establishes a general rule: if a party to an arbitration agreement commences a proceeding, and one or more of the matters in respect of which the proceeding was commenced is dealt with in the arbitration agreement, then the court shall, on the motion of another party to the agreement, stay the proceeding. TELUS further submits that while s. 7(5) permits the court to allow matters that are *not* dealt with in the arbitration agreement to proceed in court, it does not grant the court discretion to refuse to stay matters that *are* dealt with in the agreement - those matters *must* be stayed. In support of its proposed interpretation, TELUS relies primarily (though not exclusively) on *Seidel* and *Alberici Western Constructors Ltd v. Saskatchewan Power Corp.*, 2016 SKCA 46, 476 Sask. R. 255 (interpreting an equivalent provision in the corresponding Saskatchewan legislation).

60 By contrast, Mr. Wellman contends that if the arbitration agreement in question deals with only some of the matters in respect of which the proceeding was commenced, and it would not be reasonable to separate the matters dealt with in the arbitration agreement from the other matters, then s. 7(5) grants the court an independent, freestanding discretion that is entirely separate from s. 7(1) and (2) to refuse to stay the matters dealt with in the arbitration agreement. In a nutshell, Mr. Wellman submits that s. 7(5) offers a choice between staying *some* of the matters (i.e., ordering a partial stay) and staying *none* of the matters (i.e., refusing to order any stay). In support of his proposed interpretation, he relies primarily (though not exclusively) on *Griffin, New Era Nutrition* (interpreting an equivalent provision in the corresponding Alberta legislation), and *Briones v. National Money Mart Co.*, 2013 MBQB 168, 295 Man R. (2d) 101, aff'd 2014 MBCA 57, 306 Man. [page182] R. (2d) 129, leave to appeal refused, [2014] 3 S.C.R. ix (interpreting an equivalent provision in the corresponding Manitoba legislation).

61 Although the parties lock horns over whether s. 7(5) of the *Arbitration Act* grants the court discretion to refuse to

stay claims that are otherwise subject to a valid and binding arbitration agreement, they agree on several key points, including the following:

(1) arbitration clauses contained in commercial agreements will generally be enforced absent legislative override;

(2) the business customer claims are dealt with in an arbitration agreement;

(3) by virtue of the *Consumer Protection Act*, the consumers are entitled to pursue their claims in court; and

(4) if the two conditions identified in s. 7(5) of the *Arbitration Act* are satisfied, then the court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters.

62 These points of agreement narrow the focus of this appeal, placing it squarely on the following issue: Does s. 7(5) of the *Arbitration Act* grant the court discretion to refuse to stay the business customer claims? With that in mind, I would interpret s. 7 as follows.

(c) *Section 7 Framework*

(d) Section 7(1) - General Rule

63 First, s. 7(1) establishes a general rule: where a party to an arbitration agreement commences a proceeding in respect of a matter dealt with in the agreement - that is, at least one matter in the proceeding is dealt with in the arbitration agreement - the court [page183] "shall", on the motion of another party to the agreement, stay the court proceeding in favour of arbitration. The use of the word "shall" in s. 7(1) indicates a mandatory obligation (see *Haas*, at paras. 10-12; see also R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 90). This general rule reaffirms the concept of party autonomy and upholds the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement.

64 However, as I will explain, this general rule is not absolute.

(ii) Section 7(2) - List of Five Exceptions

65 Section 7(2) lists five exceptions to the general rule under s. 7(1). Where any of the following conditions are met, the court "may" refuse to stay the proceeding: (1) a party entered into the arbitration agreement while under a legal incapacity; (2) the arbitration agreement is invalid; (3) the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law; (4) the motion was brought with undue delay; or (5) the matter is a proper one for default or summary judgment. These are "all cases where it would be either unfair or impractical to refer the matter to arbitration" (*MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656, 92 O.R. (3d) 4, at para. 36).

(iii) Section 7(5) - Partial Stay Provision

66 Section 7(5) provides a further exception to the general rule under s. 7(1). Structurally, s. 7(5) consists of two main components:

(1) **Preconditions** - Section 7(5)(a) and (b) set out two preconditions: (a) "the agreement deals with only some of the matters in respect of which the proceeding was commenced" and (b) "it is reasonable to separate the matters dealt with in the agreement from the other matters".

[page184]

(2) **Discretionary exception** - If both of these preconditions are satisfied, then the court "may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters".

67 Starting with the two preconditions, the first precondition is met if "the agreement deals with only some of the

matters in respect of which the proceeding was commenced". Put differently, the proceeding must involve both (1) at least one matter that *is* dealt with in the arbitration agreement and (2) at least one matter that *is not* dealt with in the arbitration agreement.

68 The second precondition is met if "it is reasonable to separate the matters dealt with in the agreement from the other matters". Naturally, the "other matters" to which this precondition refers are the matters that *are not* dealt with in the arbitration agreement, as there are only two categories of "matters" contemplated by s. 7(5): those that *are* dealt with in the arbitration agreement, and those that *are not*.

69 If both preconditions are satisfied, then instead of ordering a full stay, the court "may" allow the matters that are *not* dealt with in the arbitration agreement to proceed in court, though it must nonetheless stay the court proceeding in respect of the matters that *are* dealt with in the agreement. To illustrate, where the parties to an arbitration agreement have chosen to include "A" but not "B" in their agreement, s. 7(5) allows the court, where the two preconditions are met, to hear a court proceeding in respect of "B", despite the fact that the proceeding must be stayed in respect of "A". Because it gives effect to the parties' agreement to submit only certain types of disputes to arbitration, this interpretation reaffirms the concept of party autonomy and upholds the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement.

[page185]

70 However, if the preconditions are *not* met, then the discretionary exception under s. 7(5) is not triggered. This follows as a matter of logic: s. 7(5) can have effect only "if" the two preconditions are satisfied, so if those preconditions are not met, then s. 7(5) has nothing to say. In those circumstances, unless one of the five exceptions listed in s. 7(2) applies, the general rule under s. 7(1) would apply, meaning that the proceeding must be stayed.

71 This interpretation finds support in the academic/practitioner commentary. In *Arbitration Law of Canada: Practice and Procedure*, J. B. Casey, commenting on equivalent provisions in the relevant Alberta statute, writes:

> Section 7(1) sets out the basic provision that if a party proceeds with the court action with respect to matters governed by an arbitration agreement the court "shall" stay the proceeding. Section 7(5) then grants a partial exception to this general provision by providing that the court may allow proceedings to continue with respect to matters not covered by the arbitration agreement provided it is reasonable to separate those matters from the matters that are covered by the arbitration agreement. Nothing in the words of section 7(5) appears to give the court jurisdiction to allow the entire action to proceed where it is not reasonable to separate the matters in dispute and then say section 7(4) permits a stay of the arbitration.
>
> Section 7(5) provides that the court may permit those matters not covered by the arbitration agreement to continue to be litigated if it is reasonable to separate those matters from those which are being arbitrated. It does not deal with the reverse situation; that is where the court finds that the matters cannot reasonably be separated. In such a case, it is submitted, the court would stay its own proceedings to await the outcome of the arbitration, and then determine if the court action needed to proceed. [pp. 349-50]

72 The author goes on to state that "[s]ection 7(5) does not permit a court action to proceed and allow a valid arbitration to be stayed simply because the court claims appear to overlap with the arbitration [page186] claims and cannot reasonably be separated", adding that "[s]ection 7(5) deals with whether or not to permit separate claims not covered by the arbitration agreement to proceed by court action. It does not deal with whether or not the claims covered by the arbitration agreement should be stayed" (pp. 352-53).

73 Mr. Wellman resists this logic. In effect, he submits that s. 7(5) must be read as meaning "may stay, [or may refuse to stay,] the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters", and s. 7(5)(b) must be understood as authorizing this refusal where "it is [not] reasonable to separate the matters dealt with in the agreement from the other matters". Respectfully, I cannot accede to this submission. Mr. Wellman's interpretation reads language into s. 7(5) that simply is not there. Not only that, it reads language into s. 7(5) that *is* contained elsewhere in the statute - namely, in s. 7(2), which provides that "the court may refuse to stay the proceeding in any of the following cases". Section 7(2) thus demonstrates that

where the legislature intended to authorize the court to refuse a stay, it did so through the words "may refuse to stay".

74 In addition, I am respectfully of the view that Mr. Wellman's contention that s. 7(5) is an independent, standalone provision to be read and applied in isolation from s. 7(1) and (2) cannot be sustained. Grammatically, s. 7(5) uses the definite article "the" in referring to "the proceeding", "the matters", and "the arbitration agreement". The only way of identifying "the proceeding", "the matters", and "the arbitration agreement" referred to in s. 7(5) is to look to s. 7(1), which uses indefinite articles in referring to "a proceeding", "a matter", and "an arbitration agreement". Hence, there is a logical and necessary link between the two provisions, which belies the argument that s. 7(5) stands on its own.

75 Furthermore, while I agree that s. 7(5) should be read in the context of the statutory scheme as a [page187] whole and that s. 6-3 permits the court to intervene "[t]o prevent unequal or unfair treatment of parties to arbitration agreements", I also note that s. 6 allows such intervention only "in accordance with this Act". Therefore, even though Mr. Wellman's interpretation of s. 7(5) would ostensibly give the court greater scope to intervene in an effort to prevent perceived unequal or unfair treatment of parties to arbitration agreements, the words "in accordance with this Act" indicate that s. 6 was not intended to override or change the meaning of other sections of the *Arbitration Act*.

76 More fundamentally, Mr. Wellman's interpretation sits at odds with the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement. If accepted, Mr. Wellman's interpretation would reduce the degree of certainty and predictability associated with arbitration agreements and permit persons who are party to an arbitration agreement to "piggyback" onto the claims of others. Ultimately, this would reduce confidence in the enforcement of arbitration agreements and potentially discourage parties from using arbitration as an efficient, cost-effective means of resolving disputes. Clearly, this was not what the legislature had in mind when it passed the *Arbitration Act*.

77 Mr. Wellman and various interveners also raise a number of policy concerns that, they say, support their proposed interpretation, including the following:

* **Access to justice and the courts** - *Griffin* improves access to justice by removing barriers to seeking relief in court.
* **Abuse of arbitration clauses in adhesion contracts** - Large companies with overwhelming bargaining power should not be permitted to include unfair arbitration clauses in their standard form customer contracts and thereby shield themselves from liability by requiring private, individual arbitration for all disputes, even [page188] low-value claims that would be uneconomical to pursue through arbitration.
* **Shrinking class sizes** - The interpretation of s. 7(5) outlined above would cut non-consumers out of consumer/non-consumer class actions where an arbitration agreement is present. Consequently, these class actions will shrink in size, making them less economically viable and decreasing the likelihood that they will be brought in the first place.
* **Multiplicity of proceedings**- *Griffin* enhances the courts' ability to avoid a multiplicity of proceedings, which raises the risk of inconsistent results, decreases efficiency, and increases overall costs. Further, s. 138 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43 stipulates that courts shall, as far as possible, avoid a multiplicity of proceedings.
* **Difficulty distinguishing between consumers and non-consumers**- Distinguishing between consumers and non-consumers can be challenging, particularly given the rise of "hybrid consumers" and "near consumers", making it preferable to treat consumers and non-consumers alike.

78 In their interpretation of s. 7(5), my colleagues Abella and Karakatsanis JJ. rely on many of these policy considerations, placing particular emphasis on the importance of promoting access to justice, the difficulty of

distinguishing between consumers and non-consumers, and the potential unfairness caused by enforcing arbitration clauses contained in standard form contracts.

79 While I appreciate these concerns, I am respectfully of the view that they cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not. While policy [page189] analysis has a legitimate role in the interpretative process (see Sullivan, at pp. 223-50), the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. The primary role of the courts, in my view, is to interpret and apply those laws according to their terms, provided they are lawfully enacted. It is not the role of this Court to rewrite the legislation.

80 This is particularly so given that the Ontario legislature has already spoken to some of these policy concerns by shielding consumers from the potentially harsh results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts. The legislature made a careful policy choice to exempt consumers - and *only* consumers - from the ordinary enforcement of arbitration agreements. That choice must be respected, not undermined by reading s. 7(5) in a way that permits courts to treat consumers and non-consumers as one and the same.

81 Moreover, as I will develop, I respectfully cannot agree with a number of specific points raised by my colleagues relating to the policy considerations outlined above.

82 First, while my colleagues characterize the "overall purpose" of the *Arbitration Act* as being to "promote access to justice" (para. 137), it is worth reiterating that this policy objective was by no means the legislature's sole objective in adopting the Act. As indicated, a number of "guiding principles" inform the *Arbitration Act*, one of which is that "the parties to a valid arbitration agreement should abide by their agreements" (Legislative Assembly of Ontario, March 27, 1991, at p. 256). Similarly, as Blair J. stated in *Denison Mines*, the *Arbitration Act* was designed "to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so" (para. 8).

[page190]

83 Hence, while there can be no doubt as to the importance of promoting access to justice (see *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 1), this objective cannot, absent express direction from the legislature, be permitted to overwhelm the other important objectives pursued by the *Arbitration Act*, including ensuring that parties to a valid arbitration agreement abide by their agreement. Respectfully, my colleagues' approach would undermine the legislature's stated objective of ensuring parties to a valid arbitration agreement abide by their agreement, reduce the degree of certainty and predictability associated with arbitration agreements, and weaken the concept of party autonomy in the commercial setting. It would expand the opportunities for parties to a valid arbitration agreement - even a heavily negotiated one between sophisticated commercial entities - to avoid their agreement and seek relief in court. This would in turn steer parties away from a "good and accessible method of seeking resolution for many kinds of disputes" that "can be more expedient and less costly than going to court" (Legislative Assembly of Ontario, March 27, 1991, at p. 245).

84 Second, my colleagues stress that the *Arbitration Act* was designed with a "freely negotiat[ed]" arbitration agreement in mind (at para. 131), that TELUS's "standard form contract hardly represents a bargain freely entered into" (para. 160), and that "[t]o impose arbitration on unwilling parties violates the spirit of the *Arbitration Act, 1991* and the arbitral process" (para. 167). But with respect, my colleagues lose sight of the issue actually before this Court. This case is not about debating the merits and demerits of enforcing arbitration clauses contained in standard form contracts. Rather, it is about the proper interpretation of s. 7(5) of the *Arbitration Act*. Moreover, while my colleagues maintain that the Act was designed with "freely negotiat[ed]" arbitration agreements in mind, nothing in the *Arbitration Act* suggests that standard form arbitration agreements, which are characterized by an absence of meaningful negotiation, are *per se* unenforceable. Indeed, this Court's decision in *Seidel* - as well as [page191] its predecessors *Dell*, *Rogers*, and *Desputeaux* - confirm that the starting presumption is the opposite.

85 Furthermore, Mr. Wellman has not argued, either before this Court or the courts below, that the standard form arbitration agreement in question was unconscionable, which if proven would render it invalid and thereby provide a basis for refusing a stay pursuant to s. 7(2)2 of the *Arbitration Act*. In my view, arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with directly through the doctrine of unconscionability, which was the approach taken in *Heller v. Uber Technologies Inc.*, 2019 ONCA 1, rather than indirectly by attempting to stretch the language of s. 7(5) to address a perceived problem it was never designed to address.

86 Third, my colleagues underscore the difficulty in distinguishing between consumers and non-consumers, insisting that TELUS's interpretation of s. 7(5) would render the class certification process "cumbersome" and potentially turn the certification stage into "a search by the defendant of the precise status of each member of the class" (para. 158).

87 While distinguishing between consumers and non-consumers may be a difficult exercise in certain cases, that difficulty does not, in my view, bear on the proper interpretation of s. 7(5). The challenge identified by my colleagues is a product of two factors: (1) the requirement under the *Class Proceedings Act* that any person seeking to join a class action must pass through an objective class definition; and (2) the legislature's decision to accord enhanced protections only to "consumers", which it chose to define in a particular way under the *Consumer Protection Act* - namely, as "an individual acting for personal, family or household purposes" but not including "a person who is acting for business purposes" (s. 1). While sorting between consumers and non-consumers may be "cumbersome" in [page192] certain cases, this inconvenience does not permit the court to recast the legislation as it sees fit in order to avoid such difficulties. Instead, the courts must work within the framework established by the legislature, including at the class certification stage.

88 Furthermore, reading s. 7(5) of the *Arbitration Act* in a way that permits non-consumers to "tag along" with consumers on the basis that it would be "cumbersome" to sort between the two would also allow commercial entities to find the inside of a courtroom despite having agreed to arbitration, even where the arbitration agreement was fully negotiated. Again, this would reduce the degree of certainty and predictability associated with arbitration agreements and permit parties to those agreements to "piggyback" onto the claims of others.

89 It would, of course, be open to the Ontario legislature to respond to the policy concerns outlined above, should it see fit to do so. While I make no comment on the wisdom of any particular reform, a range of responses are theoretically available. To offer just one example, it could amend the *Arbitration Act* to grant the courts discretion to refuse to stay the proceeding where the arbitration agreement deals with some but not all of the matters in dispute. In this regard, I note that in 2002, the *Uniform Arbitration Act* (1990),[6] the model legislation on which the *Arbitration Act* was based, was amended to provide as follows:

> 7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter that another party to the [page193] arbitration agreement is entitled to submit to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of the other party, stay the proceeding.
>
> ...
>
> (3) Despite subsection (1), where an arbitration agreement deals with one or more but not all of the matters in dispute in respect of which the proceeding was commenced, the court may
>
> (a) refuse to stay the proceeding, or
>
> (b) stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to the other matters in dispute.
>
> (4) In making a decision under subsection (3), the court shall have regard to
>
> (a) the importance of enforcing arbitration agreements, and
>
> (b) whether it is reasonable to separate the matters in dispute dealt with in the arbitration agreement from the other matters in dispute. [Emphasis added.]

(Uniform Law Conference of Canada, *Arbitration Amendment Act* (2002) (online))

90 Lastly, while s. 138 of the *Courts of Justice Act* stipulates that courts "shall" avoid a multiplicity of proceedings, it tempers this language by indicating that the court must do so only "as far as possible". Accordingly, where the application of an Ontario statute, properly interpreted, leads to a multiplicity of proceedings, the court must give effect to the will of the legislature, even if the consequence is to potentially create a multiplicity of proceedings. This is consistent with *Seidel*, where the Court recognized that even where a multiplicity of proceedings could result, the court must nonetheless give effect to the "legislative choice" embodied in the legislation in question (para. 50). Indeed, here, s. 7(5) of the *Arbitration Act* expressly contemplates bifurcation of proceedings, as it permits the court to order a *partial* stay, thereby potentially resulting in concurrent arbitration and court adjudication, where the [page194] two preconditions outlined in s. 7(5)(a) and (b) are met. In theory, the *Arbitration Act* could be amended to grant the courts broad discretion to refuse a stay where doing otherwise could result in a multiplicity of proceedings, but the legislature has not taken this step. For these reasons, while a multiplicity of proceedings can cause practical difficulties, this concern cannot be permitted to trump the language of the statute.

(iv) Section 7(6) - Bar on Appeals

91 Finally, s. 7(6) provides simply that "[t]here is no appeal from the court's decision". Given the absence of any qualifying language, s. 7(6) must be taken as referring to a "decision" made under any subsection contained in s. 7. This would include, for example, a decision to stay the proceeding under s. 7(1), a decision to refuse a stay under s. 7(2), or a decision to order a partial stay under s. 7(5).

92 I now turn to the application of this framework.

D. *Application*

(1) The Proceeding

93 The "proceeding" in this case is simply the class action proceeding commenced by Mr. Wellman, who claims to be a "consumer" under the *Consumer Protection Act*. This proceeding serves as a procedural vehicle through which multiple parties can pursue their individual claims together (see *Bisaillon*, at para. 17). As indicated, some of these parties are consumers, while others are business customers.

(2) The Arbitration Agreements

94 This proceeding involves not a single arbitration "agreement", but rather a constellation of "agreements", each taking the form of a standard [page195] form arbitration clause incorporated into every individual mobile phone service contract between TELUS and each of its customers, consumers and non-consumers alike. Each agreement contains identical terms regarding the types of matters covered by the agreement. Broadly speaking, they stipulate that all claims arising out of or in relation to the contract, apart from the collection of accounts by TELUS, shall be determined through mediation and, failing that, arbitration. In this way, the agreements identify the "matters" in respect of which arbitration *is* mandatory, as well as the "matters" in respect of which arbitration *is not* mandatory: disputes over collections are not subject to mandatory arbitration, whereas disputes over any other matter arising out of or in relation to the contract are.

95 This brings us to s. 7 of the *Arbitration Act*.

(3) Section 7 of the *Arbitration Act*

96 Beginning with s. 7(1) of the *Arbitration Act*, the sole "matter" at issue in the proceeding commenced by Mr. Wellman, who is a party to an arbitration agreement, is alleged overbilling. This matter is dealt with in the arbitration agreements into which the consumers and business customers entered. Therefore, because there is at least one matter in the proceeding that is dealt with in the arbitration agreements, the general rule under s. 7(1) would

ordinarily require a stay of the proceeding as a whole, leaving both consumers and business customers locked out of court.

97 But the *Consumer Protection Act* offers the consumers a key to the courtroom. Section 7(2) of the *Consumer Protection Act* renders arbitration clauses contained in a "consumer agreement", defined in s. 1 as an agreement between a "consumer" and a "supplier"[7] in which "the supplier agrees to supply goods or services for payment", "invalid [page196] insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act." Further, s. 8(1) of the *Consumer Protection Act* gives consumers the right to commence a class action, or become members of a class action, in respect of a dispute arising out of a consumer agreement. Read together, these two provisions render the arbitration agreements entered into by the consumers invalid to the extent that they would otherwise prevent the consumers from commencing or joining a class action of the kind commenced by Mr. Wellman. To this extent, the provisions of the *Consumer Protection Act* constitute a "legislative override" of the consumer arbitration agreements (*Seidel*, at para. 40). Moreover, since s. 7(2) of the *Consumer Protection Act* applies, s. 7(5) of that statute is triggered. That provision stipulates that "[s]ubsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration". In this way, s. 7(5) of the *Consumer Protection Act* shields the consumers in this case from a stay under s. 7(1) of the *Arbitration Act*.

98 The business customers, however, do not qualify as "consumers" under the *Consumer Protection Act*, and as such they cannot invoke the protections that the consumers enjoy under ss. 7(2), 7(5), and 8 of that statute. To be clear, although s. 7(5) of the *Consumer Protection Act* refers to "any proceeding to which subsection (2) applies", I am not persuaded that the use of the word "proceeding" shields *non-consumers* involved in the proceeding from a mandatory stay under s. 7(1) of the *Arbitration Act*. To reason otherwise would extend the protections of the *Consumer Protection Act* to persons who are not "consumers" and, in turn, erode the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement. If non-consumers bound by a valid arbitration agreement could do an end run around s. 7(1) of the [page197] *Arbitration Act* simply by joining their claim with that of a consumer and pointing to s. 7(5) of the *Consumer Protection Act*, then this provision could become a vehicle for "piggybacking" non-consumer claims onto consumer claims. Indeed, if such an interpretation were accepted, a class action proceeding brought on behalf of millions of non-consumers who are each bound by an arbitration agreement would, if certified, be permitted to proceed in court *in its entirety* so long as a single consumer joined the class. In this way, the inclusion of a single consumer would be enough to open the courthouse doors to all. By contrast, interpreting s. 7(5) of the *Consumer Protection Act* in a way that restricts its application to consumers leads to a sound result that upholds the legislative objectives underlying both statutes: it preserves the protections afforded solely to "consumers" under the *Consumer Protection Act* and gives effect to the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement.

99 Having concluded that the business customers cannot avoid a stay under s. 7(1) of the *Arbitration Act* by turning to the *Consumer Protection Act*, they are left with only two potential avenues for avoiding a stay: ss. 7(2) and 7(5) of the *Arbitration Act*. But since Mr. Wellman has not argued that any of the five exceptions listed in s. 7(2) applies, s. 7(5) stands as the business customers' only possible pathway into court. Yet, as I will explain, that provision has no application on these facts.

100 As indicated, s. 7(5) of the *Arbitration Act* is engaged only where the two preconditions set out in s. 7(5)(a) and (b) are satisfied. The first precondition is that the proceeding must involve both (1) at least one matter that *is* dealt with in the arbitration agreement and (2) at least one matter that *is not*. However, [page198] that is not the case here. Instead, as I have explained, the proceeding involves a single matter - alleged overbilling - and that matter is dealt with in the arbitration agreements into which the consumers and business customers entered. As such, the first precondition is not met, so s. 7(5) has nothing to say.

101 To illustrate how s. 7(5) could apply in a dispute between TELUS and its business customers, consider a hypothetical scenario in which the proceeding involves both (1) a claim advanced by business customers over alleged overbilling and (2) a claim advanced by TELUS for the collection of accounts. The former matter *is* covered by the arbitration agreements, whereas the latter *is not*. As such, this hypothetical proceeding would meet the first

precondition. Hence, if the court were to determine that it would be reasonable to separate the two matters such that the second precondition is also met, then s. 7(5) would permit the court to stay the proceeding in respect of the matter dealt with in the arbitration agreements (i.e., alleged overbilling) and allow the proceeding to continue in respect of the matter *not* dealt with in the arbitration agreements (i.e., the collection of accounts). Alternatively, if the court were to determine that it would *not* be reasonable to separate the two matters such that the second precondition is *not* met, then the general rule under s. 7(1) would apply, meaning the court must stay the proceeding.

102 But since s. 7(5) does not apply in this case, the proceeding must be stayed pursuant to the general rule under s. 7(1). And although the word "proceeding" is used without qualification in s. 7(1), seemingly in the sense of "proceeding *as a whole*", I am of the view that the stay in this case must be restricted to the parties who are legally bound by an arbitration agreement - namely, TELUS and the business customers. As indicated, the *Consumer Protection Act* grants the consumers the right to seek relief in court. The *Arbitration Act* cannot deprive them of that right. Moreover, taking a purposive approach, a principal object of the s. 7 framework [page199] is to ensure parties to a valid arbitration agreement abide by their agreement; it is not to keep parties who either never agreed to or are not bound by an arbitration agreement out of court. The *Arbitration Act* has no business interfering with these litigants' procedural or substantive rights, and it certainly has no business denying them the right to seek a remedy in court simply because they happen to be tangentially associated with others who *did* agree to and *are* bound by an arbitration agreement.

103 In sum, I conclude that the motions judge and the Court of Appeal erred in law by interpreting s. 7(5) of the *Arbitration Act* incorrectly and refusing to order a stay that, under s. 7(1), was mandatory. At the end of the day, s. 7(5) does not, in my view, permit the court to ignore a valid and binding arbitration agreement.

(4) Section 7(6) - Bar on Appeals

104 Finally, I note that the court below did not address the potential application of s. 7(6) of the *Arbitration Act*, and the matter was discussed only briefly during oral argument before this Court. Neither of the parties has suggested that the s. 7(6) bar applies. In the absence of full submissions, I do not consider it appropriate to make a final ruling on the matter.

VII. Conclusion

105 In the result, I would allow the appeal and stay the business customer claims. Given this result, TELUS is entitled to its costs in this Court and in the Court of Appeal. However, since TELUS's motion for a stay was heard together with Mr. Wellman's successful application for certification, it would not in my view be appropriate to grant TELUS costs in the Superior Court. I would therefore set aside [page200] the costs award made by the Superior Court and order that the parties bear their own costs in that court.

The reasons of Wagner C.J. and Abella, Karakatsanis and Martin JJ. were delivered by

106 ABELLA AND KARAKATSANIS JJ. (dissenting) :- - This appeal involves a class action against TELUS Communications Inc. The mandatory, non-negotiable contract which all purchasers of TELUS cell phone plans must sign, requires individual arbitration for any claim, and prevents court remedies such as class actions. Legislation in Ontario exempts consumers from the operation of these compulsory arbitration clauses. Businesses, on the other hand, no matter their size, and even if they are pursuing identical claims as consumers, can be caught by the operation of the arbitration clause in the contract. The Ontario courts, however, have recognized the denial of access to justice created by this disparity and have interpreted the *Arbitration Act, 1991* in a way that gives a court discretion to redress this anomaly and allow both sets of claimants to access a class action.

107 Statutory interpretation is the art of inferring what words mean. Sometimes the meaning is obvious, either because of the clarity of the language or of its relationship to the legislative context. But sometimes interpreting words literally in isolation, undermines the policy objectives of the statutory scheme. The debate between those who are "textualists" and those who are "intentionalists" was resolved in Canada in 1998 when this Court decided that "there is only one principle or approach, namely, the words of an Act are to be read in their entire context and

in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[8] We do [page201] not just look at the words. Moreover, in Ontario all statutes are to be read in accordance with s. 10 of the *Interpretation Act*, R.S.O. 1990, c. I.11, which states that: every Act "shall be deemed to be remedial" and shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

108 In other words, words matter, policy objectives matter, and consequences matter.

109 The majority's approach, with respect, in effect represents the return of textualism. The words have been permitted to dominate and extinguish the contextual policy objectives of both the *Arbitration Act, 1991*, S.O. 1991, c. 17, and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, creating a dispute-resolution universe that has the effect of forcing litigants to spend thousands of dollars to resolve a dispute worth a fraction of that cost; denies others meaningful access to a remedy if they are not prepared, or cannot afford to, engage in a cost-benefit losing proposition; and invites the very proliferation of proceedings a class action was invented to avoid. The result of these disincentives is that business consumers will simply not enforce their rights.

110 That is why the Ontario Court of Appeal has consistently interpreted the words of s. 7(5) of the *Arbitration Act, 1991* in a way that avoids the unpalatable consequences while invigorating the purposes and effective functioning of the relevant legislative schemes. This aligns with the Court's modern approach to statutory interpretation and should, as a result, be endorsed by this Court.

111 The Ontario Legislature enacted the *Arbitration Act, 1991*, to allow willing parties to pursue arbitration as an alternate form of dispute resolution. To ensure expedient resolution and lower litigation [page202] costs, the *Arbitration Act, 1991* limited court intervention in arbitrable disputes. But it also gave judges discretion to permit court proceedings in certain limited circumstances, such as where the arbitration agreement was manifestly unfair.

112 The issue in this appeal is how far that judicial discretion extends under the *Arbitration Act, 1991*. Specifically, the question is whether s. 7(5) gives judges the discretion to hear parties covered by an arbitration agreement when the same issue is the subject of litigation in the courts. Section 7(5) states:

> **Agreement covering part of dispute**
>
> (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
>
> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
>
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

113 Since 2002, the Ontario Court of Appeal has interpreted s. 7(5) as granting the discretion to stay matters that would otherwise be subject to arbitration. Similarly, for nearly a decade, the Ontario Court of Appeal has interpreted s. 7(5) as permitting otherwise arbitrable matters to be joined with class actions in the public interests of avoiding duplicative proceedings, increased costs, and the risk of inconsistent results.

114 This interpretation, in our respectful view, aligns with the text and scheme of the provisions and is consistent not only with the purposes motivating [page203] the enactment of the *Arbitration Act, 1991* but also with the purpose of s. 7(5) itself.

115 In our view, where a proceeding includes both matters covered by an arbitration agreement and other matters that are not, s. 7(5) gives a judge discretion to allow the entire proceeding to continue in court, even if some parties would otherwise be subject to an arbitration clause.

Background

116 The claim is that TELUS, a Canadian cellular service provider, had for a number of years, and without notifying

its customers, rounded the times of cellular phone calls up to the next minute. This resulted in overcharging clients on their monthly bills by small amounts.

117 TELUS used the same standard-form contract for business and consumer clients, who initiated a class action together against TELUS. The named plaintiff in this appeal, Avraham Wellman, is a consumer and the class representative.

118 TELUS's standard-form contract is non-negotiable. It contains a dispute resolution clause requiring mediation, and failing resolution, arbitration of any disputes other than in respect of the collection of accounts by TELUS. This arbitration clause is inapplicable to consumers because Ontario's consumer protection legislation renders an arbitration clause in a consumer contract invalid insofar as it prevents a consumer from initiating court proceedings (*Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, s. 7).

119 On its face, the arbitration clause is valid for business clients. For this reason, TELUS applied to stay the business clients' claims and have them struck from the class proceeding, arguing that those claims had to be resolved by arbitration.

[page204]

120 The provisions of the *Arbitration Act, 1991* dealing with stays are found in s. 7, which states:

Stay

7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the

following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

Effect of refusal to stay

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

Agreement covering part of dispute

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and [page205] allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

121 As previously noted, the provision at issue in this appeal is s. 7(5), which Ontario courts have interpreted to allow business clients who would otherwise be bound by an arbitration agreement to join in class proceedings with consumers.

122 Both the motions judge and the majority of the Court of Appeal in this case relied on *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481, which was decided by a five member panel of the Ontario Court of Appeal. Thaddeus Griffin, who had purchased a Dell notebook computer through his personal business, joined with consumers in a class action alleging deficiencies in Dell's products. Dell's standard-form sales agreement contained a clause requiring that all disputes be submitted to arbitration.

123 Dell's position at the certification stage was that business clients should not be allowed to join consumers in the class action, and their claims should be stayed and directed to individual arbitration. Lax J. held that it was "fanciful to think that any claimant could pursue an individual claim in a complex products liability case" and that enforcing Dell's arbitration clause would have the effect of immunizing Dell "from accounting to class members for any wrong it may have caused" (*Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (Ont. S.C.J.), at paras. 92-93).

[page206]

124 The Ontario Court of Appeal confirmed the decision to allow Griffin's claim to proceed in court. It found that s. 7(5) gives a motions judge the discretion to refuse a partial stay where an action involves some claims that are subject to an arbitration agreement and some that are not, because

> ... it would not be reasonable to separate the consumer from the non-consumer claims. We should, therefore, refuse a partial stay and allow all the claims to proceed under the umbrella of the class proceeding.
>
> Granting a stay of the non-consumer claims would lead to inefficiency, a potential multiplicity of proceedings, and added cost and delay. This would be contrary to the *Courts of Justice Act*, s. 138, which provides that "[a]s far as possible, a multiplicity of legal proceedings shall be avoided", and contrary to the jurisprudence on the reasonableness of partial stays under s. 7(5) of the *Arbitration Act, 1991*. [paras. 46-47]

125 A number of cases were relied on to support this interpretation (*Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 CanLII 23358 (S.C.J.), aff'd 2007 ONCA 721; *Johnston v. Goudie* (2006), 212 O.A.C. 79, at para. 18; *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation* (2007), 66 C.L.R. (3d) 78 (S.C.J.), at para. 31, aff'd 2008 ONCA 768, 76 C.L.R. (3d) 1; *Frambordeaux Developments Inc. v. Romandale Farms Ltd.*, 2007 CanLII 55364 (Ont. S.C.J.), at para. 34; *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280, 245 D.L.R. (4th) 107, at paras. 37-38.)

126 In the case before us, TELUS brought a similar motion to stay the proceedings with respect to the business customer claims. Conway J. relied on the Ontario Court of Appeal's decision in *Griffin* in concluding that s. 7(5) of the *Arbitration Act, 1991* expressly grants the court the discretion to determine whether it is reasonable to separate the matters dealt with in an arbitration agreement from other matters in the litigation. If the court does not consider it [page207] reasonable to separate them and refuses a partial stay, all matters could proceed, notwithstanding the arbitration clause. Pursuant to *Griffin*, she held that this discretion could be exercised to allow non-consumer claims to be joined with a consumer class action, where it is reasonable to do so. Since there is no group arbitration permitted for the non-consumer claims, separating the two proceedings could lead to inefficiency, inconsistent results and a multiplicity of proceedings.

127 TELUS appealed the decision to the Ontario Court of Appeal. Justice van Rensburg, writing for the majority, agreed with the motions judge.

128 TELUS appealed, arguing that *Griffin* was wrongly decided.

129 Unlike our colleagues, we agree with van Rensburg J.A. and would dismiss the appeal.

Analysis

130 A provision must be assessed in all its textures - language, purpose, effect - to prevent the suffocation of its meaning by a technical literal reading of the words. As Moldaver J. noted in *R. v. Alex*, *[2017] 1 S.C.R. 967*: "This Court has repeatedly observed that plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms ..." (para. 31). What is required is an interpretation that is anchored in parliamentary intention, statutory language, jurisprudence, and practice (*Rizzo & Rizzo Shoes*, at paras. 20-41). In other words, the interpretation must be "reasonable and just" (Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at s. 2.9).

[page208]

131 Ontario's *Arbitration Act, 1991* was enacted to allow parties to design their own settlement processes and resolve their disputes outside the courts. It anticipated two or more parties freely negotiating their arbitral process. Prior to the 1991 legislation, judges exercised considerable discretion to stay arbitration proceedings - even where all the parties had agreed to submit their differences to arbitration. The courts' use of this power was controversial because it was seen to represent judicial interference with the parties' freedom to contract.

132 Ontario's *Arbitration Act, 1991* was based on the *Uniform Arbitration Act* (1990) (online) adopted by the Uniform Law Conference of Canada, which resulted from the Alberta Law Commission's 1989 report on the adoption of uniform arbitration legislation. It was modeled, in part, on the Alberta Institute of Law Research and Reform's 1988 report *Proposals for a New Alberta Arbitration Act* (Report No. 51). In that report, the Institute recommended a substantial overhaul of the existing legislation. Specifically, the Institute proposed limiting the courts' ability to refuse to stay litigation where the parties had agreed to arbitrate. The proposal found expression in s. 7(1) of the *Arbitration Act, 1991*, which mandates that if a party to an arbitration agreement tries to pursue a remedy to an arbitrable dispute in court, a judge must stay the court proceeding. Limited exceptions to this general rule are found in s. 7(2).

133 The proposal also included, without commentary, a provision giving the court discretion to refuse a stay of litigation if the "arbitration agreement upon which the application is based ... does not cover the dispute, or ... *does not bind all parties to the dispute*" (s. 8(2) (emphasis added)). This provision is the progenitor of s. 7(5) of the current *Arbitration Act, 1991*.

[page209]

134 This second proposed provision suggested that courts have discretion to allow court proceedings to go ahead in two circumstances: (1) where an arbitration does not cover all of the issues raised in the dispute, and (2) where both parties *and* non-parties to an arbitration agreement commence litigation against the same defendant.

135 The policy reasons for these exceptions were the same as those which animated the *Arbitration Act, 1991*, namely, access to justice, expediency, and limiting the role of the courts to circumstances where their participation would improve efficiency and reduce delay. At the introduction of the *Arbitration Act, 1991*, the then-Attorney General, Howard Hampton, said:

> One of the commitments this government has made to the people of Ontario is to *improve access to justice in the province*. The fulfilment of this commitment will involve a wide range of programs and policies. It will also include initiatives in law reform to simplify the often intimidating legal system for the use of the public.
>
> In this context I will be introducing today for first reading the Arbitration Act, 1991. Arbitration is a good and accessible method of seeking resolution for many kinds of disputes. It can be *more expedient and less costly than going to court*. The parties can design their own procedures and select appropriate arbitrators.

...

> The new statute will make it easier for people to submit private disputes to resolution by arbitration. It will do so in several ways:
>
> First, when people have agreed to go to arbitration, the act will help ensure that all parties abide by this agreement.
>
> Second, the ability of the courts to intervene in an arbitration is spelled out precisely, and as a result, *the [page210] role of the courts will be constructive and less likely to be used by reluctant parties to delay the proceedings.* [Emphasis added.]

(Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., March 27, 1991, at p. 245)

136 At First Reading of the Bill the same day, the Attorney General further explained:

> The guiding principles of the new Arbitration Act are that the parties to a valid arbitration agreement should abide by their agreements, that they should be free to design the process for their own arbitration as they see fit *within the limits of overall fairness*, that *opportunities for delay should be minimized*, and finally that awards made in arbitrations should be readily enforceable and should be reviewable by the courts only for specific defects. [Emphasis added.]

(Legislative Assembly of Ontario, at p. 256)

137 These statements outline the guiding rationales of the legislation, as well as the means by which they were intended to be effected. The overall purpose of the *Arbitration Act, 1991* was to promote access to justice. Its chosen means of achieving that goal was to promote accessibility by giving parties the choice of resolving disputes outside the court system. The reason for creating this option was a recognition that the court system could be costly and slow. The courts' discretion to intervene in arbitrable matters was therefore narrowed to further the goals of expedient dispute resolution.

138 The *Arbitration Act, 1991* provides a scheme for the effective private arbitration of disputes covered by an arbitration agreement. It sets out default rules governing the conduct of arbitrations and the role of courts in relation to private arbitrations. Various provisions address when judicial intervention is warranted, when judicial support is necessary to give effect to private arbitration processes and awards, [page211] and when appeals to the court are required. Broadly speaking, the *Arbitration Act, 1991* seeks to facilitate timely and efficient dispute resolution.

139 Ontario courts have, since 1998, consistently highlighted the purposes of the *Arbitration Act, 1991* in interpreting s. 7(5) as granting a discretion to override arbitration agreements where it would be unreasonable to separate the arbitrable and non-arbitrable matters. In *Rosedale Motors Inc. v. Petro-Canada Inc.* *(1998), 42 O.R. (3d) 776* (S.C.J.), Rosedale Motors attempted to litigate a number of matters, some of which were governed by an arbitration agreement while others were not. Petro-Canada Inc. sought a stay of the arbitrable matters. Sharpe J. concluded that "[t]he language of the *Arbitration Act, 1991*, *S.O. 1991, c. 17, s. 7*(5) supports the existence of a discretion to refuse a stay where it is not reasonable to separate the matters dealt with in the agreement from the other matters in dispute between the parties" (pp. 783-84).

140 The Ontario Court of Appeal adopted this interpretation in *Brown v. Murphy* *(2002), 59 O.R. (3d) 404* (C.A.), and endorsed it in the context of multi-party proceedings in *Radewych*.

141 The following year, in *Penn-Co Construction*, the Court of Appeal highlighted the practical necessity of allowing courts to hear broad claims, some of which would otherwise be subject to arbitration proceedings. In that case, Penn-Co had claimed relief against Constance Lake First Nation beyond the scope of what was identified in the agreement as being arbitrable. They had also claimed against several other parties who were not contractually bound by the arbitration clause. Subsequently, Penn-Co tried to enforce the arbitration agreement against some of the parties. The Court of Appeal upheld the motions judge's ruling that permitting arbitration of some claims and

staying the other claims would involve duplication of effort, [page212] extra cost and inconvenience, and risk inconsistent results (para. 5).

142 This decision was followed by *Griffin*, discussed earlier in these reasons, in which the Court of Appeal found that duplication, inefficiency in the litigation process, and correspondingly higher costs - the very problems the *Arbitration Act, 1991* sought to solve - were key to determining when the discretion would apply. The court discussed how cumbersome and inefficient it would be to separate the proceedings, pointing out that a consumer class action would take place whether or not the business customers' claims were joined. The liability and damages issues would be identical. Carving out the business customers' claims would mean unnecessary duplication and expense. Moreover, individual arbitration would be inefficient, since

> [a] partial stay would require an examination of each claim and a determination of whether it was a consumer or non-consumer claim. This is bound to be contentious in the case of many purchasers, as laptop computers are portable and regularly used for a variety of purposes. Dividing the claims as between those to be litigated and those to be arbitrated would be costly and time-consuming. [para. 51]

143 This interpretation of s. 7(5) has been followed by Ontario courts since the Court of Appeal's decision in *Griffin* in 2010.

144 Before this Court, Mr. Wellman argues that the Ontario courts have correctly concluded that s. 7(5) applies whenever a court proceeding includes arbitrable and non-arbitrable matters - whether in circumstances where an arbitration agreement does not cover all of the issues put before the court, or when multiple parties commence proceedings, some of whom are bound by arbitration agreements and [page213] others not. In either case, Mr. Wellman says, a court has discretion to either allow the entire matter to proceed in court or stay the arbitrable matters so they can be decided by the arbitrator. In deciding whether to grant a partial stay of the arbitrable matters under s. 7(5), the judge must determine whether the arbitrable and non-arbitrable claims can be reasonably separated.

145 TELUS, on the other hand, seeks to overturn *Griffin*, arguing that s. 7(5) applies only when parties who are bound by an arbitration agreement seek to litigate in the courts and there are some matters that are not specifically referred to in the arbitration agreement. A judge can either allow those specific non-arbitrable matters to continue in court or stay them pending the rest of the arbitration. TELUS submits that s. 7(1) of the *Arbitration Act, 1991* entirely precludes courts from hearing any matter covered by an arbitration agreement, and s. 7(5) only gives the court a discretion to decide what to do with the non-arbitrable matters: it can either hold them in abeyance pending the outcome of arbitration or allow them to proceed in court. On TELUS's reading of the provision, therefore, s. 7(5) does not apply to arbitrable matters, but rather gives courts only the discretion to decide whether to stay non-arbitrable matters.

146 As noted above, s. 7 of the *Arbitration Act, 1991* sets out the statutory rules related to stays. Under the default rule in subs. (1), upon request by another party to the arbitration agreement, any proceeding relating to an arbitrable matter shall be stayed. This rule is qualified by the exceptions set out in subs. (2), which include grounds related to undue delay or a judge's assessment of the merits. If the court refuses to stay the proceeding, subs. (4) renders any arbitration without effect.

[page214]

147 Section 7(5) addresses situations where the proceeding includes both matters subject to an arbitration agreement and non-arbitrable "other matters," which are properly before the court. In such cases, subs. (5) permits a judge to partially stay the arbitrable matters while allowing the non-arbitrable matters to proceed if the court is satisfied that (a) the proceeding is "hybrid"; and (b) it is reasonable to separate the matters. The determination of whether it is reasonable to separate the matters governs this latter exercise of discretion.

148 Nothing in the text directs a court to read s. 7(5) (or s. 7 as a whole) on a party-by-party basis, as TELUS urges this Court to do. Rather, the focus of the provision is on "matters in respect of which the proceeding was commenced". Subsection (5) uses "proceeding" and "other matters" generally and without qualification. The

motions judge is required, as a result, to consider "the proceeding" as a whole. TELUS correctly notes that "other matters" in s. 7(5) will, in certain circumstances, refer to disputes between the same parties that fall outside their arbitration agreement. But it does not follow that "other matters" must be read restrictively. "Other matters" simply refers to non-arbitrable disputes, whether they involve parties to the arbitration agreement at issue or individuals who are not subject to the arbitration agreement.

149 The scheme of the Ontario legislation is markedly different from the British Columbia legislation at issue in *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, a decision TELUS relied on. In that case, Michelle Seidel sought to certify a class action against TELUS for overbilling on cell phone contracts. TELUS sought to stay the proceedings because there was a requirement in the standard form contract that disputes be resolved through individual arbitration. In *Seidel*, this Court stated that "[a]bsent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of [page215]adhesion, including an arbitration clause" (para. 2). Therefore, clear legislative intent is required for a court to entertain otherwise arbitrable matters.

150 *Seidel*'s direct application to the case before us is blocked by the fact that it involved a completely different legislative framework. Two British Columbia statutes were in issue, the *Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2*, and B.C.'s *Commercial Arbitration Act, R.S.B.C. 1996, c. 55*. The Court permitted a consumer claim to proceed in court pursuant to s. 172 of the *Business Practices and Consumer Protection Act*, even though it was subject to an arbitration agreement. A stay was granted on all other arbitrable claims, based on the mandatory language in s. 15 of B.C.'s *Commercial Arbitration Act*, which stated:

> **15** (2) In an application under subsection (1), the court *must* make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

151 The issue in *Seidel* was whether s. 172 of British Columbia's consumer protection legislation constituted a legislative override of the arbitration clause at issue. The Court emphasized that the relevant provincial legislation was determinative of whether a court must stay matters covered by an arbitration agreement.

152 Notably, in the legislation at issue in *Seidel*, there was no analogous provision to s. 7(5) of Ontario's *Arbitration Act, 1991* permitting the exercise of discretion. In fact, unlike B.C.'s arbitration legislation, Ontario's statute expressly authorizes a discretionary judicial override of arbitration clauses in several circumstances. Section 7(2) contains exceptions similar to those in B.C. but adds discretionary [page216] evaluations to determine whether the motion for a stay "was brought with undue delay" and whether "the matter is a proper one for default or summary judgment." Under both of these latter exceptions, and unlike B.C.'s legislation, a court may override an arbitration clause for reasons unrelated to the clause's contractual validity.

153 Section 7(5) of the Ontario legislation similarly reflects an explicit legislative intention to override an otherwise applicable arbitration clause. The words of the provision state that "[t]he court *may* stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters ... ." This means that the court can either stay the arbitrable matters before it *or* allow them to proceed. Logically, a discretionary ability to grant a partial stay also includes the power to refuse a partial stay. In other words, "may" means "may".

154 Non-arbitrable disputes, by definition, fall outside an arbitrator's jurisdiction. Unless the parties agree to arbitrate after the dispute arises, non-arbitrable claims cannot proceed by arbitration. In addition, statutory language is not required for a court to continue hearing a non-arbitrable matter which is properly before it. Therefore, the only interpretation that gives meaningful effect to the discretionary language of s. 7(5) is one that confers on judges the ability to allow both arbitrable and non-arbitrable disputes to proceed *in court*.

155 TELUS's assertion that a court can *never* stay arbitrable matters under s. 7(5) renders the opening phrase - "may stay the proceeding with respect to the matters dealt with in the arbitration agreement" - superfluous. And by interpreting the provision to apply only to non-arbitrable matters, s. 7(5) adds nothing to a judge's existing discretion: a court already has the ability to stay proceedings "on its own [page217] initiative or on motion by any

person, whether or not a party, ... on such terms as are considered just" (*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 106).

156 By inserting the reasonableness requirement in s. 7(5)(b), Ontario's legislature clearly contemplated that in certain circumstances, it would be *unreasonable* "to separate the matters dealt with in the [arbitration] agreement from the other matters". However, TELUS's interpretation would mean that arbitrable and non-arbitrable matters would *always* be separated, and could never be heard together - hardly an efficient outcome, or one that promotes access to justice.

157 Finally, TELUS's interpretation would result in costly and time-consuming factual inquiries on how to divide the arbitrable and non-arbitrable claims even where the substance of both claims is identical, as in this case. Both parties acknowledged the potential difficulties associated with drawing the line between a "consumer" as defined by the *Consumer Protection Act*, who is exempt from arbitration, and a business customer, who is not. This distinction may be especially difficult to determine for those individuals who use their cell phone for both personal and business purposes. For these individuals, determining whether they fall within the scope of the exception in the *Consumer Protection Act* adds unnecessary complexity.

158 For class actions, the real-world effect of separating out everything subject to an arbitration clause could well turn the certification stage into a search by the defendant of the precise status of each member of the class to determine whether they are in fact business or consumer clients. As the interveners Public Interest Advocacy Centre and Consumers Council of Canada pointed out in their factum, this determination could well result in "an individual fact-finding process", leading to "confusion [that] would further undermine Ontario's class actions regime [page218] as a viable, procedural access to justice mechanism for consumers" (para. 25). TELUS's interpretation, in short, not only renders s. 7(5) meaningless, but also undermines the *Class Proceedings Act, 1992*, by making class certification overly cumbersome.

159 Thus, when s. 7 is read as a whole, it becomes evident that subs. (1) and (5) are complementary, not incompatible. Both provisions align with the purposes of the *Arbitration Act, 1991*. They both prevent courts from undermining arbitration agreements. At the same time, the legislature also saw fit to include several exceptions in s. 7, exceptions which allow a court to override arbitration clauses in prescribed circumstances when doing so would promote access to justice and the efficient resolution of disputes.

160 TELUS argues that while there may be negative consequences associated with mandatory, individualized arbitration, these consequences are the foreseeable results of bargains into which its clients freely entered. Their position is that freedom of contract requires that parties abide by their agreements, and courts should not rewrite bargains. This argument, however, is undermined by the fact that their standard form contract hardly represents a bargain freely entered into - they were non-negotiable compulsory terms that were preconditions to being able to purchase TELUS products.

161 Arbitration was intended to be a means by which parties on a relatively equal bargaining footing chose to design an alternative dispute mechanism. Respecting parties' autonomy was a key goal of the *Arbitration Act, 1991*. As Prof. Shelley McGill points out,

> The new arbitration policy ... proceeded from the assumption that *sophisticated disputants with relatively [page219] equal bargaining power would collaborate* to design their own resolution process. Inherent in this policy was the goal of empowering disputants and giving them more control over dispute resolution while facilitating international trade. [Emphasis added.]

(Shelley McGill, "The Conflict Between Consumer Class Actions and Contractual Arbitration Clauses" (2006), 43 *Can. Bus. L.J.* 359, at p. 365)

162 The standard terms of TELUS's contract did not permit group arbitration, but required individualized arbitration proceedings for each complaint. The impact of not permitting group proceedings was discussed by the Court of Appeal in *Griffin*:

> It is important to note ... that Dell's arbitration clause not only requires all claims to be arbitrated, but also provides that "[t]he arbitration will be limited solely to the dispute or controversy between Customer and Dell", thereby precluding the possibility of a class arbitration. *I would have found Dell's position much more persuasive had Dell been prepared to submit to an arbitration that would allow for the efficient adjudication of the claims on a group or class basis...* . In my view, this provides further evidence ... that Dell does not genuinely seek to have the claims advanced against it determined by way of arbitration. Dell is simply seeking to exploit the inefficiency of arbitrating individual claims. [Emphasis added; para. 60.]

163 The empirical reality is that the effect of mandatory arbitration clauses is to deny access to justice in the context of low-value claims. As Prof. Cynthia Estlund points out,

> ... the great bulk of disputes that are subject to mandatory arbitration agreements ... simply evaporate before they are even filed. It is one thing to know that mandatory arbitration draws a thick veil of secrecy over cases that are subject to that process. It is quite another to find that almost nothing lies behind that veil. Mandatory arbitration is less of an "alternative dispute resolution" mechanism than it is a magician's disappearing trick or a mirage. Metaphors beckon, but I have opted for that of [page220] the black hole into which matter collapses and no light escapes.

(Cynthia Estlund, "The Black Hole of Mandatory Arbitration" (2018), 96 N.C. L. Rev. 679, at p. 682)

164 The Court of Appeal in *Griffin* recognized this reality when it observed:

> The seller's stated preference for arbitration is often nothing more than a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually *but when aggregated form the subject of a viable class proceeding*: see Theodore Eisenberg, Geoffrey P. Miller and Emily Sherwin, "Mandatory Arbitration for Customers but not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts" (2008), 92 *Judicature* 118. [Emphasis added; para. 30.]

165 All of TELUS's clients - both businesses and consumers - signed the same, non-negotiable standard form agreement. TELUS's individualized arbitration clause effectively precludes access to justice for business clients when a low-value claim does not justify the expense. And its mandatory nature, in turn, illustrates that the animating rationales of party autonomy and freedom of contract are nowhere to be seen. As the court in *Griffin* stated:

> Deference to arbitration is largely based on freedom of contract and the value of personal autonomy. How can such values come into play in contracts of adhesion where that autonomy is only exercised by one of the parties? *There is no reason to defer to businesses that seek to advance only their own self-interests and evade laws not to their liking.* [para. 30]

(Citing Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" *(2006), 51 McGill L.J. 693*, at p. 734.)

[page221]

166 One cannot talk about "equal bargaining power" and "party autonomy" if the very nature of the contract reveals that one party has exclusive contractual authority. Parties to mandatory individual arbitration clauses cannot, therefore, reasonably be said to have "come to the table" and bargained, since there is no bargaining table. That individuals and companies sign these contracts is a function not of bargaining choices, but of an *absence* of choice.

167 Perhaps the most ironic contradiction of refusing to acknowledge the discretion embodied in s. 7(5) is its corrosive effect on access to justice. The purpose of the *Arbitration Act, 1991*, was to facilitate the ability of parties to negotiate their own process for resolving disputes outside of the courts, on the premise that access to justice had as much to do with access to a result as with access to a judge. To impose arbitration on unwilling parties violates the spirit of the *Arbitration Act, 1991* and the arbitral process. This operates as an invisible but formidable barrier to a remedy and presumptively immunizes wrongdoing from accountability contrary to our most fundamental notions of civil justice.

168 The concurring judge in the Court of Appeal expressed concern that using s. 7(5) to override otherwise valid arbitration clauses could result in sophisticated parties sidestepping arbitration agreements by including a few consumers in a class action alongside numerous business clients. However, experience teaches us that this is anxiety without a cause. There are no known cases where such a ruse has been attempted in Canadian courts. That does not mean it could never happen, but such gossamer speculation cannot drive statutory interpretation.

169 In any event, such concerns are mitigated by the fact that the availability of judicial discretion in s. 7(5) does not *require* judges to allow a class action including arbitrable claims to proceed: it simply lets them decide when it is reasonable to do so. [page222] Eliminating judicial discretion, on the other hand, effectively eliminates access to justice.

170 In this light, s. 7(5) must be interpreted to give judges the discretion to refuse to stay arbitrable claims if it is unreasonable to separate them from non-arbitrable claims. This interpretation applies with equal force whether the proceeding is between two or more named parties, or is a class action.

171 TELUS's arbitration agreement "deals with only some of the matters in respect of which the proceeding was commenced", namely, the claims of business customers. The consumer claims are "other matters" which are not subject to arbitration. Therefore, s. 7(5)(b) gave the motions judge discretion to consider whether it was "reasonable to separate the matters dealt with in the agreement [the claims of business customers] from the other matters [the consumer claims]".

172 In our view, the discretion in this case was properly exercised to allow the business claims to be joined with the consumer class action dealing with the same issues. We would therefore dismiss the appeal.

Appeal allowed, WAGNER C.J. *and* ABELLA, KARAKATSANIS *and* MARTIN JJ. *dissenting.*

Solicitors:

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver; TELUS Communications Inc., Vancouver.

Solicitors for the respondent: Rochon, Genova, Toronto; Morganti & Co., Toronto.

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

[page223]

Solicitors for the intervener ADR Chambers Inc.: Bennett Jones, Toronto.

Solicitors for the intervener the Canadian Chamber of Commerce: McCarthy Tétrault, Toronto.

Solicitors for the interveners the Public Interest Advocacy Centre and the Consumers Council of Canada: Sotos, Toronto.

Solicitor for the intervener the Canadian Federation of Independent Business: Canadian Federation of Independent Business, Ottawa.

Solicitor for the intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: University of Ottawa, Ottawa.

Solicitors for the intervener the Consumers' Association of Canada: Siskinds, Toronto; Michael Sobkin, Ottawa.

1 Unless indicated otherwise, all section number references are to the *Arbitration Act*.

2 Mr. Wellman in fact sued three defendants - TELUS, TELUS Communications Company, and Tele-Mobile Company - but TELUS is the only remaining defendant, as the other two have ceased to exist and their assets and liabilities have been transferred to TELUS.

3 Another proposed class action, commenced by Jason Corless, advances substantially similar allegations against Bell Mobility Inc., and the certification application in that action was heard together with the application in the TELUS litigation. This appeal does not concern the Bell action.

4 TELUS also sought leave to appeal the certification order to the Divisional Court. That motion was dismissed (see *Corless v. Bell Mobility Inc.*, 2015 ONSC 7682). The Divisional Court's decision is not challenged in this appeal, nor are the merits of Mr. Wellman's allegations in the underlying class action.

5 The representative plaintiff who qualified as a "consumer" was added only after certification was granted (see *Griffin*, at para. 2).

6 As the Alberta Law Reform Institute observes, "the [Uniform Law Conference of Canada] materials do not discuss or even mention section 7(5)'s intended purpose, meaning or effect" (para. 34, citing Uniform Law Conference of Canada, *Proceedings of the Seventy-first Annual Meeting* (August 1989), at pp. 77-78 and Appendix B; Uniform Law Conference of Canada, *Proceedings of the Seventy-second Annual Meeting* (August 1990), at p. 36 and Appendix A).

7 "Supplier" is defined in s. 1 as "a person who is in the business of selling, leasing or trading in goods or services".

8 Elmer Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87, cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

End of Document

2022 BCLRB 146
(Leave for Reconsideration of 2022 BCLRB 108)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

VANCOUVER SHIPYARDS CO. LTD.

("VSY" or "the Employer")

-and-

CONSTRUCTION, MAINTENANCE AND ALLIED WORKERS BARGAINING COUNCIL, LOCAL UNIT NUMBER 506 OF MARINE & SHIPBUILDERS; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 692; LOCAL 213 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 170; AND CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 378

(the "Poly-Party Unions")

-and-

BC FEDERATION OF LABOUR

(the "BC Fed")

-and-

BUSINESS COUNCIL OF BRITISH COLUMBIA

(the "Business Council")

-and-

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION CANADA

("ILWU")

PANEL:	Jennifer Glougie, Chair Brett Matthews, Associate Chair J. Najeeb Hassan, Vice-Chair and Registrar
APPEARANCES:	Donald J. Jordan, K.C. and Chris E. Leenheer, for VSY Tamara Ramusovic, Daniel McBain, and Melissa VanderHouwen, for the Poly-Party Unions Craig D. Bavis, for the BC Fed Ryan Copeland, for the Business Council Rebecca Kantwerg, for ILWU
CASE NO.:	2022-001260
DATE OF HEARING:	October 3, 2022
DATE OF DECISION:	December 30, 2022

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Employer applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of *Vancouver Shipyards Co. Ltd.*, 2022 BCLRB 108 (the "Original Decision"). The Original Decision dismisses the Employer's application for a declaration that the Poly-Party Unions, in refusing to cross a picket line, are engaging in an illegal strike. The Employer seeks reconsideration of the Original Decision on the basis that it is inconsistent with principles expressed or implied in the Code.

II. PROCEDURAL MATTERS

2 The Business Council, BC Fed, and ILWU applied for intervenor status to make submissions on the reconsideration application. We granted their intervenor applications and have considered their written submissions. We also received and considered the written submissions of the Employer and the Poly-Party Unions.

3 In addition, we held a day-long hearing at which the parties and intervenors made oral submissions to this panel.

III. BACKGROUND AND ORIGINAL DECISION

4 No issue was taken with the summary of the factual background to this matter set out in paragraphs 5-11 of the Original Decision.

5 In brief, the Employer is a provincially regulated shipbuilding operation located in North Vancouver. The Poly-Party Unions are certified under the Code as a council to represent a bargaining unit of its employees. The Employer is owned by an entity which also owns a federally regulated marine transportation operation, Seaspan ULC ("Seaspan"). The Canadian Merchant Service Guild (the "Guild") is federally certified to represent a bargaining unit of Seaspan's employees.

6 When the matter was argued, the Guild was on strike against Seaspan, and its members were picketing at the entrance to Seaspan's operation in North Vancouver. That entrance is also the entrance to the Employer's operations: there is only one entrance to both workplaces. Members of the Poly-Party Unions have refused to cross the picket line at that entrance and report for work.

7 The Employer asserts the Poly-Party Unions and their members were thereby engaging in a concerted refusal to work within the meaning of the definition of "strike" in Section 1(1) of the Code. The Poly-Party Unions rely on the exception in subsection (b) of the definition of "strike": a concerted refusal to work "that occurs as a direct result of and for no other reason than picketing that is permitted under this Code".

8 The Original Decision notes the dispute turns on how the phrase "picketing that is permitted under this Code" in subsection (b) of the strike definition in the Code (the "Phrase") is interpreted (para. 46). It notes the principles of statutory interpretation include considering the words at issue contextually and purposively (para. 49), and it holds that when the Phrase is so considered, it is ambiguous as to whether the Phrase means only provincially regulated picketing or also includes federally regulated picketing (paras. 50-52). The Original Decision notes that, where there is ambiguity, an interpretation consistent with *Charter* values is to be preferred (para. 54).

9 The original panel was satisfied that honouring a picket line is *Charter*-protected activity (para. 56). It further stated that respecting a picket line is "fundamental to union solidarity and has long been recognized and enshrined in the Code as an exception to the definition of strike" (para. 57). The original panel held the Legislature intended the Phrase "to create an exception for honouring lawful picket lines, regardless of whether that picket line is federally or provincially regulated" (para. 57). It found this interpretation "is consistent with the purpose and context of the language in the Code, labour relations principles, and *Charter* values" (para. 57). Accordingly, the Original Decision dismissed the Employer's illegal strike application.

IV. SUBMISSIONS ON RECONSIDERATION

10 The written and oral submissions of the parties and intervenors on reconsideration were extensive, and we have considered them carefully. However, we have summarized them only to the extent we find necessary for the purpose of rendering this decision.

1. The Employer

11 The Employer submits the original panel erred in its interpretation of the Phrase. The Employer submits the meaning of the Phrase is clear and unambiguous and there is only one possible interpretation: "picketing that is permitted under this Code" means picketing that meets the Code's prerequisites for picketing to be permitted under the Code. Those statutory prerequisites for picketing to be permitted under the Code cannot apply to federal picketing, which is beyond the jurisdiction of the province to regulate. Accordingly, the Phrase cannot be interpreted to include federal picketing.

12 The Employer submits the Original Decision is also inconsistent with Code principles because it fails to consider Section 2(f) of the Code, which requires the Board to exercise its powers and perform its duties so as to minimize the effects of labour disputes on uninvolved persons. It submits the original panel focused solely on the importance to the labour movement of honouring picket lines and ignored the impact of its interpretation of the Phrase on uninvolved provincially regulated employers and their suppliers and customers.

13 The Employer further submits the phrase "permitted under this Code" also appears in Section 66 of the Code, which prohibits certain tort actions "arising out of strikes, lockouts or picketing permitted under this Code". The Employer submits that if

picketing "permitted under this Code" includes federal picketing as the Original Decision finds, then Section 66 would prohibit a provincially regulated employer from going to court to seek injunctive relief from picketing by a federally regulated trade union. The Employer submits the Poly-Party Unions and the original panel accept that it can go to court to seek injunctive relief (Original Decision, para. 53).

14 The Employer submits the Original Decision's interpretation of the Phrase as including federal picketing amounts to a finding that federal picketing is within the jurisdiction of the Code, which is wrong in law. The Board's jurisdiction under the Code only applies to provincially regulated employers and trade unions: *The Governor and Company of Adventurers of England Trading into Hudson's Bay doing business as The Bay*, BCLRB No. B102/95 (Leave for Reconsideration of BCLRB No. B429/94) ("*The Bay*").

15 The Employer submits the original panel erroneously applied *Charter* values to a clear and unambiguous phrase in the Code. It further submits that while picketing is *Charter*-protected expressive activity, the original panel incorrectly concluded that "the act of honouring a picket line is also *Charter*-protected expressive activity" (Original Decision, para. 56). This conclusion is contrary to the decision of the Federal Court of Appeal in *Grain Workers' Union, Local 333 v. B.C. Terminal Elevator Operators' Association*, 2009 FCA 201, leave to appeal denied [2009] S.C.C.A. No. 352 ("*Terminal Elevator*"), which the Employer submits the Original Decision declined to follow without proper reason.

16 The Employer submits the Original Decision misinterprets the Phrase as applying to federally regulated picketing. It submits the Phrase provides an exception to the definition of strike in the Code to allow for the honouring of picketing "that is permitted under this Code" – that is to say, lawful provincially regulated picketing. It submits the Original Decision should be set aside, and the remedies it sought in its illegal strike application granted.

2. Business Council

17 The Business Council supports the Employer's application for reconsideration of the Original Decision. It submits that when the Phrase is considered using the accepted framework for statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 ("*Rizzo*"), there is no ambiguity with respect to whether the Phrase applies to federal picketing.

18 The Business Council submits that, beginning with the plain meaning of the Phrase, the dictionary meaning of the word "permitted" is authorized or allowed, and "under this Code", a phrase which is used throughout the Code, means the set of rules or processes that are stipulated in the Code itself. Therefore, the Business Council submits, the plain and ordinary meaning of "picketing permitted under this Code" is picketing that the Code expressly authorizes or allows, from a purpose, timing, and location perspective. That is, to be "permitted under this Code", the picketing must be

permissible by operation of Section 65 of the Code (and not prohibited by Section 67), in a provincially regulated labour dispute.

19 The Business Council notes the phrase "permitted under this Code" is found in only two locations in the Code: in the Phrase and in Section 66 of the Code, which states that no action or proceeding may be brought for certain torts "arising out of strikes, lockouts or picketing permitted under this Code". It says the language of Section 66 has been judicially interpreted to express a legislative intent to take away common law rights of employers and others affected by picketing to sue for those torts. It submits, however, the Code can only take away those rights from provincial employers; the legislature has no constitutional jurisdiction to affect the rights of federal employers.

20 The Business Council submits that if the phrase "arising out of... picketing permitted under this Code" in Section 66 is interpreted as including federal picketing, then other federally regulated employers would be prohibited by Section 66 from bringing the types of tort claims set out in that provision, and this would be an overreach of provincial constitutional authority for the reasons set out in *The Bay*. The Business Council submits that such an interpretation would also run counter to the well-established law in this province which allows provincially regulated employers to seek to enjoin actions of a federally regulated picket line.

21 The Business Council notes, in fairness, that the Section 66 argument was not made to the original panel. However, it submits that nonetheless an absurd result should be avoided, and the same phrase should be interpreted the same way in the same legislation. It submits the Section 66 issue supports the interpretation of the Phrase as meaning only provincial and not federal picketing.

22 The Business Council also submits that the phrase "permitted under" exists elsewhere in the Code, although followed by a specific Code section number rather than "the Code" generally. It says an examination of the places where this phrase is used supports the conclusion that "permitted under" means allowed or authorized by the Code, as opposed to "not prohibited" by it. The Business Council gives several examples in its written submission and submits they show the phrase "permitted under" in the Code does not include, expressly or impliedly, common law rights or principles.

23 The Business Council submits that interpreting the Phrase as limited in scope to only picketing that is authorized or allowed by the express terms of the Code is also supported by the robust framework the Code sets out for picketing by provincially regulated employees. It submits that framework sets out rights and limitations for both sides of a labour dispute, as part of a balancing of interests. The right to refuse to work in the face of Code-permitted picketing is part of that framework, which is set out in Sections 65 and 67, the provisions which regulate when and where picketing is permissible under the Code.

24 The Business Council notes the definition of "person" in the Code was amended in 1987 to make clear that federally regulated employees, employers, and unions are not "persons" within the meaning of the Code. It submits the limitation that the Code

only regulates the labour relations of provincially regulated employees, employers, and unions, including in the context of picketing, supports the interpretation of the Phrase as including only provincial and not federal picketing.

25 The Business Council notes that in *The Bay*, the Board reviewed the evolution of the jurisprudence, and changes to the Code, on the issue of whether the Board has any authority to regulate picketing that does not emanate from a provincial labour dispute. The Business Council notes that in *The Bay*, the Board accepted the ruling in *British Columbia Ferry Corporation v. Telecommunications Workers Union*, [1981] B.C.J. No. 1193 (B.C.C.A.) ("*BC Ferry*") that the Board did not have jurisdiction over picketing by federal unions, even where the picketing affected provincially regulated employers. The Board only has jurisdiction over picketing where it emanates from a provincially regulated dispute: *The Bay*; *Tyco International of Canada Ltd.*, BCLRB No. B272/94 ("*Tyco*").

26 The Business Council notes that in *Tyco* the Board again reviewed the jurisprudence and found it did not have jurisdiction over extra-provincial picketing affecting a provincially regulated employer because the origin of the dispute was not a provincial labour dispute. The panel added that the Board would similarly not have jurisdiction to regulate picketing emanating from a complaint by retired employees, pickets protecting community issues in which the employer was involved, or pickets protesting a labour policy of the government.

27 The Business Council submits that the Board's conclusion and comments in *Tyco* are important because they underscore that the Code does not contemplate regulation by the Board of picketing whose origin is a dispute out of the Code's scope. The Business Council submits that, by logical extension, the Phrase ("picketing permitted under this Code") does not refer to federal picketing, extra-provincial picketing, or any other form of picketing that is not specifically allowed by the Code. It submits that to hold otherwise would be to give the Board an authority that is not otherwise found in the Code.

28 The Business Council submits that in *The Bay*, the Board concluded it made clear the Board could not declare a federally regulated employer to be an "ally" within the meaning of the picketing provisions of the Code. It states that, in *Southern Railway of British Columbia Ltd.*, BCLRB No. B49/2015 ("*Southern Railway*"), the Board relied on the ruling regarding the Board's lack of jurisdiction to regulate the labour relations of federal entities in *The Bay* to find it did not have jurisdiction to grant a federal employer's application for relief from provincial picketing. The Business Council submits that these authorities establish the Board does not have jurisdiction to regulate federal picketing, and it submits this conclusion supports what it says is the plain meaning of the Phrase (as including only provincial picketing and not federal picketing).

29 The Business Council submits Sections 2(f) and 2(g) of the Code also support interpreting the Phrase as excluding federal picketing. Those provisions require the Board to exercise its discretion and perform its duties in a manner that minimizes the effects of labour disputes on uninvolved parties and ensures that the public interest is

protected during labour disputes. The Business Council says the original panel's interpretation of the Phrase significantly increases the exposure of provincial employers to mid-contract work stoppages due to their employees honouring federal picket lines. Not only commercial but also non-commercial services provided by provincial employers could be affected by provincial employees refusing to cross federal picket lines.

30 The Business Council acknowledges that, as stated in the Original Decision, the Code has long contained subsection (b) of the definition of "strike", which allows provincial employees the right to honour picket lines "permitted under this Code". It further acknowledges that this provision forms an important component of the overall balance in the Code, although it submits it is not as important as other rights protected by the Code. The Business Council submits, however, that even rights recognized by the Code may be impacted when labour disputes cross jurisdictional lines. The impact flows from both the limits of provincial jurisdiction under the Constitution and the design of the Code as a comprehensive regime governing provincial labour relations.

31 For example, a striking provincial union can seek an ally declaration under the Code against a provincial employer that is assisting the struck employer in resisting the strike, but not against a federal employer who is doing the same. Similarly, an uninvolved employer affected by a provincial picket line can seek common site relief from provincial picketing under the Code but not from federal picketing. Thus, the Business Council submits, both unions and employers can be affected by the constitutional limitation on the Board's jurisdiction. The Business Council submits that the Phrase should be interpreted consistently with this jurisdictional limitation.

32 The Business Council also takes issue with the finding in the Original Decision that the Legislature intended the Phrase to include any "lawful" picketing, regardless of whether it is provincial or federal. It submits the Board has jurisdiction to regulate the labour relations aspect of picketing (when and where picketing may occur under the Code) but cannot determine the lawfulness of picketing apart from Code considerations. It is the Courts, not the Board, which determines whether federal picketing is otherwise lawful.

33 With respect to the original panel's reliance on *Charter* values, the Business Council agrees with the Employer that the Federal Court of Appeal's decision in *Terminal Elevator* should have been followed. It says that decision found honouring a picket line was not *Charter*-protected expressive activity. The Business Council adds that *Charter* values have no role to play in statutory interpretation in circumstances where the meaning of the words at issue is found to be unambiguous. The Business Council submits the meaning of the Phrase is unambiguous, and in any event, even if *Charter* values were to be applied, it would not support a different interpretation.

3. The Poly-Party Unions

34 The Poly-Party Unions submit the Employer is asking the Board to reverse half a century of labour policy underlying the Code, which is that the proper object of

regulation is picketing, and not the response to picketing. The Poly-Party Unions submit that, pursuant to that policy, for nearly 50 years union members' rights to observe legal picket lines without fear of having their actions characterized as an illegal strike have been respected. They submit the Board should dismiss the application for reconsideration of the Original Decision and uphold the rights of union members to choose to honour a legal picket line.

35 The Poly-Party Unions note that reconsideration is not an opportunity for re-argument in the hope of a more favourable outcome, and the mere fact an applicant disagrees with an original panel's labour relations judgment is not a proper ground for reconsideration. Rather, the Employer must show the Original Decision is inconsistent with the law and policy of the Code. The Poly-Party Unions say the Employer has not met this burden, and in any event the Original Decision is consistent with the law and policy of the Code.

36 The Poly-Party Unions agree that the issue before the original panel was whether picketing by a union in a federally regulated bargaining relationship is "picketing that is permitted under this Code" within the meaning of Section 1(1) of the Code. They submit that, when the Phrase is considered in light of the context, scheme, and object of the Code, and legislative intent, it is clear the Code protects the right to respect picket lines, regardless of the jurisdictional origin of those picket lines. They submit this interpretation of the Phrase is also consistent with the *Charter*-protected values of free expression and association.

37 The Poly-party Unions submit the original panel properly applied the well-established modern approach to statutory interpretation set out in *Rizzo*, to find the relevant labour relations context of subsection (b) of the definition of "strike" is the importance to unions and their members of honouring a lawful picket line. In service of this expression of the fundamental principle of union solidarity, the legislature created a specific exemption from the definition of "strike".

38 As stated by the Board in *Pacific Press Limited*, BCLRB No. 140/85, 9 CLRBR (NS) 129 (Leave for reconsideration in BCLRB No. 171/86, 13 CLRBR (NS) 74), the effect of subsection (b) of the definition of "strike" in the Code is that "even where a union does not obtain, through collective bargaining, the right to observe a picket line, the Legislature has determined that employees who refuse to work behind a picket line do not thus engage in conduct which will be regulated by the Board as an illegal strike" (p. 153).

39 The Poly-Party Unions submit the Guild's picketing was "picketing" as defined in the Code:

> "picket" or "picketing" means attending at or near a person's place of business, operation or employment for the purpose of persuading or attempting to persuade anyone not to
>
> (a) enter that place of business, operations or employment,

> (b) deal in or handle that person's product, or
>
> (c) do business with that person,
>
> and a similar act at such a place that has an equivalent purpose, but does not include lawful consumer picketing that does not unduly restrict access to or egress from that place of business, operations or employment or prevent employees from working at or from that place of employment; ...

40 The Poly-Party Unions note that VSY is a provincially regulated employer and therefore a "person" within the meaning of the Code and its definition of picketing. They say the Guild was attending at or near VSY's place of business and was attempting to persuade anyone not to enter that place. The Guild's picketing did, in fact, persuaded the Poly-Party Unions' members not to enter VSY's place of business. The Poly-Party Unions submit the fact that the location in question is also the place of business of a federally regulated entity, Seaspan, which is not a "person" under the Code, is of no moment.

41 The Poly-Party Unions submit that, once it is recognized the Guild's picketing is "picketing" within the meaning of the Code, the question becomes simply whether that picketing is "permitted under this Code". The Guild says any lawful picketing that is not prohibited under the Code is permitted under it. The ordinary meaning of the term "picketing under this Code" is simply any lawful picketing that is not prohibited.

42 The Poly-Party Unions submit the Board has accepted that the Code "permits" what it does not prohibit. For example, in *Excell Agent Services Canada Co.*, BCLRB No. B213/2003 ("*Excell*") at paragraph 40, the Board accepted that if Section 7 of the Code prohibits attempting to persuade people to join a union during working hours, then such activity is permitted during non-working hours.

43 Similarly, the Poly-Party Unions say, in *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] S.C.J. No. 107 ("*Paccar*"), the Court upheld a Board decision that employers could unilaterally alter the terms and conditions of employment following the termination of a collective agreement while noting that the Board "came to the conclusion that what is not prohibited by either the wording or the policy of the statute is permitted" (para. 34).

44 The Poly-Party Unions submit that, consistent with *Excell* and *Paccar*, the Code imposes some limits on picketing but permits what it does not prohibit. In particular, Section 67 of the Code provides: "Except as provided in this Code, a person must not picket in respect of a matter or dispute to which this Code applies", and therefore it specifically exempts picketing in respect of matters or disputes to which the Code does not apply, such as federal labour disputes. The Poly-Party Unions cite *BC Ferry* and the definition of "dispute" in Section 1 of the Code.

45 The Poly-Party Unions note that the test for whether the Code applies to picketing is the "origin of the dispute" test is set out in *Pacific Western Airlines Ltd. v.*

B.C. Federation of Labour, 1986 CanLII 833 (BCCA) Where the picketing originates from a federally regulated labour dispute, the Code does not regulate the picketing. Similarly, Section 67 only restricts picketing by "persons" as defined in the Code, which does not include federally regulated entities such as the Guild. Accordingly, as the Code does not regulate or prohibit the Guild's picketing, the Code permits it.

46 The Poly-Party Unions submit the scheme of the Code supports their argument that the picketing captured by the Phrase includes federal picketing. They submit the Board has interpreted the scheme of the Code with respect to picketing to be that the proper object of regulation is picketing, not the response to it: *MacMillan, Bloedel Packaging Limited*, BCLRB No. 90/75, [1976] 1 Can LRBR 100 ("*MacMillan Bloedel*"). There, a full Board led by then-Chair Weiler held that it was not a strike to honour a picket line, given how strike was defined in the Code. The Poly-Party Unions say that while the reasoning in *MacMillan Bloedel* relied in part on the subjective definition of strike which was in effect at that time, the Board also held there was "another, subtler" reason to find respecting a picket line did not amount to a strike (p. 104). That reason was because the regulation of picketing under the Code was focused on "the activity of picketing... rather than the anticipated reaction to the picket line, which is merely the symptom" (p. 105). The Poly-Party Unions note the Board added in *MacMillan Bloedel*:

> ... It would make a mockery of the delicate balance created by the Legislature in its picketing law to hold that once a picket line has surmounted all of these legal obstacles and, as soon as it is having some effect, the employer may come to the Board and ask us to order employees and union members to cross a legal picket line. (p. 105)

47 The Poly-Party Unions submit this latter rationale and legislative policy continued through the passage of the amended definition of strike in 1984 which removed the subjective element of the definition. They submit this is clear from the decision in *Delta Hotels Limited*, BCLRB No. 252/85, 10 CLRBR (NS) 101 ("*Delta Hotels*"). In that case, the Board declined to grant a provincial employer relief from picketing by a federally regulated union on the basis that, while the amended definition had removed the subjective element of the strike definition, the Legislature added the exception contained in subjection (b), which "reflects the policy originally expressed by the full Board in the *MacMillan Bloedel* case, namely that the proper way to try to end a work stoppage produced by picketing is to challenge the legality of the picketing itself, not to challenge the response to that picketing" (p. 104).

48 The Poly-Party Unions submit *Delta Hotels* confirms that the scheme of the Code, and the labour relations policy of this province, is to require employers to challenge picketing, and not the response to it. They submit that whether the employer must challenge that picketing before the Board or the Court does not alter that policy.

49 With respect to Section 66 of the Code, the Poly-Party Unions submit that, as the Code cannot apply to federally regulated picketing, there is no possibility Section 66

could apply to such picketing, regardless of whether federal picketing might be included in "picketing permitted under this Code" in Section 1(1) of the Code.

50 The Poly-Party Unions further submit that Section 66 only eliminates certain torts arising out of lawful collective worker actions (strikes and picketing), and that the courts have confirmed that other torts remain available to employers in this province. Thus, the Poly-Party Unions submit that, even if Section 66 does apply to prevent federally regulated employers from seeking relief against federal picketing, it would leave those employers free to pursue a wide variety of other tort claims in court, where the authority to regulate federal picketing lies.

51 Finally with respect to Section 66, the Poly-Party Unions submit that the use of a phrase similar to the Phrase in Section 1(1) in the different context of Section 66 at most raises an ambiguity about the meaning of the Phrase, which must be resolved by recourse to the normal tools of statutory interpretation and *Charter* values.

52 In terms of the objects of the Code, the Poly-Party Unions rely on Section 2(a), submitting that one of the key objects of the Code is to recognize the rights and obligations of employees, employers, and trade unions. The Poly-Party Unions submit the picketing exception in subsection (b) of the Code definition of "strike" is plainly intended to protect the rights of employees and trade unions under the Code to respect lawful picket lines. The Poly-Party Unions also rely on Section 2(d), arguing that requiring union members to cross lawful picket lines is not consistent with the Code objective of promoting conditions favourable to the orderly, constructive, and expeditious settlement of disputes. Union members in British Columbia should be able to honour any lawful picket line and not be required to try to determine whether it is federally or provincially regulated.

53 With respect to the Employer's reliance on Section 2(f) of the Code, the Poly-Party Unions note that the duty under that provision is to "minimize" the effects of labour disputes on third parties, not to eliminate the effects. They note that in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 ("*Pepsi*"), the Supreme Court of Canada stated that the "protection of innocent third parties from the economic fallout of labour disputes, while a compelling consideration, is not absolute. Some economic harm to third parties is anticipated by our labour relations system as a necessary cost of resolving industrial conflict" (para. 45).

54 The Poly-Party Unions disagree that VSY is truly an "innocent third party" to the labour dispute between the Guild and Seaspan, submitting the labour relations for both VSY and Seaspan are fully centralized in one entity. However, they acknowledge that their position regarding the correct interpretation of the Phrase would apply regardless of whether the provincial employer affected by federal picketing was an involved or uninvolved third party to the federal labour dispute. The Poly-Party Unions say that, in either case, Section 2(f) does not require that the provincial employer be completely unaffected by its employees' right to honour a federal picket line.

55 With respect to the 1984 amendment to the definition of "strike" in the Code, which eliminated the subjective element and added the exemption in subsection (b), the Poly-Party Unions submit the intention was clearly to preserve the right to honour picket lines as an exception to the general prohibition on mid-contract work stoppages. This right was previously recognized in *MacMillan Bloedel* and its continuation under the new definition of strike was recognized in *Delta Hotels*, a case in which the picketing at issue was federal. The Poly-Party Unions submit the Employer does not explain why the Legislature would have intended to create an exception for unionized employees to honour provincial picket lines but not federal picket lines. They submit the Legislative intent was to provide for one consistent response to all labour picketing in the province.

56 The Poly-Party Unions submit the 1987 amendment to the definition of "persons" in the Code was intended to avoid provincial regulation of federal labour matters, not to prevent provincial unions from honouring legal picket lines because they happened to arise from a federal bargaining relationship. In *The Bay*, the Board interpreted the amendment as providing "a clear line around the Board's jurisdiction" (para. 43) which excluded "all federally regulated undertakings" (para. 39). The Poly-Party Unions submit that nothing about the right to respect a picket line involves the Board crossing the line into regulating federal undertakings or their labour relations.

57 The Poly-Party Unions agree the Board has no jurisdiction to regulate federal undertakings and their labour relations but submit that nothing about the Original Decision would require the Board to do so. Only the court can regulate federal picketing, and the proper way to address federal picketing is to challenge the legality of the picketing itself, not the response to the picketing (*MacMillan Bloedel*, *Delta Hotels*). That approach preserves the delicate balance of interests involved in picketing, the Poly-Party Unions submit, and if the Board were to require that employees under the Code cross federal picket lines, that delicate balance would be lost.

58 The Poly-Party Unions submit that, to the extent the Board finds the modern approach to statutory interpretation results in an ambiguity as to whether the Phrase includes federal picketing, it can and should rely on *Charter* values to prefer an interpretation that upholds constitutionally protected rights. They submit that just as picketing is a constitutionally protected expressive activity (*Pepsi*), so is honouring a picket line. In that regard, they rely on the following passage, quoted in *United Food and Commercial Workers, Local 1518 v. Kmart Canada Ltd.*, [1999] 2 SCR 1083, from the earlier judgment of Chief Justice Dickson in *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 ("*BCGEU*"):

> Picketing sends a strong and automatic signal: do not cross the line lest you undermine our struggle; this time we ask you to help us by not doing business with our employer; next time, when you are on strike, we will respect your picket line and refuse to conduct business with your employer.
>
> (para. 40)

59 The Poly-Party Unions submit the majority decision in *Terminal Elevator* erred in suggesting that honouring a picket line is not expressive activity; they say Evans J.A., although in the minority, was correct to find it was *Charter*-protected expressive activity. The Poly-Party Unions submit that while no one is required to listen to picketers or to honour a picket line, union members have a constitutionally protected right to choose to listen and to engage in their own expression when they choose to honour a picket line. They submit that honouring a picket line is expressive activity that engages Section 2(b) of the *Charter*, such that union members have a right to receive the expression of picketers. An interpretation of the Code that preserves these rights should be preferred over one that does not.

60 With respect to remedy, the Poly-Party Unions submit the application for reconsideration should be dismissed. Alternatively, if the Board finds that honouring a federal picket line is an illegal strike under the Code, the Poly-Party Unions submit the Employer should nonetheless be denied any remedy, or in the further alternative they submit the only appropriate order is a declaration that the refusal to cross the picket line is a strike for purposes of the Code. The Poly-Party Unions submit that there is no reason to believe any person will continue to strike if that declaration is made.

61 The Poly-Party Unions also note that one of their constituent unions, Canadian Office of Professional Employees' Union, Local 378 ("MoveUP"), has a provision in their collective agreement with the Employer which allows it to respect picket lines. The Poly-Party Unions submit that either MoveUP is therefore entitled to respect the picket line or alternatively the application must be dismissed as against MoveUP.

4. BC Fed

62 The BC Fed submits picketing is not a right created by statute but rather is lawful by virtue of the common law and exists independent of any statutory regime. In many jurisdictions like British Columbia, picketing is restricted and regulated by statute. However, the Code does not restrict or prohibit picketing by federal unions, including where it occurs at a provincial employer's place of operations. The BC Fed submits that therefore the Code permits such picketing, because the common law continues to govern. At common law, picketing is permitted and lawful unless it involves a tort or a crime: *Pepsi*, para. 62. The BC Fed submits the Code permits lawful (non-tortious and non-criminal) picketing through the absence of regulation because the right to picket exists independent of labour relations legislation.

63 The BC Fed further submits that federally the Canada Labour Code leaves the regulation of picketing exclusively to the courts, which apply the common law: *Moffat Communications Ltd. v. Hughes*, [1975] 55 D.L.R. (3d) 701, p. 710. In contrast, the Code regulates picketing by provincially certified trade unions, limiting the common law rights of such unions to engage in secondary picketing and codifying the rights of their members to refuse to cross picket lines. The BC Fed submits the language in the Code which codifies the right to refuse to cross picket lines (subsection (b) of the definition of strike) does not distinguish between federal and provincial picketing lines. While the Code does not provide the Board with authority to regulate federal picketing, the BC

Fed submits the right of employees under the Code to refuse to cross a picket line without being found to engage in an illegal strike can be triggered by a federal picket line. The Court of Appeal has stated the BC Legislature could have, but did not, restrict federal picketing at provincial employers under the Code: *BC Ferry*, para. 15. Such picketing is therefore permitted under the Code.

64 The BC Fed submits that under the original version of the Code, the Board believed it had concurrent jurisdiction with the courts to regulate federal picketing at provincial employer worksites: *The Bay*, para. 68. The Board also believed it had the power to declare a federally regulated undertaking to be an ally of a provincially regulated employer. However, the Board subsequently recognized it did not have such jurisdiction under the Code, particularly after the definition of "person" was narrowed to exclude federal undertakings: *The Bay*, paras. 44-46. The BC Fed submits that therefore, as the Board's jurisdiction over federal labour undertakings has been narrowed, the Code's prohibition on picketing has also been narrowed. The BC Fed submits the revisions to the Code show a legislative intent that the Code regulate picketing by provincial unions, but permit picketing at provincial worksites by "non-persons", such as picketing regulated at common law.

65 The BC Fed thus submits that "picketing permitted under the Code" includes both picketing by provincial unions, which is regulated and may be permitted when certain conditions are met under the Code, and picking by non-persons (those who do not fall within the definition of "person" under the Code") such as federal trade unions. The BC Fed submits the definition of "picketing" in the Code is not restricted to actions of "persons" but encompasses actions by anyone at the place of a person's business operations. It says a person or a non-person can engage in activity which falls within the definition of picketing under the Code, as long as that activity occurs at the place of operations of a "person" under the Code.

66 The BC Fed further submits that the Code expressly recognizes the rights of unions and their members in Section 2(a), and that innumerable judicial, arbitral, and labour relations board decisions have recognized the importance of honouring picket lines to unions: see, for example, *BCGEU*, paras. 27-28. With respect to Section 2(f) of the Code, the BC Fed submits the common law regulating picketing allows for harm to third parties incidental to lawful (non-tortious and non-criminal) picketing of a struck employer: *Pepsi*, para. 45.

67 With respect to Section 66 of the Code, the BC Fed submits that even if this provision does limit the jurisdiction of the Supreme Court so that it cannot enjoin picketing involving economic torts, trespass, and nuisance, that restriction reflects the common law. The BC Fed submits that, with the evolution of the common law, older economic torts do not constitute grounds to find the tort of inducing breach of contract at common law: *Prince Rupert Grain Ltd. v. Grain Workers' Union, Local 333*, 2002 BCCA 641 ("*Prince Rupert Grain*"), paras. 4-5 and 46. The BC Fed submits that Section 66 still leaves recourse to the courts for unlawful picketing that involves violence, threats, or harassment. It submits that, while the Legislature may restrict an employer's ability to

access court, that is a separate issue from the recognition of federal picket lines under subsection (b) of the definition of strike.

68 The BC Fed concludes by submitting that workers have the fundamental freedom to express themselves and act with their conscience and their commitment to union solidarity, and to refuse to cross picket lines. It submits such conduct cannot be considered a "strike" and the Original Decision reasonably found that a lawful picket line at a provincial employer was not intended to warrant less recognition because it was federal in origin. It submits there is no justification for recognizing provincial but not federal picket lines under the Code for the purpose of the picketing exception in the definition of strike. It further submits it is inconsistent with the *Charter* to interpret the Code as allowing workers to refuse to cross provincial picket lines but compel them to cross federal picket lines. The BC Fed submits it serves no statutory purpose and does not make labour relations sense to protect only those respecting provincial picket lines from illegal strike applications.

5. ILWU

69 The ILWU notes the *Charter* guarantees freedom of conscience (Section 2(a)), freedom of expression (Section 2(b)), and freedom of association (Section 2(d)), and it submits that all three freedoms are engaged in the present case.

70 Regarding freedom of expression, the ILWU notes it is settled law that a picket line is expressive activity protected by Section 2(b): *Pepsi*. It submits a finding that freedom of expression does not include the freedom to be persuaded and respond to a picket line – by refusing or not refusing to cross it – would dramatically undermine the purpose of freedom of expression, which is to ensure that we can persuade each other. ILWU submits that listening to and altering behaviour in response to picketing is expressive activity protected by Section 2(b). The ILWU notes that a picket line is no longer assumed to be coercive: *Prince Rupert Grain*, para. 48, and submits the Board has accepted that refusing to cross a picket line is expression: *Canadian Forest Products Ltd.*, BCLRB No. B312/2006, para. 280.

71 Regarding freedom of conscience, the ILWU submits refusing to cross a picket line is an act of solidarity with striking workers, and thus it is not only expressive activity but also an act of conscience. It submits freedom of conscience protects the freedom to act or not act in accordance with one's conscience, and to not be forced to act otherwise. ILWU submits that the decision of unionized workers to refuse to cross a picket line risks discipline and loss of wages, and is indicative of a commitment to the greater principle of union solidarity. This has long been recognized in law: *BCGEU*, paras. 28-29.

72 Regarding freedom of association, the ILWU submits a decision that would limit the effect of a picket line by forcing workers across it impacts the right of meaningful collective bargaining. It further submits the act of refusing to cross a picket line is an associative act – one that is taken in association with striking workers. There is also recognition of these principles in international law. The ILWU submits that an

interpretation of the Code which limits the effect of the Guild picket line by forcing members of the Poly-Party Unions to cross the picket line is contrary to freedom of association because it would dramatically dampen the power of the picket line, which it submits is a key part of freedom of association.

73 The ILWU submits that in *Pepsi*, the Supreme Court of Canada found the limit on constitutionally-protected picketing at common law is where there is undue harm to third parties by tortious or criminal actions. Otherwise, harm to third parties is an expected, and accepted, result of the constitutional right to picket. *Pepsi* also makes clear that *Charter* rights and freedoms are to be preferred over economic rights, which are not *Charter* protected. It submits that these principles must be considered when weighing the policy purposes of the Code set out in Section 2, and in particular when considering how to balance Section 2(a) rights against Section 2(f). ILWU submits the constitutional rights of employees and trade unions must be preferred.

74 The ILWU submits that where legislation is ambiguous, decision makers interpreting it must apply a *Charter* values presumption. Ambiguity results when words of a provision are "reasonably capable of more than one meaning" and one must consider the entire context of a provision before one can determine if it is reasonably capable of multiple interpretations: *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, para. 29 ("*Bell ExpressVu*"). Determining whether ambiguity exists requires the decision maker to first "undertake the contextual and purposive approach set out in Dreidger" and thereafter determine if the words are ambiguous: *Bell ExpressVu*, para. 30.

75 The ILWU submits there is real ambiguity in the Code with respect to whether subsection (b) of the definition of strike applies to federally regulated picketing. When the strike definition was amended in 1984, the Legislature took away the subjective element and thus the right of workers to engage in political strikes, but gave them the right to refuse to cross picket lines. The ILWU submits the legislative intent was not to give workers the right to respect only provincially regulated picket lines but any labour picket lines. The ILWU submits that while picketing by "persons" is regulated under the Code, any other picketing – by persons or non-persons, and in respect of matters or disputes to which the Code does not apply – is permitted by the Code. ILWU submits there is ambiguity in the interpretation of the interplay between the strike exemption, the picketing definition, the term "person", and Section 67 of the Code. It submits this ambiguity must be resolved in favour of the *Charter* freedoms at stake.

76 Accordingly, ILWU submits, in considering how the Code applies in a case where workers are refusing to cross a legal picket line, the Board must consider which interpretation will limit the impact on freedom of expression, freedom of conscience and freedom of association as much as possible in light of the statutory objectives: *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 ("*TWU*"), paras. 79-81. ILWU submits that the statutory objective of the picketing exception to the definition of strike in the Code is to give workers the right to respect picket lines. It submits the Original Decision correctly finds that purpose is not limited to provincially regulated picket lines.

77 In addition, ILWU submits the Board cannot make orders that violate the *Charter*. It submits that making an order requiring employees to cross a picket line is clearly contrary to the fundamental *Charter* freedoms of expression, association, and conscience, and as the Board can exercise its discretion not to make such an order, it should not make an order requiring employees to cross a picket line. The Original Decision should accordingly be upheld as it correctly interpreted the Code in a manner that respects both the intention of the picketing exception and the *Charter* freedom to refuse to cross a picket line.

V. ANALYSIS AND DECISION

78 An application under Section 141 of the Code must demonstrate a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93). An applicant must raise a serious question as to the correctness or fairness of the original decision. For the reasons that follow, we conclude that the Employer has raised a serious question as to the correctness of the Original Decision and leave for reconsideration is granted, accordingly.

79 In the present case, there is agreement that the Original Decision correctly identifies the issue in dispute to be whether the concerted refusal of the Poly-Party Unions and their members to cross the Guild's picket line and go to work constitutes an illegal strike under the Code or falls within the subsection (b) exception to the definition of strike in the Code. More particularly, the issue is whether the Guild's federally regulated picketing constitutes "picketing that is permitted under this Code" (i.e., the Phrase) in that provision, which reads:

> "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services, but does not include
>
> * * *
>
> (b) a cessation, refusal, omission or act of an employee that occurs as a direct result of and for no other reasons than picketing that is permitted under this Code, ...
>
> (emphasis added)

80 The parties present two competing interpretations of what is meant by the Phrase. The Employer and the Business Council say the Phrase refers to picketing which the Code expressly permits. The Poly-Party Unions, supported by the BC Fed and ILWU, say the Phrase refers to picketing which the Code does not expressly prohibit.

81 For the reasons which follow, we find the Employer's interpretation must prevail.

82 Before turning to our reasons, however, we note that both interpretations of the Phrase offered by the parties give rise to significant labour relations policy concerns.

83 Firstly, to adopt the interpretation of the Phrase advocated by the Employer and the Business Council may upset the longstanding and widely held understanding in the labour relations community in British Columbia that honouring a picket line does not, in and of itself, constitute a strike – an understanding that emanates from *MacMillan Bloedel* which was an early policy decision of the full Board, chaired by then Chair Weiler dealing with picketing arising from a dispute under the Code.

84 The Board in that case reasoned that the refusal to cross a picket line did not meet the subjective element of the strike definition (which was then in effect), which required that the concerted activity be "for the purpose of compelling their employer to agree to terms or conditions of employment, or of compelling another employer to agree to terms or conditions of employment of his employees". The Board went on, however, to address the policy reasons why respecting a picket line should not be considered a strike:

> As the Panel noted in its decision, there is another, subtle reason for this legal conclusion. We are not asked to find that the members of Local 5 went on strike in the abstract: instead we are asked to conclude that the actions of the box plant employees are subject to the scheme established by the Labour Code for regulating strikes. If honouring a picket line is, in principle, a strike, then it is always illegal unless it takes place within the narrow bounds during which the Code permits a strike: when the collective agreement has expired, the union has bargained, a strike vote has been taken, and strike notice has been given. In other words, it is only employees who have followed the type of procedure undertaken by Local 8 members at Harmac who will be legally entitled to strike. In turn, once such employees have actually gone on strike, they are permitted- under Section 85 of the Code, to establish picket lines at the places of business of their employer. The intriguing result of the employer's argument in this appeal is that, if it is a strike to refuse to go to work behind a picket line, the only employees legally entitled to honour the picket are those who have already gone on strike and put the pickets up in the first place. As the panel's analysis showed, every other category of employee will be violating the no-strike provisions of the Code. This includes not only the members of Local 5 here, who have not gone to work at the box plant which is subject to a collective agreement; it also includes delivery drivers who refuse to cross a picket line at the site of the strike; it includes employees who are not subject to any collective agreement (if they have not put themselves in a strike position); finally, it includes those employees whose collective agreements explicitly permit them to honour a picket line (because the parties are not permitted to contract out of the

statutory prohibition on strikes contained in Section 79 of the Code).

> These legal conclusions, which flow inexorably from the premise of this Employer's appeal, are incongruous to say the least, not just in terms of the expectations of the B.C. industrial relations community but also in the face of other explicit provisions of the Code itself. Section 85 allows a union to picket not only at the site of the strike but also at secondary locations of the struck employer and of any "ally" it has in the strike. This means that the union is entitled to persuade employees at any one of these secondary locations to refuse to go to work behind the picket line. Now we are told that the Legislature, in another part of the Code, has made it illegal for these employees to be persuaded. The law first makes trade-union picketing legal if it is directed at certain targets, the struck employer or its ally. But as soon as this picketing is having some success, the employer who is its target can go to the Board and demand an end to this "illegal" activity by its own employees of not crossing that picket line.
>
> We are not prepared to impute to the B.C. Legislature such a schizophrenic set of labour law policies....
>
> (*MacMillan Bloedel,* p. 104, emphasis added)

85 Weiler returned to this theme some years later in *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980), saying as follows:

> One tack that the law might take is to hold that if employees honour a picket line, if they refuse to cross it in order to go to work, they are thereby guilty of an illegal strike. That has never been the view of British or American law, but there are labour boards and courts which have so interpreted Canadian legislation. Undoubtedly such a wholesale legal ban can blunt the effectiveness of union picketing, whatever the reason for it. Yet I have always found that interpretation more than passing strange. On the one hand the law holds out to unions the right to picket at certain times and places, that is, the right to persuade employees not to report to for work. On the other hand, that same law is read as telling these workers that if they are persuaded not to go to work, if they choose to adhere to that fundamental tenet of the trade union ethic, they put themselves beyond the legal pale of the wider community. In British Columbia at least, we are satisfied that this legal policy would be perceived (rightly I believe) as totally unfair and likely to discredit any institution which tried seriously to enforce it. Our approach was strictly to delimit the legitimate use of the picket line – not to mount a frontal assault on those who are loathe to cross the line – a symptom of the problem.
>
> (pp. 79-80)

86 There can be no dispute that, in the context of a dispute about provincial picketing, the Weiler Board in *MacMillan Bloedel* recognized that honouring picket lines is fundamental to the ability of a trade union to exercise its rights under the Code. From a policy perspective, we see no principled difference between honouring a provincially regulated picket line and honouring a federally regulated one. In this regard, we share the former Chair's concern that requiring employees to cross a picket line – including a federally regulated one – raises similar policy concerns to the ones he expressed.

87 On the other hand, to adopt the Poly-Party Unions' interpretation of the Phrase – that "picketing that is permitted under the Code" means picketing that is not expressly prohibited by the Code – would pose its own labour relations policy concerns.

88 As the Employer and the Business Council point out, there are many instances of conduct that may have the effect of causing employees in British Columbia to down tools, but which fall outside of the Board's ability to regulate. Consequently, notwithstanding the Code's general ban on mid-contract work stoppages, adopting the interpretation of the Phrase advocated by the Poly-Party Unions would potentially allow mid-contract work stoppages which the Board has no power to restrain or to control. It may mean, for example, that a withdrawal of labour would not be an unlawful strike if done in response to "picketing" in support of political protests, consumer boycotts, or labour disputes that emanate from other jurisdictions.

89 The facts in *Tyco* illustrate the labour relations concerns that would potentially flow from the Poly-Party Unions' interpretation. *Tyco* involved picketing in British Columbia by a trade union certified in the United States to the parent company of a BC Employer. Unionized BC employees refused to cross those picket lines and therefore did not report for work. The question in that case was whether the Board could order that the pickets be removed, not whether provincially regulated employees could honour the picket line without engaging in an illegal strike for Code purposes. The Board found the picketing was in relation to a dispute not governed by the Code – the Code neither expressly permitted nor prohibited the picketing in question which emanated from a labour dispute in the United States. The Board found that it was powerless to grant relief to the BC employer from the picket line, but observed:

> This is an awkward result for the Board and the community. The work stoppage suffered by employers in the position of the Complainant is within the jurisdiction of the Board, but the activity causing it is out of the Board's reach. It is usually unhelpful to consider the former but not the latter. To do so is to address the effect while ignoring the cause. The Board prefers to deal with the cause: [*Delta Hotels*]; [*Macmillan Bloedel*]
>
> ... Picketing may spring from disputes over issues which are closely related to, but are not in strict terms labour relations issues under the Code. What of pickets emanating from a complaint by retired employees? Or pickets protesting community issues in which the employer is involved? What about pickets protesting a labour policy of the government? All of these could have massive

> labour relations consequences for provincial employers. Given the necessity to consider the origin of the dispute, it is not clear the Board would have any jurisdiction to deal with such picketing.
>
> (*Tyco*, p. 7)

90 If the Board were to adopt the Poly-Party Unions' definition of the Phrase and treat all picketing not expressly prohibited by the Code as being permitted by it, the Board would find itself in precisely the "awkward" position described in *Tyco*. There is no dispute that the Board has jurisdiction to regulate work stoppages by provincially regulated employees. However, the Board would be powerless to regulate a work stoppage by provincially regulated employees where the work stoppage results from the employees' choosing to honour a non-Code related picket line, whether it be a federal picket line, a political protest, or any other non-Code related matter. We agree with the Employer and the Business Council that such a result is entirely inconsistent with the Board's duties under Section 2(e) and (f) of the Code.

91 We further note that, by adopting the Poly-Party Unions' definition of the Phrase, we would be granting provincially regulated employees a right vis-a-vis a federal picket line that federally regulated employees do not themselves enjoy. There is no dispute that the Canada Labour Code does not contain an equivalent to the subsection (b) exception to the strike definition. If the Poly-Party Unions' definition prevails, the result would be that provincially regulated employees are protected against an illegal strike declaration for honouring a federal picket line, while federally regulated employees who honour the same picket line are not.

92 For the reasons articulated by the parties to this dispute, there are labour relations policy consequences that cannot be easily reconciled, regardless of which interpretation we find the Legislature intended by the Phrase. Ultimately, however, the Board's task in these proceedings is interpretive, not legislative. That is to say, it is not for the Board to decide what the law *should be*. That is the role of the Legislature. Our task is to interpret what the law *is*. In doing so, our job is to ascertain which of the two policy considerations – the importance to the labour movement of the right to honour a picket line or the importance of minimizing labour disputes on unrelated third parties – the Legislature intended to favour by defining "strike" the way it did.

93 To that end, there is no dispute, and in any event we find, the Original Decision correctly identifies that the proper approach to this issue of statutory interpretation is set out in *Rizzo* at paragraph 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

94 At its core, we must decide what the Legislature meant when it exempted a work stoppage which results from "picketing that is permitted under this Code" (i.e., the Phrase) from the definition of "strike". To do so, we must determine what the Legislature

intended in 1984 when the definition of "strike" was amended to (substantially) its present form.

95 Guided by *Rizzo*, we have looked for evidence of legislative intent in three broad areas: 1) legislative history and labour relations context at the time of the amendments; 2) the plain wording of the statute itself; and 3) the scheme and objects of the Code. Consistent with the guidance provided in *Rizzo*, we have considered these factors holistically, not as a checklist. Having considered both of the proposed interpretations of the Phrase in light of these factors, we find the Employer's is the only possible interpretation; specifically, only the Employer's interpretation is consistent with the scheme and objects of the Code as a whole.

96 As a starting point, we turn first to the legislative history and the labour relations context surrounding the 1984 Code amendments, beginning with the Board's 1975 decision in *MacMillan Bloedel*. At the time *MacMillan Bloedel* was decided, the Code defined a "strike" as follows:

> 'strike' includes
>
> (i)a cessation of work, or
>
> (ii)a refusal to work, or
>
> (iii)a refusal to continue to work, or
>
> (iv)an act or omission that is intended to, or does, restrict or limit production or services,
>
> by employees in combination, or in concert, or in accordance with a common understanding, for the purpose of compelling their employer to agree to terms or conditions of employment, or of compelling another employer to agree to terms or conditions of employment of his employees, and 'to strike' has a similar meaning.
>
> (emphasis added)

97 Under this definition, conduct falling within the definition of "strike" must have satisfied both an objective element and a subjective element. Even where the conduct itself met the objective elements of a strike, it would also have to be undertaken for the specific purpose set out in the definition.

98 In *MacMillan Bloedel*, the Board found that honouring a picket line could not be a strike for two reasons. First, it did not satisfy the subjective part of the "strike" definition. It held that, while the picketers themselves were acting in concert to compel their employer to resolve the bargaining impasse, it could not ascribe the same motive to those individual employees who simply encounter the picket line and "automatically and instinctively" refuse to cross it "just because it is there" (p. 103). Second, as noted

above, the Board found it would be inconsistent with the Code as a whole to find that the refusal to cross a picket line amounts to a strike.

99 Not long after *MacMillan Bloedel*, the Board again considered the definition of "strike", in *British Columbia Hydro and Power Authority*, BCLRB No. 71/76 [1976] 2 Canadian LRBR 410 ("*BC Hydro*"). At issue in that case was a National "Day of Protest" announced by the Canadian Labour Congress against a federal anti-inflation program. In support, employees of BC Hydro refused to work and set up pickets at various locations. The Board considered whether, in doing so, the definition of "strike" in the Code was met. Again, the Board determined that what occurred was not a strike because the subjective element of the definition of "strike" was not met; the motivation was political rather than to compel an employer to agree to terms or conditions of employment.

100 The Board observed, however, that in Ontario, where there was no subjective element to the definition of strike, protests on October 14, 1976, in support of the National Day of Protest were found to be unlawful strikes.

101 The Board noted the awkwardness of its decision – particularly in light of the Code's general prohibition against mid-contract work stoppages – and observed that if political strikes were to become routine, the Legislature might be forced to intervene:

> ... That major political work stoppage [October 14] was a unique event in recent Canadian history. No one knows whether it will be repeated in the foreseeable future. At this stage, surely the wisest course is not to distort the general law of strikes under the Code to deal with what may turn out to be a once-and-for-all event. If, on the other hand, "political strikes" were to become habit-forming, then unquestionably Canadian legislatures, including the B.C. Legislature, would find it necessary to deal with the problems presented by this kind of trade-union action (and the constitutional questions would then have to be answered). ...
>
> (*BC Hydro*, p. 418)

102 Political protests in the mold of the 1976 National Day of Protest were not, however, a once-and-for-all event. Notably, in 1983 a number of British Columbia trade unions engaged in Operation Solidarity – a protest of the Social Credit Government's austerity programs and legislation the trade unions saw as anti-union. In *Metro Transit Operating Company*, BCLRB No. 220/83, *Health Labour Relations Association*, BCLRB No. 221/83, and *Metro Transit Operating Company,* BCLRB No. 245/83 the Board was again asked to decide whether a political protest could be an illegal strike, this time in the context of Operation Solidarity. Again, it concluded the withdrawal of services in that context did not constitute a strike because it failed to meet the subjective element of the definition of strike. Once again, the object of the campaign was political, not to compel an employer to agree to terms or conditions of employment.

103 The following year the Social Credit Government introduced Bill 28, the *Labour Code Amendment Act*, 1984, S.B.C. 1984, c. 24 which sought to, among other things, amend the definition of strike by removing the subjective component of that definition, but adding the caveat that a strike "does not include...a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted by or under this Act". In other words, it was the 1984 amendment to the strike definition that introduced the Phrase in issue in the present case.

104 The Poly-Party Unions rely on Hansard to argue the legislative purpose of the 1984 amendment to the strike definition was to bring an end to the use of strikes other than for labour relations purposes, while expressly preserving the right to honour a picket line. We agree that it is clear from the evidence in Hansard, and from the surrounding context, that the impetus for the removal of the subjective element of the definition of strike was to avoid political strikes like those in support of Operation Solidarity (which occurred the previous year) and the National Day of Protest (from, 1976). For example, the Premier, speaking in support of Bill 28 noted with regard to the change of the definition of strike:

> I don't know , Mr. Speaker, how anyone – unless they have a very narrow view that only those they choose to think they represent are right and they should be represented – could oppose this legislation or argue against it. To me it is unarguable on any basis for the opposition to oppose what the Minister of Labour has proposed. It is positive. It will help. There are those who don't want it to help. There are those to whom dissent or having the right to political strikes are more important than seeing the province work. I was quite surprised to see the change in the definition of strike criticized – that political strikes will not be considered as part of the economy in the workplace. That's the same definition they have in other legislation across this country. To somehow suggest that we are out of step with the rest of the country is wrong; what we are doing is in step. I think the public will decide. Had they seen the type of disruptions in other parts of this country, the way political strikes were allowed to take place as part of the solution, or do they see the fact that that hasn't taken place as justification for us getting in step with the rest of the country?
>
> (British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 33rd Parl, 2nd Sess, (May 10, 1984) Afternoon Sitting, page 4678, emphasis added)

105 We are not persuaded, however, that the amendment was expressly intended to remove from the definition of strike all picketing in respect of any labour dispute whatsoever. We have considered Hansard, the Legislative history, and the political and labour relations context in 1984 but are unable, from those sources alone, to identify, with any degree of confidence, the legislative purpose behind exempting "a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no

other reason than picketing that is permitted by or under this Act" from the definition of strike.

106 One possibility is that the Legislature sought to preserve, what Weiler described in *MacMillan Bloedel* as the "the expectations of the B.C. industrial relations community" that union members be entitled to honour a picket line without fear that by doing so they will have engaged in an unlawful strike; in other words, to preserve what the Original Decision calls a recognition of "the fundamental importance that unions and their members attach to honouring a lawful picket line" (Original Decision, para. 50).

107 Another possibility, however, is that the Legislature took to heart the rationale articulated in *MacMillan Bloedel* and elsewhere and sought to allow employees to honour a picket line only in those circumstances where the Code provides the Board the capacity to regulate the picketing, and the picketing was expressly lawful pursuant to the Code.

108 We are unable to conclude, on the basis of Hansard, Legislative history, or the labour relations context in 1984, that the Legislature turned its mind to whether the Phrase should include an exemption in the case of federal picketing. Therefore, we are left to determine the meaning of the Phrase by reference to the words chosen by the Legislature, in their grammatical and ordinary sense, when read harmoniously with the scheme and objects of the Code: *Rizzo*, p. 21.

109 To that end, we might have been inclined to find the Phrase to be ambiguous were it not for the requirement that it be read harmoniously with the Code as a whole. However, taking into account the entirety of the Code, including Section 66, we are persuaded that the Phrase is unambiguous and that the Employer's interpretation must succeed.

110 We firstly accept that "permitted" can, in common usage, refer to that which is not prohibited. As the Poly-Party Unions note, reasonable authors, including the Board (in *Excell*) and the Supreme Court of Canada (in *Paccar*) have used "permitted" in this context.

111 However, "permitted" may also mean something which has been expressly allowed. As the Business Council observes:

> To "permit" is defined by Merriam-Webster as:
>
> > to consent to expressly or formally: permit access to records
> >
> > to give leave: AUTHORIZE
> >
> > to make possible : the design permits easy access
> >
> > Source: https://www.merriam-webster.com/dictionary/permit

> Similarly, to "permit" is defined by the Cambridge dictionary as to "allow something".
>
> Source: https://dictionary.cambridge.org/dictionary/english/permit

112 We accept, therefore, that in the grammatical and ordinary sense of the language used by the Legislature, both the Employer's and the Poly-Party Unions' interpretations of the Phrase are possible.

113 We further note that both the Poly-Party Unions' and the Employer's interpretations are possible on a purposive interpretation of the Phrase, albeit in different ways. The Poly-Party Unions' interpretation promotes the fundamental importance to the labour movement of honouring picket lines. The Employer's interpretation of the Phrase promotes the Board's duty to minimize the effect of labour disputes on unrelated parties by limiting the exemption to only that picketing which the Board has the constitutional authority to regulate. It is also consistent with the Board's duties under Sections 2(e) and 2(f) of the Code.

114 Had the *Rizzo* analysis allowed us to end our inquiry there, we may well have concluded the Phrase was ambiguous. However, *Rizzo* requires us to also consider the Phrase, as part of the definition of "strike" chosen by the Legislature, in a manner that is harmonious with the scheme and objects of the Code. For the reasons that follow, we find that the Employer's interpretation can be read harmoniously with the other picketing provisions of the Code, while the Poly-Party Unions' cannot.

115 Picketing is addressed in Part 5 of the Code and, specifically, in Sections 65, 66, and 67. Section 67 sets out a general prohibition on picketing and says, "except as provided in this Code", a person must not picket in respect of a matter or dispute to which this Code applies.

116 The Code provides a limited exception to the Section 67 prohibition in Section 65(3), which says:

> A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near a site or place where a member of the trade union performs work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation and the site or place is a site or place of the lawful strike or lockout.

117 In other words, Section 65(3) limits the right of employees to picket unless the trade union has taken the steps necessary under Section 60 to engage in a lawful strike or the employer has imposed a lawful lockout under Section 61. There can be no dispute that Section 65(3) only contemplates picketing in respect of a dispute to which Sections 60 and 61 apply: that is, picketing that the Code expressly allows.

118 Section 65(4) provides the Board discretion to allow picketing at certain places other than a site or place "permitted by subsection (3)":

> The board may, on application and after making the inquiries it requires, permit picketing
>
> > (a)at or near another site or place that the employer causing a lockout or whose employees are lawfully on strike is using to perform work, supply goods or furnish services for the employer's own benefit that, except for the lockout or strike, would be performed, supplied or furnished at the site or place where picketing is permitted by subsection (3), or
> >
> > (b)at or near the place where an ally performs work, supplies goods or furnishes services for the benefit of a struck employer, or for the benefit of an employer who has locked out,
>
> but the board must not permit common site picketing unless it also makes an order under subsection (6) defining the site or place and restricting the picketing in the manner referred to in that subsection.

119 We are satisfied that Part 5 of the Code sets out a comprehensive scheme regarding strikes, lockouts, and picketing, including the fact that picketing is generally prohibited (Section 67) unless the legal prerequisites set out in Section 65 are met or unless the Board expressly grants authority to picket under Section 65(4) or 65(7). We find the Employer's interpretation of the picketing exception – that "permitted" means expressly allowed – fits more harmoniously with these sections.

120 The Employer and the Business Council also point out that their interpretation is the only one consistent with the language of Section 66 of the Code. We note that, while this may be the Employer's most persuasive argument in support of its interpretation, it is one which the original panel did not have the benefit of hearing. Nonetheless, it is one that the parties have fully canvassed on reconsideration and merits consideration.

121 On reconsideration, the Employer and the Business Council note that the phrase "permitted under this Code", in fact, appears twice in the Code and in both instances refers, at least in part, to picketing. In addition to appearing in the Section 1 definition of strike, the "Phrase" also appears in Section 66:

> No action or proceeding may be brought for
>
> > (a) petty trespass to land to which a member of the public ordinarily has access,
> >
> > (b) interference with contractual relations, or
> >
> > (c) interference with the trade, business or employment of another person resulting in a reduction in trade or business, impairment of business opportunity or other economic loss

> arising out of strikes, lockouts or picketing permitted under this Code or attempts to persuade employees to join a trade union made at or near but outside entrances and exits to an employer's workplace.
>
> (emphasis added)

122 There is one grammatical difference between the Phrase ("picketing that is permitted under this Code") and Section 66 language ("picketing permitted under this Code"). We find the presence or absence of "that is" makes no substantive difference from an interpretive perspective and refer to both as the "Phrase" for the purpose of our analysis.

123 The parties do not dispute, and we accept, that the purpose and effect of Section 66 is to remove common law rights which employers and others adversely affected by picketing have to seek redress in court against those responsible for conduct which might otherwise constitute the torts captured by that section: *Value Industries Ltd. v. Pacific Press Ltd.*, [1981] B.C.J. No. 1772.

124 If the Phrase meant "picketing that is not prohibited by the Code" as the Poly-Party Unions say it must, then the prohibition would apply in the context of any picketing that is beyond the Code's scope. In that way, Section 66 would arguably prohibit a federally regulated employer from seeking a remedy in Court for torts committed by federally regulated employees on a federal picket line. We agree with the Employer and the Business Council that this would amount to a constitutional overreach and, therefore, cannot have been the Legislature's intention. The BC Fed says the prohibition in Section 66 of the Code reflects the common law of picketing in any event, and therefore it is irrelevant whether it does or does not enjoin federal employers from bringing an action in response to federal picketing. We do not agree. The Poly-Party Unions' interpretation would amount to the Legislature attempting to regulate the relations between federally regulated employers and their employees and is therefore constitutionally improper.

125 Even if we accept the Poly-Party Unions' argument that Section 66 cannot apply to federal picketing (because of the constitutional division of powers), if the phrase "permitted under the Code" means the same in Section 1 as it does in Section 66, that would still require us to conclude (on the Poly-Party Unions' interpretation) that the Legislature *tried to* remove the specified torts from the jurisdiction of the Courts in respect of federal entities even though the Legislature is without jurisdiction to do so. We find that to be an incongruous interpretation of the Code and unlikely to reflect Legislative intent.

126 Rather, we accept that Section 66 is intended to apply to conduct regulated by the Code and which properly falls within the Code's constitutional reach. That is to say, the Code does not, in Section 66, purport to remove common law tort rights from federal entities affected by strikes, lockouts and picketing or those entities that are otherwise extraneous to the Board's jurisdiction. Within the class of strikes, lockouts, and picketing regulated by the Code, however, there are strikes, lockouts and picketing that the Code

allows, and there are strikes, lockouts and picketing that the Code does not allow. We are satisfied that, reading Section 66 in accordance with the principles articulated in *Rizzo*, when that section speaks of picketing that is "permitted under the Code", it seeks to distinguish between picketing that the Code allows, and picketing that the Code does not allow – removing certain torts from conduct arising out of picketing which the Code expressly allows.

127 As we have said, Part 5 sets out the comprehensive scheme by which the Code allows picketing and in what circumstances. That is, the picketing regulated by Part 5 is picketing the Code expressly allows. We have also found that the Phrase, as it is used in Section 66, can only mean picketing which the Code expressly allows (as the Employer and the Business Council argue). The Employer's interpretation of the Phrase in the strike definition is consistent with the scheme established in Part 5 and with what we have found the Phrase can only mean in the context of Section 66, specifically. We are mindful of the principle of interpretation which says that, when a statute uses the same phrase in different provisions that phrase should be presumed to have the same meaning in both provisions: *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, para. 19. In the circumstances, we are not persuaded there is a basis on which to depart from this interpretive principle in order to find the Phrase is ambiguous and can mean something different than that, when it is used in to define what is or is not a "strike".

128 Consequently, we find the interpretation of the Phrase advanced by the Employer and the Business Council to be in harmony with our interpretation of Part 5 of the Code and, specifically, Section 66. It results in the phrase "permitted under the Code" as it appears in the Section 1 strike definition and in Section 66 having the same meaning – in both instances, it would refer to picketing that is expressly permitted by the Code or under some authority conferred by the Code. It is also consistent with the remaining scheme of the Code that regulates strikes and picketing.

129 In sum, considering the Phrase in its entire context and in its grammatical and ordinary sense harmoniously with the scheme and objects of the Code, and the intention of the Legislature, we accept that the Legislature intended to create an exception to the definition of strike only to the extent that the impugned conduct occurred as the direct result of and for no other reason than picketing that is expressly permitted by the Code or under some authority conferred by the Code. As a result, we are not persuaded that there is any ambiguity in the Phrase.

130 Because we have found, on the basis of our *Rizzo* analysis, that there is no ambiguity in the Phrase, there is no basis on which to consider *Charter* values. In *Bell ExpressVu,* the Supreme Court of Canada explained both how to determine whether statutory language is ambiguous, and when consideration of *Charter* values is appropriate (that is, only in circumstances of genuine ambiguity). With respect to what constitutes ambiguity in statutory language, the Court in *Bell ExpressVu* explained:

> What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, supra, at p. 115). The words of the provision must be "reasonably capable of more than one

> meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> (para. 29)

131 Thus, for statutory language to be ambiguous, it must be reasonably capable of more than one meaning, when considered in its entire context. There must be two (or more) plausible readings, each equally in accordance with the intentions of the statute. If there is no such ambiguity, then the Court in *Bell ExpressVu* explained it is not appropriate to apply a *Charter* values analysis to interpret the language:

> Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" (Sullivan, supra, at p. 325), it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.
>
> (para. 62, emphasis added)

132 For the reasons provided above, we find that when considered in its entire context, the Phrase is not capable of two equally plausible readings. Rather, our contextual analysis of the Phrase results in a single plausible interpretation, the one advocated by the Employer. As a result, we find there is no basis on which to engage in a *Charter* values analysis.

133 The Employer's application for reconsideration is allowed and the Original Decision is cancelled.

134 With the exception of MoveUP and its members, we find that the concerted refusal of the Poly-Party Unions' other constituent unions and their members to cross the Guild's picket line and go to work constituted an illegal strike, and we so declare.

135 We understand that, since our hearing into this matter, the Guild has removed its picket lines and that the conduct complained of no longer continues. We also note that the Employer's and the Business Council's argument about Section 66, which we find the most persuasive, was raised for the first time in the application for leave and reconsideration. In light of the above, we find no other orders or remedies would be appropriate.

136 In the case of MoveUP, the question of whether or not its members engaged in an illegal strike by honouring the Guild's picket line remains undecided, given that they are relying on a collective agreement provision in addition to the Code. The original panel did not address this issue, given the outcome was reached on other grounds. This aspect of the application is remitted to the original panel who will address it, if the parties, on or before January 9, 2023, request that it do so.

VI. CONCLUSION

137 For the reasons given, the application for reconsideration is granted and the Original Decision is cancelled.

LABOUR RELATIONS BOARD

JENNIFER GLOUGIE
CHAIR

BRETT MATTHEWS
ASSOCIATE CHAIR

J. NAJEEB HASSAN
REGISTRAR AND VICE-CHAIR

Insurance Corp of British Columbia (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: Paul C. Weiler, Chairman John Billings, Member John Brown, Member

Judgment: June 12, 1974

No. 63/74

[1974] B.C.L.R.B.D. No. 63 | *[1974] 1 Can. LRBR 403* | *75 CLLC 16,146*

Between: Insurance Corporation of British Columbia (The Employer), and Canadian Union of Public Employees, Local 1695 and Office and Technical Employees' Union, Local 378 and British Columbia Government Employees Union and Miscellaneous Workers', Wholesale and Retail Delivery Drivers' and Helpers' Union, Teamsters Local 351 (The Unions)

Counsel: John Baigent, for the Employer Shaun Hennessy, for the Canadian Union of Public Employees R.E. Cocking, for the Office and Technical Employees' Union D. LaCharite, for the British Columbia Government Employees Union

---

I

On March 11, 1974, the Canadian Union of Public Employees, Local 1695 (hereinafter called CUPE) applied for certification for a unit of employees of the Insurance Corporation of British Columbia (hereinafter called ICBC). That unit was described as:

> "employees in all functional claims centres, their suboffices, including key point and resident locations throughout the Province of British Columbia.

On May 7, 1974, the Office and Technical Employees' Union, Local 378 (hereinafter called OTEU) applied for certification for a unit of employees of ICBC. That unit was described as:

> "office, clerical, technical and administrative employees in B.C., including but not limited to those employees at and from 1055 W. Georgia St., Vancouver, 1699 W. Broadway, Vancouver, 5342 Lougheed Highway, Burnaby, and 1441 Ellis St., Kelowna, and except those employees in all functional claims centres, their sub-offices, including key point and resident locations throughout British Columbia."

On May 14, 1974, the British Columbia Government Employees Union (hereinafter called the BCGEU) requested that its name be placed on a ballot of the employees of ICBC should a vote be conducted by the Board. Finally, on May 16, 1974, the Miscellaneous Workers', Wholesale and Retail Delivery Drivers' and Helpers' Union, Local 351 (hereinafter called the Teamsters) applied to be certified for employees of ICBC in a unit of "truck drivers at and from the Royal Centre, Burrard & Georgia Sts., Vancouver". Meanwhile, the Employer, ICBC, has taken the position that the appropriate bargaining unit in its case should include "all employees of ICBC". In view of this disparity in proposals, the Board set the matter down for a hearing about the appropriate bargaining unit before processing these individual applications for certification through to completion.

II

In order to appreciate the type of unit boundaries contemplated by these descriptions, one must first understand the nature of the Employer's operations. The Insurance Corporation of British Columbia is a recently-created Crown Corporation which implements the provincial government's participation in the insurance business. By statute, ICBC has a monopoly over all insurance in the motor vehicle area. As well, it acts as a general underwriter of other typical forms of insurance, except life insurance. This general underwriting now comprises only about 5% of its total business, but it is expected that this will increase in the future through its marketing efforts.

The President of ICBC and the Chairman of the Board of Directors is the Honourable Robert Strachan, the Minister of Transport and Communications. The Minister of Health, the Honourable Dennis Cocke, is another member of the five-man Board of Directors. The operation they head now employs about 1600 people, 1400 in permanent positions and 200 in temporary jobs required to get the new venture under way. The number of permanent positions is increasing every day, while the temporary employees are gradually finishing their projects and leaving. The eventual complement is estimated to be slightly over 1600 full-time employees. About 1000 of these will be at the head office at the Royal Centre in downtown Vancouver and the other 600 will be scattered in a variety of locations around the province.

How is this total divided up among different categories? The operations of ICBC are divided functionally into nine different divisions. Four of these handle various facets of the insurance business -- Automobile Plan, General Indemnity, Marketing, and Claims. Five divisions are supportive -- Personnel, Financing, Systems and Procedures, Corporate Services, and Legal. The senior executives and associated management of each of these divisions are all in the head office. So also are all of the employees in the Personnel, Systems and Procedures and Legal divisions. The vast bulk of the Finance Division is at head office, except for three field auditors. All of the Marketing division is there except for eight field marketing representatives. The Automobile Plan personnel are at head office except for eight permanent employees (aided by some temporary people) who have been seconded to a refund centre established for a period of time on Broadway in Vancouver, Corporate Services is located at the head office except for five employees in its warehouse in Burnaby. Most of the general underwriting is done from head office except for a branch office in the Interior, at Kelowna, with 25 employees (and another such office is intended for the Island, to be located in Victoria).

The major exception to this distribution of employees is the Claims Division. That division will have about 570 employees, of whom only 40 will be at the head office. Another 15 employees will be in five salvage depots throughout the province for the storage of cars damaged beyond repair. All of the others are in claims centres, of which there are to be 9 in the Interior, 3 on Vancouver Island, and 13 on the Lower Mainland. These will have adjustors, estimators, and clerical employees, totalling about 25 employees in each centre. The Kelowna claims centre also houses the branch office of the Indemnity division, together with a field auditor and marketing representative, all under the administrative supervision of the same Manager. That will also be the situation in Victoria, when it reaches the stage of a full-fledged branch office.

We can now return to the unit descriptions proposed in this case. The Teamsters seek to represent a very specific group -- the truck drivers at the Royal Centre. These are the employees in one job classification at one location. If that proposal were accepted and we applied the same principle across the board, there would be countless units at ICBC. The CUPE proposal is for a much broader unit than the Teamsters, but with some resemblances in principle: all of the claims personnel located in district claims centres. CUPE did not ask for all of the employees of ICBC in the Claims Division because that would include some people at the head office and some in the salvage depots. It did not ask for all of the employees in the field and away from the head office because that would include persons from five other divisions -- Underwriting, Marketing, Corporate Services (the Burnaby warehouse), Finance (the field auditors), and Automobile Plan (the refund centres). The dividing line is based on a combination of both function and location -- claims people in district claims centres -- and would encompass about 275 adjustors, 65 estimators, and 100 clerical employees (including dispatchers). The OTEU's application followed receipt of that from CUPE. It sought to represent all of the employees of ICBC except those acquired by CUPE.

III

This case is a suitable vehicle in which this Board can begin to explain in some detail the principles which it intends to use in defining an appropriate bargaining unit. However, before dealing with those factors which are of great significance in that enquiry, I want to discuss one which I believe is not. Counsel for CUPE in this case argued strongly that the primary criterion which the Board should follow is the expressed wishes of the employees. Under the Code, employees are granted the freedom to join a union and to decide whether they will have union representation or not. The suggestion was that the employees should also be free to define the scope of their own bargaining unit; in effect to settle themselves who should be in the groups which would bargain together. While agreeing that other auxiliary tests would place some limitations on that choice -- the unit must be capable of

meaningful bargaining and not cause great hardship to the employer -- the principal factor would be employee free choice.

On its face, it might appear to be an attractive proposal to respect employee decisions in this way. However, on further analysis, the argument is not persuasive. Under Section 43(l) of the Code, it is this Board which is told to determine whether a unit of employees is appropriate for collective bargaining. Section 34(i) reinforces that directive when it says that it is the Board which has exclusive jurisdiction over that decision. We would not be exercising the functions delegated to us by statute if we simply ratified decisions already made by groups of employees (especially in the somewhat haphazard way which occurred here).

Moreover, it is quite clear in the structure of the Code why the Board is told in Section 42 to make its own decisions about the scope of the bargaining unit, in contrast with Section 45 where we are directed to satisfy ourselves about the choice by the majority of employees about certification. Conceivably, tradeunions might bargain only on behalf of those who join the union and want to be represented by it. No formal certification would be needed for that purpose. In our system, once a union is certified, it becomes the exclusive bargaining representative of all the employees in the unit (under Section 46) and the employer is legally required to bargain with the union (under Section 6). This certification decision not only has a considerable impact on the employer, as we shall see, but also has an impact on other employees, both those who don't want any union and those who prefer another union (e.g. the truck drivers here who prefer the Teamsters to the OTEU). Moreover, that impact can be irreversible. If we follow the logic of pure freedom of choice to its ultimate point, then every time a new group of employees wanted to carve out a different bargaining unit and select a new representative, this should be permissible. Right now that is not the case and once an appropriate unit has been settled and collective bargaining has begun, a strong presumption exists against changing it. As new unions come in to organize remaining segments of the employees, their certifications will be erected around the original one. The result is often a chaotic patchwork of bargaining units dividing up the employees of one employer, a situation which it is almost impossible to rationalize later on. There are some instances of that occurring under the previous Labour Relations Act (e.g. at the University of British Columbia) and this Board is not going to allow that experience to be repeated under the Code (as witness our decision in the recent Simon Fraser University case).

In sum, when the first group of employees in an enterprise turns its mind to collective bargaining, its wishes cannot predominate in the decision about its own bargaining unit. The choice it makes has too much impact on the options of other interested parties. The Legislature delegated it to the Board to weigh and to balance the various factors and then to make up its own mind about the proper boundaries around a bargaining unit. Certainly, we may take account of the reasons why the employees may want a particular unit description, but the mere fact that they made a choice cannot be persuasive. Of course, once the appropriate unit has been defined, the majority decision of the employees about whether there will be collective bargaining is decisive.

IV

What are the standards which the Board should apply? The statute gives no specific direction for the exercise of our judgment and we must develop the guidelines on our own. That is a difficult task for several reasons, but primarily because there is a tension between the two uses of the bargaining unit. On the one hand the scope of the unit is the key to securing trade union representation and collective bargaining rights for the employees. Since this is a fundamental purpose of the Code, the Board's definitions must be such as to facilitate organization of the employees. On the other hand, that unit sets the framework for actual bargaining for a long time into the future. A structure is needed which is conducive to voluntary settlements without strikes and will minimize the disruptive effects of the latter when they do occur. Unfortunately, the lesson of experience is that these two objectives often point in different directions.

Most discussions of the nature of an appropriate unit concentrate on the latter issue -- the long-term structure. However, clearly one can't have collective bargaining at all unless there is a unit in which a majority of employees will select a trade union's representative. There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stimulate opposition to a representation campaign. If, notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, this Board will exercise its discretion in order to get collective bargaining under way.

In that kind of situation, it makes no sense to stick rigidly to a conception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset.

However, the Board must be realistic and cautious in basing its judgment on this factor of the degree of organization. Certainly, there is no reluctance on the part of the employees of ICBC to become members of a trade union. In the very short time the operation has been under way, well over half of the employees have become members of one of four different unions. Perhaps one reason is the attitude of the management of ICBC, which is not simply tolerant of collective bargaining but rather anxious for it to get under way. Even if we were to hold that only one large unit is appropriate, we are confident that the majority of employees will agree upon a union or association of unions to represent them. Accordingly, in this particular case, the need to facilitate the achievement of collective bargaining does not figure prominently in our judgment about the appropriate bargaining unit.

V

We can turn then to the problem of designing an appropriate framework for the conduct of bargaining at ICBC. In that connection, there is always a good case to be made for a unit comprised of all of the employees of an employer, except those excluded by the statute. The several factors which point in that directlon are accentuated in the case of ICBC.

The simplest reason favouring one overall unit is administrative efficiency and convenience in bargaining. All other things being equal, it is preferable to have only one set of negotiations going on, rather than spreading management efforts among two or three or even more units. At ICBC this is especially necessary because of the highly centralized character of management. Not only the terms of the collective agreement, but even the day-today decisions about hiring, firing, suspension, or promotion will be controlled by the Personnel division at the head office. For that reason, there is an interest in having the union which represents the employees in the branch office also being present in the head office where managerial authority has been centralized.

A second administrative factor, this one clearly in the interest of both employer and employee, is the matter of lateral mobility. The presence of several bargaining units, each with their own seniority lists and different contract benefits, is an obstacle in the way of an employee's transfer or promotion out of the original unit into which he was hired. ThiS limits the mobility of the employee whose place of residence may have changed and who thus needs a different job or the employee who wants to improve his job position through promotion to a position which has come open in another division. It also restricts management's range of selection among qualified persons to fill a job.

At the moment, the significance of this factor at ICBC is still rather speculative. However, one must assume that a large public entity, having over 1500 employees scattered all over the province, will experience a considerable number of job transfers. In the first few months of operation, while most employees were still on probation, there have already been 30 to 40 transfers across divisional lines and several transfers from one location to another.

What would be the effect of the proposed dividing line between CUPE and the OTEU? Persons holding clerical positions in the Lower Mainland area will find it difficult to transfer from a job at the head office to a claims centre nearer their residence, in Surrey for example. There will be an obstacle in the way of promotion from a clerical position in the Claims division at Kelowna to one in the underwriting branch, just down the aisle in the same office. I think we can assume that transfers across divisional lines will not be a major factor for the experienced adjustors in the claims centres. However, the proposed unit division cuts across their natural line of job progression. Most motor vehicle claims can now be handled and adjusted solely at the claims centres However, all claims involving more than $10,000 damages must be referred to head office. As well, the more complex claims under that amount are referred to the claims group there. The most qualified and the highest-rated adjustor positions are at head office and a move there from the claims centres will be a promotion (and there was evidence that this had already occurred). However, that is not the tope of that line of progression. The move back from the claims group at the head office to the position of manager of a claims centre is considered a further promotion (as was testified by Mr. John Hill, the president of the CUPE local and an adjustor himself). Movement along this line within the claims division would become more difficult if CUPE represented the claims function in the district centres and the OTEU represented the claims function at head office.

The existence of a single bargaining unit facilitates the achievement of a common framework of employment conditions -- vacations, statutory holidays, overtime, insurance scheme, pension plan, and so on. ICBC has

developed a wage structure whereby all the positions across every division have been evaluated and placed in some coherent relationship one to the other. It is unlikely that this pattern would continue if there were two units represented by different unions. Indeed, if we did not expect different terms of employment to emerge, there is no reason to allow separate representation for groups of employees. For that same reason, this objective of a common schedule and fringe benefits is not unambiguously desirable. The imposition of a single pattern runs the risk of ignoring real differences in employees' needs and wishes (and I shall explore this later when I discuss the problem of the community of interests). However, unless a good case can be made for the existence of such differences, the creation of two units will lead only to artificial disparities in the benefits enjoyed by groups of employees.

Another factor favouring a single large unit is the objective of industrial stability. If there is one union and one set of negotiations, then the risk of strikes has to be less than if there are several unions negotiating separately. If there are two or more units representing employees in an operation which is functionally integrated, then if one unit goes on strike, it will put the employees in the other unit out of work as well (and even if they have nothing to gain from a strike because they have already signed their agreement). The two proposed units at ICBC are interdependent in that sense. Without the claims centres, ICBC can take in premium money from the public but it can't pay it back to those who have been injured. The operation needs the adjustors, estimators, and clerical staff across the province to investigate, process and settle the claims made by the public. However, the claims centres can't perform this function on their own. When a claim comes in, the adjustor must first learn the nature of the coverage and this comes from the computer at the head office. So does technical assistance on complex claims and the authority to handle the large claims. Finally, once the claim is settled by the adjustor, the actual payment of the money must be approved by the staff at head office. To sum up, the service which ICBC provides the public is the payment of claims when damages are suffered. If either unit goes on strike, that service will be interrupted.

Of course, it is by no means inevitable that there will be a strike just because a unit is created for collective bargaining. However, it is true that if there are two or more units, there is a greater risk of a strike than if there is only one.

VI

These virtues of the employer-wide unit are significant, especially when considered cumulatively. However, they are not absolutely compelling. It is common to find certifications granted by this Board where narrower unit boundaries are drawn. The usual reason for that description of the appropriate bargaining unit is the Board's judgment about the community of interest of the employees. There is a simple explanation for the importance of this factor. The point of certification under the Code is to secure collective bargaining for the employees. Accordingly, the group on whose behalf this bargaining is to be carried on should include only those categories of employees whose interests can reasonably be reflected in one set of negotiations and whose working conditions can be incorporated into one document. If some groups differ greatly in background, skills, nature of work, method of payment and so on, it may prove difficult to accommodate their interests in one bargaining unit.

A typical example of this is the distinction between the production employees in the plant and the salesmen who sell their product. The former will be blue collar employees, working together at one location, having set hours and being paid by the hour, and exhibiting much the same kind of skills. The salesmen are a white collar group with very different skills, working individually out in the field, often at irregular hours, and usually paid at least partially on a commission basis. Suppose all of these are included in one unit. It will be difficult to prepare one collective agreement whose terms will establish working conditions appropriate for each group (e.g. about hours of work and overtime). The effort of negotiators to work on both fronts may hamper the achievement of a settlement for either group. When an agreement does come, it may be because the interests of one group (perhaps the numerically smaller one) are ignored, and the resistance of the latter will only cause problems during the term of that collective agreement. For that reason, the Board normally carves out separate units for these groups of employees, because of their separate communities of interest. (I might add that this practice also serves the objective mentioned earlier, of facilitating the organization of the group of employees which wants union representation, because there is no need to overcome the opposition of a different group which fears that its interests will be submerged in the overall bargaining.)

In each case, then, the Board must decide whether the distinctive needs of special groupings of employees are strong enough to outweigh the practical arguments in favour of one all-employee bargaining unit. Several of the

factors which ordinarily suggest different communities of interest are present among this large group of employees at ICBC. However, even if we were persuaded that they might justify the creation of separate bargaining units, they certainly do not justify the line which was proposed here.

It might be argued, for example, that the claims function is different from the other functions of an insurance enterprise (perhaps because of the history of independent adjustors acting on behalf of private insurance companies). However, if that were the case, then the whole Claims division, including the adjustors responsible for the most difficult claims, would be in one separate unit. If that were so, then part of the employees at head office must go in the CUPE unit. A related point was made about the special skills and background of adjustors and estimators, and how it was important that their interests not be outweighed by a large clerical component in the OTEU unit. (Although in point of fact there are about 270 adjustors with ICBC and about 240 clerical positions.) Again, if we followed that argument we would put the head office adjustors in the CUPE unit, and then would have to put the clerical persons in the claims centres into the OTEU unit (because otherwise they would be in a minority position vis-a-vis the adjustors and the estimators). The line originally drawn by CUPE and then accepted by OTEU just does not fit with a division of the community of interest of the employees along functional lines.

What about geographical factors? The head office is in downtown Vancouver while the claims centres are scattered throughout the province. From the testimony at the hearing, it appeared that one of the reasons the claims centre people wanted a separate unit was their fear of domination by the large group of employees at the head office (more or less affectionately known as the "Ivory Tower"). Again, whatever weight one may attach to the argument, that is not the line proposed here. The underwriting branch in Kelowna, the one which will be established in Victoria, the warehouse in Burnaby, the five salvage depots across the province, the refund centre on West Broadway, all have employees working away from the head office. Yet all will be in the OTEU unit along with the employees in the head office.

As a general matter, the geographic factor seems neutral in this case. In principle, this can often be a material factor in creating a community of interest. Employees at one location, under their own management, and living and working under special conditions, may have a distinctive interest in negotiating their own collective agreement. However, at ICBC, the basic management decisions are made for everyone from the head office. Each claims centre is supervised by its own manager who also gives administrative supervision to the underwriting and marketing personnel located there. If the fact of living in different parts of the province should be reflected in the kinds of wages and fringe benefits negotiated, it would seem that an appropriate geographic description would include employees both at the head office and at the Lower Mainland claims centres, with separate units for other areas. Again, whatever be the weight one wants to give to this factor, it cannot support the unit descriptions contended for by the Unions in this case.

VII

Having said that, I don't believe that this decision should be left to rest on the negative ground that the unit descriptions proposed by the unions do not define appropriate bargaining units. Let us assume that, after taking these various factors into account, the Board concluded that a reasonably defensible line might be drawn between two groups of ICBC employees having different sets of interests in collective bargaining. There is a further feature of this case, one that I have not so far dwelt upon, which would lead the Board to find that an all-employee unit is the appropriate unit at ICBC. This is the fact that ICBC is a public employer.

As stated earlier, ICBC is a Crown Corporation, established by statute, headed by a Minister of the Crown and a Board of Directors appointed by the government, and financed largely out of its statutory monopoly over compulsory motor vehicle insurance. Its employees work for ICBC, not directly for the provincial government, and for that reason are excluded from the one large bargaining unit created by the Public Service Labour Relations Act. Their collective bargaining is governed by the Labour Code which applies to a wide range of employers, public and private. However, in exercising our judgment under tile Code, this Board must always take a realistic view of the special character of the enterprise before us and try to implement policies which make sense for an undertaking of that particular kind.

Here, we have a clear indication of the policy which has been authoritatively adopted by the legislature of British Columbia regarding public employees. In the Public Service Labour Relations Act, a single bargaining unit was

created for all employees in the public service, except for professional employees (who are largely excluded from the Code in any event). That proposal was in line with the recommendation of the Higgins Report, Making Bargaining Work in British Columbia's Public Service. After hearing representation from a large number of groups, and canvassing the issue fully, the Higgins Commission came down with a firm policy against fragmentation of the bargaining units in the public service. A variety of reasons were advanced for that conclusion, of which the following are especially material to the case of ICBC:

(i) The administrative advantage of concentrating the negotiating efforts of the public employer in bargaining with only one spokesman for the employees;

(ii) The desirability of achieving standard terms and conditions of employment for all employees of a public employer throughout the province.

(iii) The need to minimize the likelihood of a strike interrupting the availability of an essential service provided by the government and not available to the public from another source.

Under the Labour Code, unlike the Public Service Labour Relations Act, the board is not required to adhere to a rule of an all-employee bargaining unit. However, in exercising our judgment under Section 42 of the Code, we do consider that there should be a presumption of such a unit in the case of public employers where there is no history of collective bargaining within a different format. Only if there are extremely persuasive reasons for that step should separate units be carved out. In the Board's recent decision in the Workmen's Compensation Board case it was held that the presumption in favour of an all-employee unit could not be over-ridden even in the case of paramedical employees seeking separate representation through their own craft union. A fortiori, in this case we do not find sufficient grounds for dividing the employees of ICBC into separate units.

VIII

Accordingly, we find that the appropriate bargaining unit at ICBC is one which includes all employees except those excluded by the Code. None of the applications before us satisfies that description and so none of these can be granted in their present form. Now that the several unions who are in the process of organizing at ICBC are aware of the proper unit, they can each renew their application, either individually or in association with another union, to represent all of the employees at ICBC. We shall treat any such applications as having been made on the date we receive written notification that the unit in question wishes to proceed in accordance with this revised unit description.

PAUL C. WEILER, CHAIRMAN

JOHN BILLINGS, MEMBER

JOHN BROWN, MEMBER

End of Document

British Columbia (Public Service Commission) (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: Paul C. Weiler, Chairman John Billings, Member Angus Macdonald, Member

Heard: November 22, December 6, 1974

Judgment: December 24, 1974

No. 166/74

[1974] B.C.L.R.B.D. No. 163

Between: British Columbia Government Professional Employees Association (the Union), and Public Service Commission (the Employer), and British Columbia Government Employees Union (Intervenor)

Counsel: W.H. Deverell, for the Union B.H. McColl, for the Employer C. Andstein, for the Intervenor

---

I

This case involved an application by the British Columbia Government Professional Employees Association (the B.C.G.P.E.A.) under Section 34 of the Labour Code, asking for an interpretation of the scope of its bargaining unit which is established by statute, under Section 4(b) of the Public Service Labour Relations Act:

> " A licensed professional bargaining unit including all employees in a professional classification in the Public Service Classification structure who are members of an association that has statutory authority to license a person to practise that profession, other than those persons described in clause (a); "

Under this legislation, the two specific bargaining units created by Sections 4(a) and 4(b) are carved out of the large residual bargaining unit defined by Section 4(c):

> " A public service bargaining unit including all employees other than those persons described in clause (a) or (b). "

The British Columbia Government Employees Union (the B.C.G.E.U.), which is the bargaining agent selected by the employees in the latter unit opposed the position taken by the B.C.G.P.E.A. in interpreting Section 4(b). So did the Public Service Commission which is designated as the bargaining agent for the government by Section 3 of the Public Service Labour Relations Act.

II

The B.C.G.P.E.A. located and put before the Board evidence about the situation of several different individuals who were affected by the two contrasting interpretations of Section 4(b). It asked for specific decisions concerning the status of these individuals and an opinion from the Board whose reasoning and interpretation of the statute would presumably clarify the situation of similar cases which will emerge in the future. Before dealing with the circumstances of these individuals, it would seem helpful at the outset to give some picture of the overall dimensions of the problem. There are now over 30,000 employees in the Section 4(c) unit which is represented by the B.C.G.E.U. There are over 1000 employees in the Section 4(b) unit which is represented by the B.C.G.P.E.A. The best current estimate is that there may be 25 employees in the public service in British Columbia whose bargaining unit status is affected by this precise problem.

III

The first case we will outline is that of Jean Gibbs, who is employed by the B.C. Hospital Insurance Service as a physiotherapy consultant. The actual title of her position is "Inspector - Hospitals and Consultant 1", which is a

"professional" classification within the meaning of that term in the Public Service Commission Classification Schedules. One of the necessary qualifications for her job is registration as a physiotherapist with the Association of Massage and Physiotherapy Practitioners. This body has the authority to licence individuals to practice under the Physiotherapy and Massage Practitioners Act. Apparently Gibbs is the only physiotherapy consultant within this classification, but there are other consultants in the same classification -- such as dietitians -- who do not require any such registration from a statutory authority.

A second example is William Sargent who works in the Dept. of Agriculture as the Supervisor of the Pesticide Laboratory. He is classified as "Laboratory Scientist 5", which again is a "professional" classification under the PSC schedules. Sargent has a Bachelor of Science degree in Agriculture to fulfil the educational requirements for his position. He is also a registered member of the B.C. Institute of Agrologists, which has the authority to license individuals under the Agrologists Act. However, by contrast with the situation of Gibbs, this registration is not a requirement of Sargent's position under the job description established by the Public Service Commission. Sargent has occupied his present job since April 1973 but did not become a member of the Institute of Agrologists until June 1974. None of the other individuals classified as Laboratory Scientist 5 are registered Agrologists and in fact membership in the Institute is probably not obtainable by other Laboratory Scientists, such as the person running the Water Resources Laboratory for the Pollution Control Department.

Lyn Williams has worked in the Department of Agriculture since January 1, 1974, as a 4-H Specialist. She is classified as a "Home Economist 1", again a "professional" classification. She satisfied the educational requirement for this position with a Bachelor of Science in Home Economics from the University of Manitoba. However, Williams is not required by her job to be a licensed Agrologist. When she did enquire about membership in the B.C. Institute of Agrologists, the latter wrote her as follows:

> " The British Columbia Institute of Agrologists is interested in two main factors when reviewing applicants for membership. They are a degree in agriculture or comparable degree and employment in professional agriculture.
>
> A degree in Home Economics with employment by BCDA satisfies these requirements. "

Her membership in the Institute became effective in mid-1974.

E.H. Harper is classified as a "Boiler Inspector 2" and works in the Safety Engineering Services Division of the Department of Public Works. He formerly worked for some time as a Stationary Engineer 4 in the public service and in that period also obtained a university degree, a Bachelor of Applied Science in Mechanical Engineering. Harper then applied for and received the Boiler Inspector position in May 1966. Following this, he applied for and became a member of the Association of Professional Engineers of British Columbia in September 1966. This body is entitled under the Engineering Professions Act to licence engineers. However, membership in and registration by the Association is not a requirement of the Boiler Inspector 2 classification. In fact, of a total of 20 employees in that classification in the public service, Harper is the only one so registered.

IV

There is a common thread running through these several situations. Each of the employees works in a position within a "professional" classification under PSC Classification Schedules:

> " GROUP "PR" PROFESSIONAL
>
> This group includes those positions, the duties of which require highly specialized qualifications equivalent to a degree from a college of recognized standing "

All of these employees, following on from their educational qualifications, have then secured membership in the professional body which has statutory authority to licence individuals within that profession. In each instance this professional registration is within the general line of work performed by the employee for the public service (be it agriculture, engineering, or physiotherapy). However, in no case does the classification within which the individual is employed make that statutory registration a condition of employment. In fact there are other individuals working within the same classifications who are not so qualified and yet are perfectly capable of performing the work required by the classification. The only deviation from the pattern occurs in the case of Jean Gibbs. While her

classification -- "Inspector - Hospitals and Consultant 1" -- does not require professional registration, the particular function for which she was hired -- physiotherapy consultant --- does require it (for reasons which are not altogether apparent). Accordingly, it is not accidental that she was the only one of these four individuals who was registered by a professional body before obtaining her position.

V

With this factual background, we can now turn to the legislation and in particular, Section 4:

" 4. For the purpose of collective bargaining, every employee shall be included in one of the following bargaining units:

(a) A nurses' bargaining unit including all employees licensed or registered under the Registered Psychiatric Nurses Act or the Registered Nurses Act, including those employees who are eligible for licence or registration;

(b) A licensed professional bargaining unit including all employees in a professional classification in the Public Service Classification structure who are members of an association that has statutory authority to license a person to practise that profession, other than those persons described in clause (a);

(c) A public service bargaining unit including all employees other than those persons described in clause (a) or (b)."

The immediately striking feature of the statute for our purposes is that it creates three mandatory bargaining units. The Board does not enjoy the discretion it has under Section 42 of the Labour Code to tailor appropriate bargaining units having regard to the particular industrial relations situations. Under Section 4 of the Public Service Labour Relations Act, "for the purpose of collective bargaining every employee shall be included in one of the following bargaining units". The legislature sets out the conditions which must be satisfied for each unit. Then, any employee who meets those conditions, whether at the time of certification or thereafter, is automatically allocated to his or her statutory unit. The only office of this Board is to interpret the language of Section 4 in cases of dispute; we have no authority to adjust these units in a manner inconsistent with their statutory meaning in order to deal with practical difficulties which the legislature may not have anticipated.

The B.C.G.P.E.A. contended that the words of Section 4 (b) could and should be interpreted in accordance with their natural, ordinary meaning. It was conceded by everyone that each of the employees in question was "in a professional classification in the Public Service Classification structure". It is also demonstrated that all of these employees "are members of an association that has statutory authority to license a person to practise that profession". (For example, Harper is a member of the Association of Professional Engineers which has the authority under the Engineering Professions Act to license persons to practice the profession of engineering.) Every employee who satisfies each of these two conditions should automatically be included in the "licensed professional bargaining unit" under Section 4(b). The conditions for inclusion in the Section 4(a) unit appear even simpler: every employee in the Public Service who is a registered nurse is automatically included.

The position of both the Public Service Commission and the B.C.G.E.U. is that a further qualification must be implied in each of these two professional bargaining units. Both of these parties agree on the general lines of interpretation and the way that it should be applied to the particular cases before us, but there are significant differences in the precise manner in which the positions were phrased. The Public Service Commission would have the Board interpret Section 4(b) as though it read "all employees in a professional classification ... who are required to be members of an association ...." The B.C.G.E.U. would have the Board interpret Section 4(b) as though it had added to it "and who are engaged in the practise of such profession". The thrust of both of these interpretations is to require an essential relationship between membership in the professional association and the work the employee is performing in the Public Service before the employee is included in the licensed professional bargaining unit. (By the same token, a registered nurse would be included in the Section 4(a) unit only if she were required to be and/or was working as a registered nurse in the public service.) For that reason, both the Public Service Commission and the B.C.G.E.U. now agree that Gibbs is properly in the Section 4(b) unit but contend that the three other employees in question are not.

We shall deal a little later on with some of the practical arguments advanced for and against this interpretation. At this point, we must note that this further qualification -- however it might be worded -- is conspicuous by its absence from the explicit language of Section 4(b) (or of 4(a)). Nor can it be argued that the presence of this qualification would be assumed as a matter of course by the legislature in drafting a reference to professional employees. Both the surrounding legislative language and its history testify to the contrary.

First of all, in the definition of "employee" in Section 1 of the Public Service Labour Relations Act, government lawyers are excluded by this wording: "a person qualified under the Legal Professions Act ... who is engaged and working in the practice of such profession." Almost exactly the same language is used in the Labour Code in its general exclusion of professionals from the scope of collective bargaining:

> " 'employee' means a person employed by an employer, and includes a person engaged in police duties, and a dependent contractor included in an appropriate bargaining unit under section 48, but does not include a person who, in the opinion of the board,
>
> .....
>
> (iii) is qualified in a profession, trade, or calling and is licensed under the Architectural Profession Act, Chartered Accountants Act, Chiropractic Act, Dentistry Act, Engineering Profession Act, Insurance Act, Land Surveyors Act, Legal Professions Act, Medical Act, Naturopathic Physicians Act, Optometry Act, Podiatry Act, Real Estate Act, Securities Act, 1967, or Veterinary Medical Act, or is an enrolled student under any such Act, and is engaged and working in the practice of such profession, trade, or calling; "

In each provision, by contrast with Section 4 of the P.S.L.R.A., the statute made it clear that it was referring only to those licensed professionals who were actually practising their profession. The need for the legislature to be explicit on that point was brought home by the decision of the B.C. Court of Appeal in Scotton and Office and Technical Employees Union, Local 378 *(1974) 39 DLR (3d) 392*. In that case, dealing with the somewhat different wording in the predecessor Labour Relations Act, the Court held that a student engineer was excluded from the statute though he was not doing engineering work in his job. That decision was issued on June 12, 1973. It led to the revised wording, quoted earlier, of the professional exclusion in the new Labour Code which was enacted at the Fall 1973 session of the B.C. Legislature. The same language was inserted in the Public Service Labour Relations Act to exclude lawyers in the public service from collective bargaining. However, the example was not followed in defining the scope of the professional bargaining units in Section 4. Here, as well, the legislative history is instructive. An earlier version of the P.S.L.R.A. was given first reading at the April 1973 session of the legislature and Section 4 of that draft was worded as follows:

> " 4. For the purpose of collective bargaining, every employee shall be included in one of the following bargaining units:
>
> (a) A nurses' bargaining unit including all employees licensed under the Psychiatric Nurses Act or the Registered Nurses Act;
>
> (b) A licensed professional bargaining unit including all employees licensed to practise under any Act, other than those described in clause (a);
>
> (c) A public service bargaining unit including all employees other than those described in clause (a) or (b). "

This language was re-worded in the second version of the statute presented to the legislature, and enacted into law in October, 1973:

> " 4. For the purpose of collective bargaining, every employee shall be included in one of the following bargaining units:
>
> (a) A nurses' bargaining unit including all employees licensed or registered under the Registered Psychiatric Nurses Act or the Registered Nurses Act, including those employees who are eligible for licence or registration;
>
> (b) A licensed professional bargaining unit including all employees in a professional classification in the Public Service Classification structure who are members of an association that has statutory

authority to license a person to practise that profession, other than those persons described in clause (a);

(c) A public service bargaining unit including all employees other than those persons described in clause (a) or (b). "

The point of the change in Section 4(b) was to make it clear that an employee must be in a professional classification in the Public Service classification structure as well as a member of an association with statutory licensing authority. But a "professional classification", as defined in the PSC schedule, is by no means synonymous with practising a licensed profession for the public service. And no mention at all was made in the revised Section 4(b) of the further requirement that the position of the employee in the public service involve him in the practice of his profession.

VI

For the reasons we have given, the language, context and history of Section 4(b) pose an apparently insuperable legal roadblock in the face of the interpretation urged on us by the Public Service Commission and the B.C.G.E.U. However, we still should address the major argument made in support of that conclusion, an argument essentially to the effect that the literal interpretation of 4(b) would lead to such an unworkable and irrational form of collective bargaining that we must assume the legislature could never have intended this meaning.

Unquestionably, practical difficulties will be created by a decision which includes these four individuals in the B.C.G.P.E.A. unit rather than the B.C.G.E.U. unit. This is nowhere better illustrated than in the case of Harper. He is only one of twenty employees working as a Boiler Inspector 2. All of the other employees in that position are properly represented by the B.C.G.E.U., which has negotiated a master agreement providing for general conditions and benefits for these employees, and a component agreement which sets an hourly wage rate for the job. Now, if Harper is included in the B.C.G.P.E.A. unit, he will enjoy a different set of fringe benefits -- the one negotiated for professional employees -- and quite conceivably he will be paid at a different hourly wage rate (if for no other reason than that one trade-union may emphasize hourly rates more heavily than costly fringe benefits in its overall package). We need not dwell on the dissatisfaction this can produce among fellow employees, the competition between the unions, and thus the continuing difficulties for the Employer. And it should be noted that these consequences will stem from the unilateral decision of the employee, who has it in his power to decide whether to take out or to maintain membership in the professional association. (If the evidence relating to the B.C. Institute of Agrologists is any indication, the conditions for obtaining membership in such a body are not all that stringent either.) Both the Public Service Commission and the B.C.G.E.U. contended vigorously that such a situation was wrong in principle and unworkable in practice and the statute must not be interpreted so as to allow it.

We fully appreciate the force of these practical concerns when the situation is viewed from this perspective. However, there is another side as well and one equally reflected in the legislation. Section 4 of the P.S.L.R.A. provides for quite an unusual bargaining unit structure. The basic judgment of the legislature was that there should be one trade union representing one bargaining unit composed of the more than 30,000 employees in the Public Service, despite the wide variations in their work, qualifications, and background. (A decision of the Board illustrating that policy is Inter-Provincial Power Engineers Association.) Yet the statute does single out professionals -- and professionals alone -- for separate treatment under Section 4 of the Act. This is the one group of employees given separate union representation, rather than simply the degree of autonomy which comes from bargaining within a separate occupational component under Section 9. Moreover, except for nurses, all of the professional employees are put together in one bargaining unit -- doctors, dentists, engineers, agrologists, pharmacists, and so on. One can only infer from these provisions that the legislature made the judgment that the fact of professional registration was not just one important factor, but indeed the over-riding element in determining the necessary community of interest for a separate bargaining unit in the public service.

It is clear from the antecedents of the statute why this is so. The reasons were made explicit in the Report of the Higgins Commission, Making Bargaining Work in British Columbia's Public Service, and in particular in these excerpts:

" During questioning, it became apparent that there was a genuine worry on the part of the members of the [professional] groups concerned that their inclusion in a large bargaining unit could lead to a situation

whereby their ethical and professional responsibilities would, in their view, be at odds with the requirements of that bargaining unit. These dual loyalties could result in disciplinary action and, in extreme cases, the loss of accreditation might be involved. Such potential conflicts could be avoided provided: (1) the professional groups were not grouped into a bargaining unit with non-professionals; (2) membership in the bargaining agent were not compulsory; and (3) a method of dispute settlement, other than strike, were open to these professional groups. "

*****

" After much deliberation, we were able to devise a formula that had the two-fold advantage of extending collective bargaining to the professional groups involved while, at the same time, avoiding the conflict of interest about which these groups seemed so concerned.

The Commission recommends that all employees (other than managerial and confidential exclusions) in professional classifications whose association has statutory authority to license persons to practise that profession be placed by statute within a single bargaining unit to be known in the Public Service Labour Relations Act as the 'licensed professional bargaining unit'. "

That recommendation was followed in Section 4 of the Public Service Labour Relations Act. If we do consider the intended scope of the licensed professional bargaining unit in light of this rationale for its existence, there appears to be no practical distinction between someone like Harper and an employee like Gibbs who is conceded to be within the Section 4(b) unit. Each is subject to the commitments which follow from membership in a professional body, each may possibly face a conflict of loyalties if a strike is called by the bargaining unit, and thus each wishes to be a part of the professional bargaining unit created under the Act.

Accordingly, when this problem is analyzed from a functional point of view, what we find is a conflict between two policies, rather than a choice between a sensible alternative and a completely absurd one. On the one hand, there is the interest of the employee in being placed in the same unit as the professionals with whom is shared this community of interest. On the other hand, there is the interest of the employer in avoiding the difficulties which are caused by employees in the same job being represented by two different trade-unions. If it were within the power of this Board to define the appropriate bargaining unit, we would likely give greater weight to the second policy and allocate these individuals to the Section 4(c) unit represented by the B.C.G.E.U. (as we did in an analogous case under Section 42 of the Labour Code, in the Campbell River & District General Hospital case). However, we are not given such a discretion under Section 4 of the Labour Relations Act and there is nothing in the language, the context, or the history of Section 4(b) which permits us to apply this further condition for inclusion in the licensed professional bargaining unit.

VII

In conclusion, we find that all four of these employees -- Gibbs, Sargent, Williams and Harper -- are included in the bargaining unit created by Section 4(b) and represented by the B.C. Government Professional Employees Union. Other individuals who satisfy the same statutory conditions as interpreted in this judgment are also to be included in that same unit. The practical problems which this may create will have to be faced by the Public Service Commission in the exercise of its power to create and adjust job classifications under the Public Service Act. If this proves an insufficient remedy, it is up to the legislature to decide whether a further condition must be established for inclusion in the professional bargaining units defined by Section 4 of the Public Service Labour Relations Act.

PAUL C. WEILER
CHAIRMAN

JOHN BILLINGS
MEMBER

ANGUS MACDONALD
MEMBER

End of Document

Public Service Commission (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: Paul C. Weiler, Chairman John Brown, Member Ken Martin, Member

Heard: April 6, 1976

Judgment: April 20, 1976

No. 24/76

[1976] B.C.L.R.B.D. No. 24 | [1976] 2 Can. L.R.B.R. 89 | 1976 CarswellBC 1452

Between: Robert Enoch (the Applicant), and Public Service Commission (the Employer), and British Columbia Government Employees Union (the Union)

Counsel: Robert Enoch, for the Applicant Bruce McColl, for the Employer Rod Germaine, for the Union

I

On December 15, 1975, a Mr. Bob Enoch lodged several applications with the Labour Relations Board. First of all, he requested the Board, under Section 34(1)(d) of the Labour Code, to find that he was a person bound by the collective agreement between the B.C. Government Employees Union (the B.C.G.E.U.) and the Public Service Commission (the P.S.C.). Secondly, he asked the Board to exercise its powers under Section 65 of the Labour Code to order the P.S.C. to comply with that agreement in providing him the benefits of its provisions. Both the B.C.G.E.U. and the P.S.C. took the position that Enoch was not in fact covered by that agreement and thus the Board should not make the orders requested. In that alternative, Enoch lodged a third application: a request that the Board find the B.C.G.E.U. in breach of its duty of fair representation under Section 7 of the Labour Code, on the grounds that it had arbitrarily negotiated a provision which excluded him from the benefits of the collective agreement for the public service. The Board proceeded initially with the question of the application of the collective agreement to Enoch and our decision follows.

II

The genesis of this extremely complex problem was an apparently simple and straightforward application for certification by Canadian Union of Public Employees, Local 458 (CUPE). CUPE sought certification under the Labour Code for a number of employees of the Chilliwack Community Chest and Services (the Society). The union had as members a number of individuals working in the Remand Receiving Home which was owned by the Society. The application for certification was unopposed and certification was granted on September 19, 1974.

Shortly thereafter, and presumably after CUPE served notice to bargain, the situation began to unravel. The Society realized, at least in its own mind, that it was not the effective "employer" of the individuals in the Remand Home who were the subject of the certification and that it was not able to engage in meaningful collective bargaining with CUPE. After some lengthy exchanges between the parties, including the B.C.G.E.U. and the P.S.C., and after examining the various documents and arrangements for the Remand Home, these facts emerged to the view of the Board:

(i) The Society is a non-profit and registered body, consisting largely of volunteer directors and workers, which administers a variety of social services in the community.

(ii) One such effort is a Remand Receiving Home. This project was initiated by the Rotary Club of Chilliwack and

was funded by a grant from the B.C. government under the Treatment Resources Act. In compliance with the requirements of the Act, the Society, which was a registered body within the community, took title to the "home"

(iii) The Remand Home was put to use as a facility for the care of children for whom the Super- intendent of Child Welfare is the guardian. The Super- intendent, in effect, purchases the use of this home from the Society as a residence for the children under his care under the Protection of Children Act. This means that the Superintendent, through the Department of Human Resources, pays for all of the costs of the building -- interest, maintenance and utilities -- as well as providing a budget for food, clothes, recreation and transportation for the children.

(iv) Under Section 4(2) of the Protection of Children Act, the Superintendent is entitled "to appoint such persons to act for him in the performance of his duties under this Act as occasion may require". Under that provision, the local officer in the Department of Human Resources hired Mr. Enoch, his wife, and another couple as "houseparents" for the Remand Hone. Salary and fringe benefits were agreed to and a contract was signed whereby the house parents agreed to care for the children as required and as responsible to the Superintendent. Supervision and direction in the operation of the Home comes from the Officers of the Department as would termination of the contract should the performance by the houseparents become unsatisfactory. The Society receives the funds from the Department for payment of salaries and fringe benefits of the houseparents, and signs the cheques for these just as it does for the operation of the house or the provision of food.

On the basis of these undisputed facts, the Board concluded that the Society was not, as a matter of law, the "employer" of the houseparents in the Remand Home. As the Board stated in Cranbrook and District Hospital [1975] 1 Canadian LRBR 42:

"What are those features which go to make up an employee in the usual sense of the term? Someone is interviewed by an employer and hired for a job. He will work for some period of time and will be paid a fixed wage, computed hourly, weekly or monthly. He will perform tasks assigned by the employer and subject to the direction and supervision of the latter. This work is of benefit to the employer's business or enterprise. For that reason, it is worth the while of the employer to pay for the doing of it. If the work is performed well, it will be so evaluated by the employer, and result in the retention or even promotion of the employee. If the work is not performed well, he will be disciplined and perhaps even discharged, again by the employer."

(at p. 5O)

As regards each of these incidents of employment, the effective decision-maker is the Department of Human Resources, not the Society. The Society might be considered the employer of record, but it really functions in this situation as a landlord and a bookkeeper, and enjoys no effective role as an employer. That is particularly evident when one looks at the relationship of Enoch to the Society and the Department from the point of view of collective bargaining. Again, we refer to the remarks of the Board in the analogous case of Cranbrook District Hospital:

"In summary, then, most of the normal incidents of an employment relationship -- hiring, payment of wages, scheduling, promotion, seniority, discipline and dismissal -- are totally lacking in the relationship between the Hospital and the student practical nurse. Put another way, when we consider the objective of the statute, which is to afford employees the right to collective bargaining and a collective agreement, there is very little in the present situation of the students about which the union can now bargain with the Hospital. Collective agreements invariably contain provisions relating to wages, fringe benefits, hours of work, shift schedules, promotion, probation, discipline and dismissal, and the like. Right now, these policies are set by the College for the student practical nurses. Within that perspective, if there is anyone who is the employer of these students for purposes of collective bargaining, it would be the College, not the Hospital."

(at p. 53)

In the result, the Board concluded that Enoch et al were legally employees of the provincial government rather than of the Society, and thus the certification granted to CUPE had to be cancelled.

III

The other side of that Board decision was to introduce Enoch and his colleagues to the legal "never-never" land of the Public Service Labour Relations Act. The reason is that Enoch satisfied the definition of "employee" under the PSLRA:

"'employee' means a member of the public service, as the expression 'public service' is defined in the Public Service Act, or a person employed by, or holding office at the pleasure of the Crown..."

This Act applies not simply to those individuals who become part of the "public service" through the formal procedures of job creation, posting, bidding, and selection under the Public Service Act. The PSLRA defines the collective bargaining rights of anyone employed by the Crown in the Right of the Province, and the breadth of that definition is confirmed by the fact that explicit exemptions had to be written in for employees of Crown corporations such as the B.C. Hydro or the Insurance Corporation of B.C. (see the analysis in this Board's decision in Workmen's Compensation Board [1974] 1 Canadian LRBR 135). As stated, Enoch was hired and controlled by an official in the Department of Human Resources to perform duties related to the responsibilities of the Superintendent of Child Welfare and was paid with provincial funds appropriated for purposes of the Protection of Children Act. He was and is employed by the Crown, within the meaning of the PSLRA.

Once an individual comes within the compass of the PSLRA, he automatically falls within one of the bargaining units established in Section 4:

"For the purpose of collective bargaining, every employee shall be included in one of the following bargaining units:

(a) A nurses' bargaining unit, including all employees licensed or registered under the Registered Psychiatric Nurses Act or the Registered Nurses Act, including those employees who are eligible for licence or registration;

(b) A licensed professional bargaining unit, including all employees in a professional classification in the Public Service Classification structure who are members of an association that has statutory authority to license a person to practise that profession, other than those persons described in clause (a);

(c) A public service bargaining unit including all employees other than those persons described in clause (a) or (b)."

Since neither Enoch nor the other houseparents are nurses or other licensed professionals, they fit within the general public service bargaining unit created by Section 4(c) of the statute. Once the Board held that the houseparents working in the Remand Home were employees of the Crown and cancelled the certification granted to C.U.P.E., these individuals came within the umbrella of the B.C.G.E.U. which had already been certified by the Board to represent the employees in the British Columbia public sector. Whatever collective bargaining rights they would obtain would have to come from the representation of that trade-union.

IV

The PSLRA is a peculiar form of collective bargaining statute not simply because it creates essentially one public service bargaining unit which is represented by the one trade-union and negotiates within a two-tier structure of master and component bargaining units:

"11.(1) There shall be two collective agreements applying to each bargaining unit, as follows:

(a) A master agreement including all the terms and conditions of employment that are common to all employees in the bargaining unit; and

(b) A subsidy agreement for each occupational group, including the terms and conditions of employment that apply only to employees in a specific occupational group in the bargaining unit.

(2) Specific occupational groups under clause (b) of subsection (1) shall be determined by negotiation between the parties."

As well, the statute does not provide for the legal exclusion of certain classes of employees from the bargaining unit, even those who are in managerial and confidential positions. Instead, the Government and the B.C.G.E.U. are empowered to negotiate the exclusion of these employees from the coverage of their collective agreement:

"12.(1) A collective agreement concluded under section 9 or 10 may exclude from its application certain classes of employees, including, without limiting the generality of the foregoing, employees who are in managerial or confidential positions.

(2) Employees or classes of employees to be excluded from the collective agreement shall be determined by negotiation between the parties."

Even before certification was granted to the B.C.G.E.U., indeed even before the PSLRA was made law, the B.C.G.E.U. and the P.S.C. (the Government's bargaining agent under Section 3 of the Act) were busy at the design of the structure of collective bargaining for the public service. One major task was the definition of those employee groups who would be excluded and those who would be included under the master collective agreement. The bargaining unit covered by that agreement extends to those employees falling within Section 4(c) of the PSLRA who work in the "Departments, Boards and Agencies of the Government of B.C. as outlined in Appendix 1". That Appendix lists all of the departments of the B.C. Government, including the Department of Human Resources, and also these boards, agencies and commissions:

" APPENDIX 1 — DEPARTMENTS

Glendale Lodge Society Liquor Administration Branch Drug and Alcohol Commission Purchasing Commission Assessment Commission Milk Board Public Service Commission Superannuation Branch Environment and Land Use Committee Provincial Land Commission B.C. Parole Board Commission"

The definition of "employee" in the agreement does not extend to:

"a) persons excluded by section 1 of the Public Service Labour Relations Act

b) incumbents of managerial or confidential positions mutually excluded by the parties to this Agreement."

Section 2.01 of the agreement establishes a procedure and criteria for negotiating such managerial and confidential exclusions. Finally, the original master agreement contains a set of heterogeneous exclusions which have been continued into the term of this, the second master agreement:

"APPENDIX 2 — EXCLUDED CLASSES

Persons employed in the service of the Legislative Assembly, including the staff of Government House, officials of the Legislative Assembly, the staff of Hansard, the support staff of the Government Caucus and of the Opposition parties.

Persons employed in the office of a member of the Executive Council, including the administrative assistants and support staff.

Persons appointed to office by the Lieutenant-Governor in Council.

Persons appointed to boards, commissions, and agencies under the authority of an Act of the Legislative Assembly other than the Public Service Act.

Persons locally engaged outside of British Columbia.

Persons appointed on a temporary limited basis for a specific term of less than 60 calendar-days, pursuant to section 1(1) of the Public Service Labour Relations Act."

Both the P.S.C. and the B.C.G.E.U. contend that Enoch is a person "appointed to an agency under the authority of an Act other than the Public Service Act" and thus is excluded from the collective agreement negotiated to cover the Section 4(c) bargaining unit. Enoch disagrees. The legal dispute in this case turns on the proper interpretation of that language in the master agreement.

In the normal course of events, when two parties to a collective agreement agree on the meaning of contract language which they have negotiated, an outside body interpreting that language should be reluctant to disagree with them. We do not mean to say that this Board is legally barred from adopting a different interpretation, especially when faced with an application from an employee whose interests are directly affected by a contract, as in this case. However, when the Board is satisfied that the parties are honestly conveying the meaning they originally intended for their language, this is strong and persuasive evidence that that is the proper meaning. In this case, when the language of Appendix 2 is closely analyzed in the light of its historical context, the Board is satisfied that the parties did agree to exclude individuals such as Enoch from coverage under the collective agreement.

We may begin with the report of the Higgins Commission, Making Bargaining Work in the B.C. Public Service, which was the source of the PSLRA. This passage from the report indicates the type of individuals which the Commission had in mind:

"DEFINING THE PUBLIC SERVICE

At the outset of its deliberations, the Commission of Inquiry had to determine the meaning intended by the term "public service" in its terms of reference. The Commission concluded that collective bargaining existed in the major Crown agencies of the British Columbia Hydro and Power Authority and the British Columbia Railway and, as such, these jurisdictions should be excluded from its inquiry. Clearly, then, the Commission's main concern was with the approximately 31,000 employees holding appointments under the Civil Service Act who are engaged in a variety of tasks within the departmental structure of government and who do not have the right to bargain collectively. Therefore, the major recommendations in this report are intended to apply to what has been referred to in the past as the "civil service", which term the Commission considers should be replaced by the term "public service"."

As we have seen, the legal net was cast much wider by the actual language used in the statutory definition of "employee". However, the Public Service Commission, which included in its membership Mr. Higgins, the Chairman of the Commission of Inquiry, was knowledgeable of and felt it had jurisdiction over those appointed to the public service in the narrower sense. Moreover, the B.C.G.E.U., whose President and General Secretary were members of the Higgins Commission, was also primarily responsive to its membership in the British Columbia public service. Accordingly, these individuals sat down and decided that, at least in the early stages of their new venture into collective bargaining, they would develop a collective agreement which applied only to the true "public service". This background is the clue to Appendix 1 of the master agreement (quoted above). That Appendix first named each of the Departments of Government,whose staff would all be hired through formal Public Service Act procedures.

Secondly, it singles out certain boards and agencies by name. Again, each of these agencies, for historical or for functional reasons, have their employees all appointed under Public Service Act procedures. At the same time, Appendix 2 of the master agreement attempted to exclude everyone else who would not be so appointed. First of all, it excludes all order-in-council appointments, even to those departments or agencies which are included in Appendix 1. Secondly, it excludes everyone employed by boards, commissions or agencies whose appointments are made by authority of an act other than the Public Service Act. There is no need to read the language in Appendix 2 as carrying a technical, legal meaning (for example, referring only to Crown agencies in the true sense). Rather, the parties were trying to capture the tremendous variety of instrumentalities and forms of government action through which individuals might be hired under statutes other than the Public Service Act. That language is perfectly applicable to the case of Enoch. He was "appointed" by the Super- intendent of Child Welfare, under the Protection of Children Act, to work in the remand home which was owned by the Society, but for which the Society was acting as an agency of government in the care of children who are under the guardianship of the Superintendent. Enoch is precisely the type of individual whom the P.S.C. and the B.C.G.E.U., for better or for worse, were intending to exclude from coverage under their collective agreement.

V

However, the Board cannot leave the matter simply with that conclusion. The result of our decision under Section 34 of the Code is that while Enoch et al are excluded from the benefits of the collective agreement negotiated by the B.C.G.E.U. , they continue to be included in the statutory bargaining unit represented by the B.C.G.E.U. This means that these individuals cannot be represented by another union under the Labour Code (as is indicated by cancellation of the certification granted to CUPE). It is understandable that the Legislature would place all such individuals who are effectively employed by the Crown in the one bargaining unit represented by the one trade-union. This serves the statutory policy of minimizing competitive bargaining by different unions for contract settlements which will ultimately be paid from the one financial source. However, it is intolerable that individuals within the statutory unit be permanently denied access to the collective bargaining which they need by the mutual agreement of the bargaining agents who derive their authority from the PSLRA.

In these remarks, we are not addressing ourselves to the events which have already taken place, (and which may have to be the subject of a future proceeding under Section 7 of the Labour Code). Suffice it to say that it is understandable that at the outset of the mammoth task of instituting collective bargaining for a brand new unit of nearly 40,000 diverse government employees, the P.S.C. and the B.C.G.E.U. decided to exclude for the moment such small and exotic employee group as these houseparents, whose special work situation and schedules would seem to require a special set of contract terms. But that is no excuse for a continuing failure by the parties to discover how many groups there are in the situation of Enoch who are legally swept into the statutory bargaining unit; and once having located them, then bargaining to provide such employees with the security and benefits of a collective agreement which they have a right to.

The Board was informed at the hearing that while the B.C.G.E.U. is now anxious to proceed with the task of negotiating agreements for previously excluded employees such as the Remand House houseparents, the P.S.C. remains reluctant. Apparently, the reason is that the P.S.C. feels that it has jurisdiction only over employees appointed under the Public Service Act. Since these individuals are employed by other official agencies acting under different legislation, the P.S.C. believes that it cannot negotiate a collective agreement which will bind these other agencies with respect to the terms under which they may such appointments.

If that in fact is the assumption of the P.S.C., we wish to state very clearly that it is founded on a complete misapprehension of the legal character of the PSLRA. (And we should add that the same misapprehension on the part of the P.S.C. gave rise to certain earlier disputes coming before the Labour Board under the PSLRA: see B.C. Government Professional Employees' Association vs. P.S.C. [1975] 1 Canadian LRBR 204; Graphic Arts International Union vs. P.S.C. [1975] 2 Canadian LRBR.) The P.S.C. derives its legal authority in collective bargaining from the PSLRA, in particular Section 3 of that Act:

"The bargaining agent for the Government is the Public Service Commission' acting on behalf of, and under the direction of, the Treasury Board, which for this purpose may include one additional member of the Executive Council designated by the Lieutenant-Governor in Council, and the bargaining agent has full power and authority to bargain collectively with bargaining agents for the employees and to execute, on behalf of the Government, collective agreements that may be concluded under this Act. "

The P.S.C. enjoys such an authority to negotiate binding collective agreements respecting all employees covered by the Act who are included in one of the certified bargaining units defined by Section 4 of the PSLRA. The P.S.C. is clothed with that bargaining. authority irrespective of whether those employees also fall within the P. S.C.'s personnel jurisdiction arising under the Public Service Act.

In our view, the time has certainly come, two and a half years after the enactment of the PSLRA, (if it had not already arrived some time ago), at which the P.S.C. and the B.C.G.E.U. must meet and bargain collectively in good faith, and make every reasonable effort to conclude a collective agreement with respect to the variety of Crown employees typified by the situation of Mr. Enoch which we have canvassed in this decision. But having stated that, we reaffirm our earlier conclusion ,under Section 34 of the Labour Code, that Mr. Enoch is not now covered by the master collective agreement negotiated between the B.C.G.E.U. and the P.S.C.

PAUL C. WEILER CHAIRMAN

JOHN BROWN MEMBER

KEN MARTIN MEMBER

End of Document

British Columbia (Government Employee Relations Bureau) (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: John Baigent, Vice-Chairman Ben Van Der Woerd, Member Angus Macdonald, Member

Heard: December 17, 1976

Judgment: February 28, 1977

No. 10/77

[1977] B.C.L.R.B.D. No. 9 | 1977 CarswellBC 629 | [1977] 2 Can. LRBR 30

Between: Government Employee Relations Bureau (the "Employer"), and British Columbia Government Employees' Union (the "Union")

Counsel: Rod Germaine, for the British Columbia Government Employees' Union Bruce H. McColl, for the Government Employee Relations Bureau

---

I

This case involves an application by the British Columbia Government Employees' Union (the "BCGEU") under Section 108 of the Labour Code for review of an arbitration award which determined that one Robert Hall, a Correctional Officer for the B.C. Corrections Branch, had been terminated for just cause.

Mr. Hall was dismissed by his employer following the escape of ten inmates from the Vancouver Island Regional Correctional Centre during his shift.

II

The application before the Board involves parties in the provincial public service. The Public Service Labour Relations Act ("PSLRA") is the statute whereby collective bargaining rights were extended to the public service and which prescribes certain features of bargaining in that arena.

The BCGEU represents employees in the public service in a unit defined by Section 4(c) of the Public Service Labour Relations Act. Recent amendments to Section 3 of the same statute provide that the Treasury Board is the bargaining agent for the provincial government and that the Treasury Board may discharge its duties under the statute through the agency of the Government Employee Relations Bureau ("GERB").

Neither counsel contested the jurisdiction of the Labour Relations Board to entertain the review application under Section 108 of the Labour Code. In our view, theywere correct in taking that position. We think it appropriate to take this occasion to analyze the pertinent statutory provisions which indicate why.

The interrelation of the two statutes can best be understood by a consideration of the following provisions in each statute:

From the Public Service Labour Relations Act

> "2(1) Unless inconsistent with this Act and for the purposes of this Act, the board (i.e., the Labour Relations Board) has all the powers of the Labour Relations Board under the Labour Code of British Columbia Act, and a union under this Act shall be deemed to be a trade-union within the meaning of the Labour Code of British Columbia."
>
> "26. Unless otherwise provided in this Act, the Labour Code of British Columbia applies, but, where a provision of this Act is contrary to, in conflict with, or inconsistent with the provisions of that or any other Act, the provisions of this Act prevail."

The Public Service Labour Relations Act does specify in Section 15(1) that every collective agreement must contain a provision providing that all differences arising under the collective agreement be settled "by arbitration, or by such other method as agreed upon by the parties". There is no provision in the statute for review of arbitration awards.

From the Labour Code of British Columbia

"92(1) In this Part, unless the context otherwise requires, "arbitration board" includes

(i) a single arbitrator; or

(ii) any other tribunal or body appointed or constituted under this Part or under a collective agreement;

and:

"108(1) On the application of a party affected by the decision or award of an arbitration board, the board may set aside an award of the arbitration board, or remit the matters referred back to the arbitration board, or stay the proceedings before the arbitration board, or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground:

(a) that a party to the arbitration has been or is likely to be denied a fair hearing; or

(b) that the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Act, or any other Act dealing with labour relations."

As we have noted, there is no provision in the Public Service Labour Relations Act governing review of arbitration awards. Accordingly, there is no basis for finding that any provision of the Public Service Labour Relations Act is "contrary to, in conflict with, or inconsistent with the provisions" of the Labour Code or, specifically, Section 108 thereof. The absence of any conflict in the two statutes and the wording of Section 26 results in the Labour Code of British Columbia "applying" generally to arbitrations arising under collective agreements negotiated pursuant to the Public Service Labour Relations Act.

Our conclusion is reinforced by an analysis of Sections 92 and 108 of the Labour Code. Section 108 of the Code allows an application for review by a "party affected by the decision or award of an arbitration board". Under Section 92(1) an "arbitration board", includes:

(i) a single arbitrator; or

(ii) any other tribunal or body appointed or constituted under this Part or under a collective agreement;"

The arbitration board in the present case was constituted under a collective agreement -- albeit a collective agreement as defined by the public Service Labour Relations Act. The Panel is satisfied that the definition of "collective agreement under the Labour Code is broad enough to encompass the collective agreement as defined by the Public Service Labour Relations Act.

It should be noted that a collective agreement under the Labour Code is between an "employer" and a trade-union while under the Public Service Labour Relations Act, it is between "the bargaining agent for the government" and the bargaining agent for a bargaining unit as defined in Section 4 of the Public Service Labour Relations Act. The bargaining agent for the government is now the Treasury Board since the proclamation of the Public Service Labour Relations Amendment Act, 1976. And, as we have noted, under the Public Service Act the Treasury Board may delegate any of its duties and powers as a bargaining agent to GERB.

The "employer" in the public service is the Crown and the definition section in the Public Service Labour Relations Act provides that the "Crown" and "government" are interchangeable terms. The PSLRA definition of a "collective agreement" merely recognizes the fact that thereis only one possible employer-party to collective agreements in the public service. That party, however, is acting on behalf of an employer and concludes collective agreements "between (that) employer, and a trade-union". As such we are satisfied that a collective agreement in the provincial public sector entered into by the bargaining agent for the government is a collective agreement entered into by an employer. It follows from that analysis that a tribunal appointed under a collective agreement in

the public service is an "arbitration board" pursuant to Section 92(1) of the Code and that under Section 108 of the Code its awards can be reviewed.

The recent amendments to the Public Service Act also suggest that it was the intent of the legislature that this Board should review arbitration board awards arising in the public service. Part III of the new Public Service Act establishes the Public Service Adjudication Board which can hear and determine grievances relating to those matters which are not permissibly included in public service collective agreements. The legislature has also provided (in Section 67(1)(c)) that the parties to a collective agreement may provide for that board to be their arbitration board in respect of differences relating to the collective agreement. Section 70 then provides, that should the parties avail themselves of Section 67(1)(c), then Section 106 and 106 of the Labour Code apply. Both can apply only if Section 106 is interpreted to exclude the Arbitration Act. But the point is that the legislature could only have enacted Section 70 to ensure that, should the parties to a public service collective agreement avail themselves of the new option to utilize the Public Service Adjudication Board for disputes under collective agreements, the review of that Board's grievance arbitration awards would be within the statutory framework common to all other grievance arbitration awards. Consistency was obviously the motivation. An interpretation of Section 108 of the Code which excluded arbitral review by this Board of arbitration awards arising under collective agreements in the public sector (other than those within Section 67(1)(c)) would attribute to the legislature an intent that some, but not all, arbitrations were reviewable by this Board and that the decisive factor in choosing the appropriate forum would be whom the parties had chosen for their arbitration board!

In summary, there is no conflict between any provisions in the Public Service Labour Relations Act and Section 108 of the Labour Code and full effect must be given to Section 26 of the former statute with the result that an arbitration award emanating from the provincial public service is an arbitration under the Labour Code.

III

The BCGEU application is brought under Section 108 of the Code:

> "108.(1) On the application of a party affected by the decision or award of an arbitration board, the board may set aside an award of the arbitration board, or remit the matters referred back to the arbitration board, or stay the proceedings before the arbitration board, or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground
>
> (a) that a party to the arbitration has been or is likely to be denied a fair hearing; or
>
> (b) that the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Act, or any other Act dealing with labour relations."

The BCGEU argues that the arbitration award is "inconsistent with the principles expressed or implied" in the Labour Code in that:

(1) The majority of the Arbitration Board failed to consider the question of whether the employer had just cause for any discipline;

(2) The majority of the Arbitration Board failed to conclude there was not just cause for any discipline on the facts and on the basis of established doctrines of arbitral jurisprudence;

(3) In the alternative, and if there was just cause for some form of discipline, the majority of the Arbitration Board failed to consider whether dismissal was excessive in all of the circumstances; and

(4) In the alternative, and if there was just cause for some discipline, the majority of the Arbitration Board failed to determine the form of discipline which would be just and equitable in all of the circumstances."

Those four grounds of appeal can be more conveniently dealt with under two headings. Did the arbitration board deal with the issue of just cause in a manner consistent with the principles of the Code? Secondly, did the Board err in not reviewing the actual discipline meted out by the employer.

At the outset the Panel wishes to restate its position on the role of this Board in reviewing finds of fact by arbitration boards. It is not the Board's function to second guess an arbitration board's assessment of the evidence

before it. An allegedly erroneous finding of fact by an arbitration board provides no ground for review under Section 108(1)(b) provided the parties have received a "fair hearing" within the meaning of Section 108(1)(a) of the Code.

It does not follow from that, however, that all findings of fact are immunized from Section 108(1)(b) review. It may be that those findings were arrived at in a manner inconsistent with the principles of the Code. When that occurs the validity of those findings can be challenged. This case provides a good example of how a finding of fact could have involved an arbitration board arriving at a decision inconsistent with the principles of the Code.

The union in this case predicated its defence of the grievor on the lax system prevailing at the prison and, specifically, a procedure followed by the afternoon shift on the East Tier by which the "formal inmate count system" had been suspended. That shift, with the knowledge and concurrence of the grievor's immediate supervisors, had adopted a "count system" which made it unnecessary for the security officers to actually go into the tier to count heads. The other aspect of the "accepted system" to which the grievor directed the arbitration board was the practice of correctional officers leaving their look-out stations to attend to other functions without being relieved. Speaking of those practices the board said:

> "S. H. Page, Inspector of Standards, reported that, while instructions in the East Wing diary require a formal count be taken, "the afternoon shift suspended the "formal" inmate count system and introduced a system of adding to or taking from the initial count according to inmate movement on or off the tier. This way, if an inmate does not leave the tier by proper means, he is assumed to be still there. Under such a method of control an escape might go undetected until shift termination, which indeed, was the case in point on this occasion.
>
> From the above it might be construed that the grievor was not derelict in his duties by not going into the cell and dayroom area to effect a security check or because he was required to be away from his post on other duties without relief."

These facts provided the backdrop for the union's argument that the grievor had been disciplined for merely following the accepted procedure on the afternoon shift.

The union's argument and the board's findings of facts concerning the prevailing system of surveillance in the East Tier went to the very root of the question of whether or not there was cause for discipline. An arbitration board confronted with that predicament is not free to ignore the argument and the principles that have emerged from the arbitral jurisprudence on precisely that point, i.e., the fairness of an employer invoking disciplinary measures as a response to conduct which the employer has condoned or tolerated.

Section 108(1)(b) precludes an arbitration board from arriving at decisions "inconsistent with the principles expressed or implied in the (Labour Code)". That direction which was

described in the Simon Fraser case as the "subtle mandate" to arbitration boards can, in the present context, be better understood by considering the role of arbitration under the Code. As this Board has pointed out in several of its decisions, the Code, in Section 93(1), has espoused an arbitration type of dispute-resolution during the currency of collective agreements. At the same time there is an absolute ban on strikes (except possibly in the case of technological change). That trade-off is only equitable and workable if the arbitral method of reviewing employee grievances is sufficiently broad to encompass all disputes arising under the collective agreement (Cassiar Asbestos 1974 1 Canadian LRBR 428) and, more importantly,provides a "fair hearing" to the parties while remaining faithful to the underlying principles of the Code. One such principle involves a recognition that the conscious legislative policy in favour of arbitration cannot be divorced from the emerging body of industrial jurisprudence which is part of that system. The Code's direction in Section 93(1) of the Code that parties to collective agreements provide for dispute settlement through arbitration carries with it a direction which goes beyond the mechanical insertion in a collective agreement of a standard arbitration clause. It is a direction that disputes under collective agreements be settled with reference to the principles which have emerged in many areas of arbitral jurisprudence -- principles which define the climate of expectations for those who negotiate the substantive terms of collective agreements and which provide a rich body of refined analysis in many areas of recurring industrial disputes.

That is not to say that an arbitrator must, in his

award, faithfully note the various arbitration awards he has considered or even that he must arrive at decisions consistent with any consensus that has emerged in the arbitral jurisprudence. It is to say, however, that an

arbitration board may not ignore accepted principles of industrial jurisprudence which in many cases will suggest to arbitrators how to approach disputes where the language of the agreement is imprecise or silent. For example, had the board in the present case refused to consider the estoppel or condonation argument advanced by the union on the theory that even if the grievor's conduct was accepted by his superiors, it would provide no justification for an individual's conduct, the Board would have been flying in the face of an established principle of the published arbitration awards -- a principle reflected in the following passage from an Ontario award:

> "... it would in our view, be grossly unfair to allow the company to suddenly and without any prior warning or admonition, rely on the conduct of the grievor to support his discharge, when by its own conduct it had led him and indeed the other driver-salesmen such as Mr. Gillies to believe that such conduct was permissible and proper behaviour. To paraphrase the language of another board of arbitration, it simply is not proper for the company to have allowed Mr. McMurren to have climbed out on a limb so that they could saw him off..."
>
> Re: Frito-Lay Canada Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647
>
> (1975) 10 LAC 234.

It is the union's allegation in the second grounds of their appeal that the Board did ignore this "established doctrine of arbitral jurisprudence" and that its failure to do so invalidated any finding of such cause. If in fact the board had concluded that the grievor's conduct was deserving ofdiscipline when it had only been conduct in conformity with standards condoned by his superiors, then this Panel would refer the matter back to the arbitration board. And the Panel would do that, not because it wished to challenge a finding of fact, but because that finding of fact was arrived at without consideration (not necessarily acceptance) of a recognized principle of arbitral jurisprudence.

In the instant case it is true that the arbitration board did find that the failure of the grievor to enter the tier and his absence without relief from his post were condoned by the employer's practice. Nor did the board deal with the union's argument of estoppel by conduct. Speaking of the employer's practice, it said:

> "The Board does not accept, as an excuse for the grievor's conduct, the obviously lax system prevailing at the Institute; such as the failure of staff to properly log all of their activities and the failure of staff to properly conduct a survey of the area during a shift."

However, after reviewing and acknowledging the lax surveillance methods in the East Tier, the board found that the grievor had been notified three months earlier that increased surveillance and vigilance were required since the authorities had learned of an attempted escape by three inmates. On the night of the escape only one of those three was still in custody but two other escape artists were, to the knowledge of the grievor, in the Institute. The board clearly felt that those facts should have resulted in the exercise of greater caution by the grievor.

There was ample scope for the exercise of additional caution by the grievor even within the accepted and lax system whereby officers were not relieved and did not enter the Tier. That was because the grievor was stationed immediately outside the Tier gate and could, without entering, peer inside. Had this been done, the escape would have been detected. Turning to this point the board said:

> "The Board noted that the grievor, sitting in a chair at the tier gate entrance, would have his view of the escape route slightly obstructed if he had remained rigidly seated. However, a slight leaning to his right would have afforded him a clear sighting.
>
> The Board finds it incomprehensible that the grievor, who was fully aware of his responsibility as a security guard, could have not observed the removal of the bars and screen to effect the escape aperture which was less than twenty (20) feet from his post."

While this Board might have invested the September 18th directive with less significance than its relative staleness (three months) would suggest, that is no basis for us to challenge the finding that the grievor should have been more alert on December 18th. That finding was within the province of the arbitration board. Additionally, the passage quoted immediately above makes it clear that the board found the grievor's failure to check visually inside the tier deserving of discipline and that finding cannot be challenged. Having found grounds for discipline for conduct which was unrelated or outside the umbrella of condoned practices asserted by the union, the board's finding of conduct deserving of discipline cannot be impugned.

IV

The second aspect of the union's appeal asserts that the arbitration board's failure to consider whether the dismissal was excessive in all the circumstances should attract the Board's review jurisdiction under Section 108 of the Code. The wording of that ground of appeal is based on Section 98(d)which provides that an arbitration board has the authority:

> "to determine that a dismissal or discipline is excessive in all the circumstances of the case and substitute such other measures as appears just and equitable;"

As this Board indicated in the case of Wm. Scott & Company Ltd. and Canadian Food & Allied Workers Union, Local P 162 (No. 46/76), the central thrust of the recent amendments to Sections 92 and 98 (and specifically, Section 98(d) which provides an arbitration board with the authority "to determine that a dismissal or discipline is excessive in all circumstances") was to eradicate the truncated approach to discipline arbitrations which followed the Port Arthurs decision of the Supreme Court of Canada (1968) 68 CLLC 14, 136 at 587 . An arbitration board is no longer permitted to make an abstract determination of whether or not a specific incident in and of itself amounts to just cause for dismissal. The Scott case set out the proper procedure now to be followed:

> "Indeed, arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?"

In the present case there is nothing in the body of the award to indicate that the arbitration board did direct itself to the issue of whether or not the dismissal of the grievor was "an excessive response in all of the circumstances of the case." Counsel for the employer advised the Panel that in fact there was argument before the board on this point and that we should infer or assume that the board had taken this into consideration. Counsel for the union did not agree that the point had been argued before the arbitration board. We do not feel it necessary to resolve that disagreement for, even on the assumption that argument was made to the board on the excessiveness of the penalty, we are satisfied that the arbitration board did not proceed in accordance with the principles of the Code in dealing with this discharge.

And that is because Section 98(d) of the Code does not provide an arbitration board with a discretionary option which they may exercise in some instances. Rather, in conjunction with Section 92(3) it is intended to mandate a procedural approach to disciplinary grievances. According to the terms of Section 108(1)(b) of the Code an arbitration award can be reviewed where it is "inconsistent with the principles expressed or implied in (the Labour Code). As the Wm. Scott case emphasized in some detail, one of the clearest principles that emerges from the 1975 amendments of the Code is the legislative rejection of the common law approach to cause which suggested fixed consequences for specified types of misconduct. Section 98(d) allows arbitration boards to approach discharge cases in the manner suggested by Mr. Justice Laskin speaking for the Ontario Court of Appeal in Port Arthurs *(1967) 67 CLLC 14,024*, (at p. 116).

> "The formulae of 'just cause' or, 'proper cause' ... which are found in collective agreements join to the pragmatic case by case approach a sensible individualization in the assessment of punishment for misconduct. Whether the qualifying word by 'proper' or 'just' it expresses the City to act according to the circumstances of the case in which an issue of discipline, reaching perhaps to discharge, arises."

Once it is perceived that the approach relates to the procedural, rather than the interpretative function of the arbitration board, it makes no sense to argue that in a case such as this the Labour Relations Board should give the award a "sympathetic reading" and assume that the arbitration board adopted an approach belied by the award itself. The Board's review jurisdiction under Section 108(1)(b) of the Code cannot be exercised on the basis of assumptions.

The issues raised in this appeal are clearly distinguishable from an appeal where the applicant alleges that the arbitration board failed to consider an issue or argument of counsel because there is no mention of it in the award. In the context the following passage from the Western Mines case (1977) 1 Canadian LRBR indicates the approach taken by this Board:

> "It is not uncommon that ... awards can be sketchy in dealing with issues which are not at the forefront of the minds of arbitrators when they are preparing their reasons. Such points may later be fastened on by counsel for the losing side in preparing an appeal. But when this Board is reviewing (most) awards under Section 108, it should give the award a sympathetic reading, based on the premise that (experienced) arbitrators ... were aware of the implication of the issues raised before them and did in fact reach those conclusions which are logically implied by their ultimate ruling ... The Board should not analyze the award from a purely external point of view: one which requires that each relevant issue clearly be adverted to and covered on the face of the award or the ultimate decision will be found invalid..."

To the same effect are the comments of the Panel in Lornex Mining Corporation Limited and United Steelworkers of America, Local 7619, (No. 97/76).

> "First, the Board should not assume that an arbitrator has failed to consider certain evidence, an argument of counsel, or a provision of the collective agreement, and then leap to a finding that a fair hearing has been denied, merely because the arbitrator has not specifically mentioned the same in his award."

It is one thing for an arbitration board to refrain from sketching out each argument of the parties or detail all of the evidence which it heard. As the passages above indicate, that is not necessary. That is not the point in issue in this appeal. Here we are confronted with a decision which indicates that the arbitration board did not approach the dismissal in the manner now required under the Code, i.e., that in failing to deal with a discharge in the manner mandated by a consideration of Sections 92(3) and 98(d) of the Code, the board acted inconsistently with an underlying principle of the Code. Because we agree with that assertion the Panel is now remitting the decision to the arbitration board.

The Wm. Scott case has already outlined some of the criteria which the Board should now consider in assessing the discharge of a particular grievor. In the present case the Panel feels that some additional direction can be offered in light of the union's argument concerning the employer's condonation of lax surveillance procedures. As we have already indicated, the arbitration board quite properly found cause for discipline by focusing on conduct by the grievorwhich could not be excused by preference to condoned employer practices. Yet, immediately after detailing the grievor's conduct there is a troubling reference to the lax system of surveillance which the arbitrator found as part of the "practice" of the afternoon shift -- a practice evidently condoned by the grievor's superiors.

> "The Board does not accept, as an excuse for the grievor's conduct, the obviously lax system prevailing at the Institute; such as the failure of staff to properly log all of their activities and the failure of staff to properly conduct a survey of the area during a shift."

If by that comment the arbitration board meant only that the system offered no excuse since the grievor's conduct, which they found to justify discipline, went beyond it, then it is unobjectionable. If however, the board meant that the system adopted by the afternoon shift was irrelevant in assessing the conduct of the grievor, it would clearly ignore the established principle of arbitral jurisprudence to which we have previously referred. In reviewing the finding of conduct warranting discipline the Panel did extend a "sympathetic reading" to this passage and assumed the board meant the former. However, in the context of assessing the penalty imposed on the grievor's misconduct, the lax system of surveillance cannot be ignored. And that is because the misconduct of the grievor cannot fairly be divorced from circumstances in which it arose. A major task for the arbitration board on the remission will be to measure the grievor's conduct against the standards which obtained in the employer's operations at the time of the escape. The point was put this way in an arbitration arising out of the federalpenitentiary system where the arbitration board was reviewing suspensions imposed upon correctional officers following an escape. In that case the arbitrator found no negligence on the part of the grievors, but that does not detract from the validity of the following comments.

"The crux of the problem before me throughout this lengthy adjudication has been to ascertain an acceptable standard of conduct for a particular officer in the circumstances; to find the yardstick against which that officer's conduct could be measured....there was no proof of a broken working rule, of which an officer knew or ought to have known. For the most part, the employer sought to establish appropriate standards of conduct for particular officers through the mouth of Mr. Popp, the Director of Custody for the Canadian Penitentiary Service. In the case of each of the grievors, Mr. Popp was able to point to one or more acts or omissions which, in his view, fell short of the standard to be maintained by a correctional officer standing in the grievors' shoes. On the other hand, the thrust of the largest part of the evidence presented on behalf of the grievors was to demonstrate that they were just

following routine; that they had behaved in a reasonable manner and that they had lived up to the standards of security which had obtained for some long time on the evening shift at the Saskatchewan Penitentiary. It is my finding that Mr. Popp set his standards rather too high. Rather than looking to behavioral norms which had in fact existed during evening shifts at the Saskatchewan Penitentiary prior to November 25, 1970, Mr. Popp measured the conduct of the grievors against a standard of text-book perfection."

(Cameche et al and Treasury Board (Norman), September 27, 1971)

The point of that passage is simply that the arbitration board cannot properly assess the seriousness of an offence without reference to the accepted norms of the working place. And that in turn involves measuring the conduct of the grievor against the conduct of his fellow employees and "the standards of security which had obtained for some time."

We have emphasized that factor because the members of the Panel are of the view that, on the basis of the facts narrated on the face of the award, the penalty imposed in the present case seems excessive. This arbitration involved an employee of two and half years experience. The only reference in the award relating to his past employment record was to a promotion and his failure or negligence on the night of the escape does not appear to have involved a breach of rules, disobedience or other wilful conduct. His negligence, such as it was, must be evaluated with those factors in mind and tempered by a recognition of the atmosphere in which it arose.

For the above reasons, the union's application under Section 108(1)(b) is granted and the matter is remitted to the arbitration board for proper consideration of the appropriateness of the discharge in light of all the circumstances. Should the board conclude that the discharge was an excessive response, then it must substitute an alternative disciplinary measure.

John Baigent, Vice-Chairman
Ben van der Woerd, Member
Angus Macdonald, Member

End of Document

British Columbia (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: Barry Goff, Vice-Chairman Derek Doubleday, Member Jack Kerssens, Member

Heard: February 4, 1987

Judgment: February 16, 1987

No. 55/87

[1987] B.C.L.R.B.D. No. 55

Between Government of the Province of British Columbia (the "Employer"), and B.C. Government Employees' Union (the "Union")

Counsel: George C.E. Fuller for the Employer

John Rogers for the Union

I

The Government of the Province of British Columbia has made application pursuant to Section 12 of the Public Service Labour Relations Act, R.S.B.C. 1979, c. 346 (the "PSLRA") for a determination that 43, later amended to 44, District Finance & Administration Officers are "managers" within the meaning of Section 12(3) of the PSLRA and should, therefore, be excluded from the bargaining unit for which the B.C. Government Employees' Union is certified.

Prior to the commencement of the hearing into this matter, counsel for the Union applied for a preliminary ruling on the criteria to be used by the Board in determining the status of the employees affected by the Employer's application. The parties agreed that this matter should be heard and decided prior to the commencement of the hearing.

II

Section 12 of the PSLRA, which was enacted in 1978, states as follows:

"12(1) A collective agreement concluded under section 9 or 10 may exclude from its application certain employees or classes of employees.

(2) Employees or classes of employees to be excluded from the collective agreement may be determined by negotiation between the parties, but where the parties are unable to agree, either party may refer the matter to the board for a final and binding decision.

(3) In making its decision under subsection (2) the board shall exclude those employees or classes of employees who are employed

(a) to exercise the functions, and do exercise the functions, of a manager or superintendent in the direction or control of employees;

(b) in a confidential planning or advisory position in the development of management policy for the government; or

(c) in a confidential capacity in matters relating to labour relations or personnel."

Article 2 of the collective agreement between the parties was agreed to in 1975 and states as follows:

"Article 2 - Union Recognition and Rights

2.01 Bargaining Unit Defined

(a) The bargaining unit shall comprise all employees included in the Public Service bargaining unit as defined in this Agreement except those employees in positions mutually agreed to between the parties as managerial and (or) confidential exclusions. The parties to this agreement acknowledge the difficulty in establishing a service - wide policy for determining managerial and (or) confidential exclusions. The parties further agree that cognizance shall be given to the type of organization and to the degree to which employees, at varying levels, are involved either in the formation of Government policy or in the process of employer-employee relations.

(b) The guidelines to be considered in negotiating exclusions shall be:

(i) position incumbents employed for the primary purpose of exercising senior management functions;

(ii) position incumbents employed in a confidential capacity in matters relating to labour relations;

(iii) a sufficient number of position incumbents to represent management in matters relating to labour relations taking into account both operational and geographical considerations.

(c) Incumbents of new positions established by the Employer shall automatically be included in the bargaining unit unless specifically excluded by mutual agreement or by virtue of their being covered by another bargaining unit as specified in Section 4(a) or (b) of the Public Service Labour Relations Act."

III

Counsel for the Union argued that the Board should consider, in any exclusion/inclusion question, both the terms of Section 12(3) of the PSLRA and of Article 2.01 of the collective agreement, rather than just the provisions of the statute and the appropriate jurisprudence. Counsel argued that Article 2.01 outlines the guidelines that should be considered whenever a question of exclusion is addressed.

Counsel noted the presumption, contained in Section 12(2) of the PSLRA, that public service employees are within the bargaining unit, unless the parties agree otherwise or the Board makes a contrary ruling. Where the parties negotiate the exclusion of a position, they are bound by the provisions of Article 2.01 of the collective agreement. The parties have agreed to exclude certain classes of employees (see Appendix 2 of the collective agreement). They have also, in Article 2.01 of the collective agreement, agreed to certain guidelines which will govern negotiations on the exclusion of any additional positions.

Where the parties are unable to negotiate the qUestion of the exclusion of a particular position, they may, under Section 17 of the PSLRA, refer the matter to mediation or arbitration. They may also refer the matter to the Board for a final and binding decision under Section 12(3) of the PSLRA.

Section 12 of the PSLRA parallels Section 34 of the Labour Code, which conveys to the Board the exclusive jurisdiction to determine, inter alia, whether an individual is "included or excluded from an appropriate bargaining unit". There are some differences between the two statutes. The definition of employee is wider in the Labour Code than in the PSLRA. Further, the Code contains no provision for mediation or arbitration.

The Board has drawn up guidelines for parties who wish to make an application pursuant to Section 34 of the Labour Code (Statement of Policy, April 14, 1982) and has tailored those guidelines to address the specific needs of the public service under the PSLRA (BCLRB LD February 9, 1983). The Board has stated, both in its Statement of Policy and in subsequent cases, that it will respect the agreement that the parties may be able to reach on specific positions (Kelowna Hospital Society, BCLRB No. 110/85). Counsel argued that as the Board respects the parties' agreement on specific positions, so too the Board should respect the parties' agreement on the guidelines which should be used in the event that the parties are unable to reach an agreement themselves. That is, counsel argued that the guidelines in the collective agreement are in addition to the provisions of Section 12(3) of the PSLRA and the Board's jurisprudence, and are not instead of the statutory provisions. Thus, because the Board will not overturn an agreement by the parties on a particular position, the Board should not ignore the parties' agreement on the guidelines that should be used.

Counsel argued that the Board's respect for the agreement of the parties reflects the fact that exclusions are a matter of judgment. Decisions on inclusions and exclusions vary widely, based on the circumstances and the nature of the operation, and involve an "impressionistic rather than scientific" process. There is therefore nothing inconsistent with allowing the parties to establish guidelines.

Counsel suggested that the Board has not, in any of the cases to date, ruled out the possibility that guidelines may be considered. In fact, in an arbitration decision, the arbitrator specifically relied upon the collective agreement guidelines, which are worded similarly to the ones before us here (Registered Psychiatric Nurses' Association of British Columbia et al and Government Employees' Relations Bureau of British Columbia, unreported, June 29, 1979, Williams). In that case, the arbitrator stated as follows:

> "2. The criteria for exclusion shall be the guidelines within the Collective Agreement plus those principles which emerge from both the common law and the common sense of industrial relations insofar as the same are consistent with the guidelines in the Collective Agreement. While the Collective Agreement Guidelines are stated to be for the purposes of negotiation, I consider that those guidelines are the cornerstone of my criteria as well since I anticipate that I am expected to achieve for the parties what they could not achieve in the negotiation process. In other words, I propose to operate within the same general framework and rules as the parties have done in their collective negotiations." (at 9-10)

The Board followed the arbitrator's approach in Government of the Province of British Columbia, BCLRB No. L3l4/82. Finally, counsel referred the Board to the cases decided under Section 34 of the Code, wherein the Board has applied certain "rules of thumb" to assist in the decision-making (i.e. Tahsis Company Limited, BCLRB No. 46/77; British Columbia Ferry Corporation, BCLRB No. 65/78, *[1979] 1 Can LRBR 116*).

In short, counsel argued that there is nothing inconsistent between Section 12(3) of the PSLRA and Article 2.01 of the collective agreement, and accordingly, the Board should consider both in addressing the qUestions of which employees are excluded from the bargaining unit. Section 12(3) of the PSLRA does not set out the criteria to be used and as the Board itself has developed guidelines to adjudicate these questions, so too it should consider the guidelines developed by the parties themselves.

Counsel for the Employer argued that the criteria to be used in a Section 12(3) determination are contained in the clear and unambiguous language of the statute. Counsel argued that the Board does not have the jurisdiction to consider anything else. In the alternative, counsel argued that if the guidelines are to be considered, they are of secondary importance to the legislation.

Counsel argued that Section 12(3) of the PSLRA sets out first, the procedure to be adopted and, second, the criteria to be considered. Counsel reviewed the history of the PSLRA including the amendments which brought in Section l2 (3) Counsel noted the wording of Section 12(3) which is mandatory and imperative.

In counsel's submission, the parties have the opportunity, pursuant to Section 12(2), to resolve the matter themselves and, in doing so, may agree to specific guidelines. However, where the negotiation process is unsuccessful, and the parties turn to the Board for assistance, the statutory framework, including the criteria contained therein, is triggered. Counsel argued that the application of the Board's jurisprudence, under Section 34 of the Code, is appropriate to any consideration under Section 12(3) of the PSLRA. Counsel submitted that the Board has embraced this scheme in previous cases. Counsel argued that a review of the Board's jurisprudence makes it clear that the Board views its role as mandated by the statutory tests contained in Section 12(3), and that it lacks the jurisdiction to go outside the boundaries of the statutory criteria.

In short, counsel argued that the statutory criteria have the force of law, and as mandatory provisions, override the guidelines of the collective agreement.

IV

In the Panel's view, the Union's argument has been adequately answered by the Board on at least two specific occasions. In BCLRB No. 425/83, the Board set out the relevant clauses in the PSLRA including Section 26 of that Act which reads:

"26. Unless otherwise provided in this Act, the Labour Code applies, but, where this Act is contrary to, in conflict with or inconsistent with that or any other Act, this Act prevails."

The Board went on to state:

"After a consideration of the relevant provisions of the Public Service Labour Relations Act, the Labour Code and the Board's decision in Native Court Workers and Counselling Association of British Columbia, supra, Corporation Delta, BCLRB No. L6/83 and Chetwynd General Hospital, BCLRB No. 235/83, we are of the view that Section 4 of the Public Service Labour Relations Act mandates that all persons must be included in one of the bargaining units set out there. The only means for exclusion from those bargaining units is negotiation between the parties or, where no agreement can be reached, by a determination of this Board according to the criteria set out in Section 12(3). Since Pastorek does not perform the managerial functions referred to in Sections 12(3)(a), and his exclusion has not been sought under any other basis, we cannot exercise our discretion to exclude him. That would be contrary to the legislative scheme set up under Sections 4 and 12 of the Public Service Labour Relations Act. Pastorek is accordingly included in the Unions' bargaining unit."

(at 5, emphasis added)

On reconsideration, the Board's approach was upheld (Government of the Province of British Columbia, BCLRB No. 186/84) :

"We agree with the earlier reconsideration panel's determination with respect to the 'management team' concept. The bargaining units in the Provincial public service are defined by statute as are the exclusions. Therefore, the Board lacks the jurisdiction to make the type of determinations sought by GERB. A person can only be excluded from the bargaining units in the Provincial public service if he is specifically excluded under the Act or if he falls within the scope of Section 12 (3)(a), (b) or (c)."

(at 6)

If the guidelines dovetailed into the criteria of Section 12(3) of the PSLRA, it would be easier to reconcile the two. That is, if the guidelines specifically defined or augmented the statutory wording, the two could conceivably be read together. However, the guidelines address different issues than those raised in Section 12(3). In our opinion Article 2.01 limits the statutory criteria and, given the mandatory wording of Section 12(3), we are not convinced that the Board has the discretion to consider such a restriction.

Counsel for the Union made a very careful and thoughtful presentation to the Panel. Although counsel's arguments are persuasive and make good labour relations sense, the mandate for the Board, as outlined in Section 12(3) of the PSLRA is clear. Another interpretation of Section 12(3) simply cannot be coaxed from the wording of the statute in order to permit the Board to utilize the guidelines adopted by the parties in their collective agreement. Accordingly, the Union's application to consider the guidelines outlined in Article 2.01 of the collective agreement, in addition to the provision of Section 12(3) of the PSLRA, on the matter of the Employer's application to exclude certain employees, is hereby dismissed.

BARRY GOFF
VICE-CHAIRMAN

DEREK DOUBLEDAY
MEMBER

JACK KERSSENS
MEMBER

End of Document

Vancouver Island Housing Assn. for the Physically Disabled (1976) (Nigel House) (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: Ken Saunders, Vice-Chair

Decision: June 27, 2011.

Case No.: 61327

[2011] B.C.L.R.B.D. No. 112 | 197 C.L.R.B.R. (2d) 161 | BCLRB No. B112/2011

Vancouver Island Housing Association for the Physically Disabled (1976) (Nigel House) ("Nigel"), and Broadmead Care Society ("Broadmead"), and Construction and Specialized Workers' Union Local 1611 ("Local 1611"), and B.C. Government and Service Employees' Union ("BCGEU"), and British Columbia Nurses' Union ("BCNU")

(82 paras.)

Appearances

Peter A. Gall Q.C., for Nigel and Broadmead.

Kevin Blakely, for Local 1611.

Andrea Davis, for BCGEU.

Hope Cumming, for the BCNU.

DECISION OF THE BOARD

I. INTRODUCTION

1 Local 1611 is the bargaining agent for a unit employed by Nigel. Nigel falls under the legislated collective bargaining regime for designated health care employers. That regime is established by the intersection of the *Labour Relations Code* (the "Code"), *Public Sector Employers Act, R.S.B.C. 1996, c. 384* and the *Health Authorities Act*, R.S.B.C .1996, c. 180.

2 Nigel was in the business of operating a facility providing care services for young adults with disabilities (the "Facility"). It contracted with Broadmead to manage the business attached to Local 1611's certification in 2009 and 2010. Nigel decided to dissolve in 2010. It planned to sell its assets to Broadmead (the "Transfer"). The result was that Nigel would layoff its employees.

3 Broadmead began to employ persons working at the Facility effective January 1, 2011. There is no dispute that Broadmead offered employment to Nigel's employees and subsequently hired many of those persons.

4 Broadmead is a designated employer under the *Public Service Act, R.S.B.C. 1996, c. 385* (the "PSA"). It falls under the legislated collective bargaining scheme for public sector employers established by the intersection of the Code, the PSA and the *Public Sector Labour Relations Act, R.S.B.C. 1996, c. 388* (the "PSLRA").

5 This case raises a number of interrelated issues stemming from Nigel's conduct toward Local 1611 and the BCGEU. Local 1611 seeks remedies against Nigel for alleged contraventions of Sections 6(1), 9, 54 and 143 of the Code.

6 In this decision I will explain why many of the issues stem from confusion about the operation of Section 35 when a business is transferred from a health sector employer to a public service employer, as well as confusion about the respective roles of Local 1611 and the BCGEU as the exclusive bargaining agents for their units. In summary, the collective bargaining regime governing public service employers confined the scope of what Local 1611 could achieve in an adjustment plan. Yet Local 1611 persisted in requesting information that was irrelevant to the issues within the reach of an adjustment plan and sought to use that process to achieve legally impossible outcomes. Although it was open to Local 1611 to ask Nigel to walk down that path, Nigel did not contravene Section 54 of the Code by insisting that discussions stick to the issues that were relevant to its plan to close the business and layoff its employees.

7 Moreover, the terms under which Broadmead hired employees were not matters within Local 1611's exclusive bargaining agency under its collective agreement with Nigel. Rather, those terms fall under BCGEU's exclusive bargaining agency in its collective bargaining relationship with Broadmead. It was open to Broadmead and the BCGEU to informally consult third parties like Nigel, when deciding the terms under which new hires would enter their unit. In this context, Nigel's participation in that process and its announcements about Broadmead's plans did not interfere with Local 1611's bargaining agency or amount to acts of coercion under Sections 6 or 9 or the Code.

II. THE ISSUES

8 The issues arise under four main headings. Local 1611's key submissions are below each heading.

1) Section 54

Did the Employer contravene Section 54 by:

a) refusing to provide documents relevant to whether there was a successorship between Nigel and Broadmead (within the meaning of Section 35);

b) by refusing to provide documents relevant to the timeframe in which a successorship would occur;

c) by refusing to provide documents relevant to the transitioning of employees from employment with Nigel to employment with Broadmead, or

d) by meeting with the BCGEU and the BCNU to discuss the terms under which Broadmead would hire Nigel's employees?

9 Local 1611 submits in part:

> No information whatsoever has been provided to Local 1611 to support the existence of a successorship. Without this basic information it cannot be expected that Local 1611 can agree whether such a successorship has in fact occurred. *This is a necessary first step before the parties might then proceed to address the consequences of that successorship in a thoughtful and productive fashion.*
>
> It is clear that Nigel Services and Broadmead have already made up their respective corporate minds that the successorship has occurred and that Local 1611 will have no role in the new combined unit. *Even if such a successorship is a certainty, there is still an obligation to meet and discuss matters relating to its implementation.*
>
> * * *
>
> It is evident that Nigel was merely following through with what it perceived as a *pro forma* obligation to meet with Local 1611. *Nigel Services has not engaged in any actual discussions either about the nature of the*

successorship or about the manner in which staff might be transitioned from one employer to another in the event a successorship is declared to exist.

The *pro forma* nature of the meeting with Local 1611 has also been borne out by subsequent events. *Nigel Services has engaged in discussions with other unions about matters which are of significant interest to the bargaining unit members employed by Nigel Services. This includes such matters as lay-offs, seniority, vacation entitlements, probation, among others. These matters are being addressed by union representatives from the BCGEU and BCNU who serve the interests of a different community.*

* * *

The fact of whether a successorship has or has not occurred is indeed a matter within the jurisdiction of the *Labour Code*. Without a successorship declaration *Local 1611 retains its right to represent the members of the bargaining unit. Even if a successorship is declared Local 1611 retains a residual interest until such matters under s. 35(5)(d) and (e) are resolved.*

The Employer's high handed and indifferent response to Local 1611's requests for documents confirming the existence of a successorship is reflective of its misguided belief that successorship is immune from the s. 54 process. The Employers response *ignores the fact Local 1611 has both a current interest in representing the interests of its members and an interest that will continue even in the event of a successorship declaration.*

* * *

Since July 16, 2010, the representatives of Nigel Services have consistently rejected any role of Local 1611 in the s. 54 process. This approach was evident in the email dated July 16, 2010, from Ken Gower, Director of Human Resources of Nigel Services.

* * *

While it is evident that Local 1611 did not accept the Employer's assertion that the results under the *PSLRA* were either a foregone conclusion, or a bar to s. 54 discussions, Local 1611 did not assert that acceptance of the Union's interpretation was a pre-condition for having s. 54 discussions. Indeed, at no point has Local 1611 insisted that s. 54 discussions were contingent upon the Employer recognizing the Union's argument that there were successorship matters that remained to be addressed the Board.

It is clear from the substance of the September 8 letter that the Union was seeking information upon which legitimate s. 54 discussions might take place. Specifically, the Union requested:

* The resolution from the Annual General Meeting addressing the proposed transfers;
* Details of the timelines and contingencies of the planned transfer;
* Details of the terms of the planned transfer; and
* Details of the plans to transfer the service contract currently held by Nigel to Broadmead

* * *

The Employer refused to provide even the most basic information as to when the transfer/disposition would be completed.

Ordinarily, the date of the transfer/disposition might be of some value to the s. 54 process even for the most basic purpose of allowing the Union and Employer to know the timeline in which discussions must occur. The employees too would benefit by being able to consider the options available to them mindful of a fixed transfer date.

For example, employees continue to enjoy sick benefits and severance entitlements and of course, continue to enjoy all the benefits of their existing Collective Agreement prior to any transfer /disposition. In this respect, it is unnecessary for employees to elect to take any action prior to the actual occurrence of a transfer/disposition.

* * *

The real reason there were no s. 54 discussions is because the Employer refused to have them. The Employer's true motivations are unknown but it is clear that the Employer maintained that the information sought by Local 1611 was "irrelevant".

Even if the Employer believed the Union was insisting on future bargaining rights, there is no reason why the Employer couldn't have met with the Union while agreeing to disagree on a final outcome of the transfer/disposition. (emphasis added)

10 Local 1611 originally sought the following remedies for the alleged contravention of Section 54:

1) an order directing the Employer to provide all documentation and information requested in its letter dated September 8, 2010 together with such additional information as necessary to establish the exact nature of the alleged pending successorship;
2) an order that Nigel meet with Local 1611 in a meaningful way to discuss an adjustment plan;
3) an order extending the 60 day notice period under Section 54;
4) an order that Nigel rescind all lay of notices and cease offering employment or otherwise dealing with the unit until it meets with Local 1611 and complies with Section 54;
5) an order that employees who felt pressured to quit due to the impending layoff be reinstated with compensation.

11 Subsequently, and in view of events that unfolded with passage of time, Local 1611 amended the remedies sought to include the following:

1) a declaration that Nigel contravened Section 54 by failing to meet with Local 1611 in a meaningful fashion;
2) a declaration that former Nigel employees have a right to refuse continuing employment with Broadmead and exercise their Verrin rights to remain with Nigel services-the Union submits this is consistent with an agreement between the parties;
3) an order that Nigel and the Union meet to implement their Verrin options or to consider alternatives;
4) an declaration that the employees' rights under the Local 1611-Nigel collective agreement are not prejudiced by the passage of time (i.e. a claim that the collective agreement is no longer in force or the grievance is untimely);
5) a declaration that the BCGEU and Broadmead disclose to Local 1611 all terms agreed between those parties with respect to all job benefits/entitlements etc. to which the former Nigel employees would be entitled under their continuing employment with Broadmead;
6) a declaration that former Nigel employees have 30 days in which to exercise their Verrin options, such 30 day period to follow compliance with the order to disclose in (5) above;
6) an order that Nigel compensate Local 1611 for its costs thrown away in pursuing this matter; and
7) a declaration that Local 1611 has a further 30 day period in which to seek a determination under Section 35(5) as to what rights (such as seniority) continue to exist under the collective agreement between the BCGEU and Broadmead.

2. <u>Section 6(1)</u>

Did Nigel contravene Section 6(1) of the Code by: a) inviting representatives of the BCGEU and the BCNU to meet with employees of Nigel to the exclusion of Local 1611; or b) by negotiating with the BCGEU and the BCNU, the terms under which Broadmead will employ persons hired from Local 1611's unit?

12 Local 1611 submits in part as follows:

> Until a successorship has been established by the Board, or otherwise accepted by Local 1611, Local 1611 has both an obligation and a right to continue to represent the employees of Nigel Services. *The Employer's invitation to BCGEU representatives and BCNU representatives to attend at a staff meeting, to the exclusion of Local 1611, is interfering with the administration of the bargaining unit by Local 1611.*
>
> The invitation extended by Nigel Services to other unions coupled with the Employers repeated claims that Local 1611 has no role in the process serves only to confuse the membership and undermine the ability of Local 1611 to represent its members.
>
> Adding insult to injury is the Employer's [Nigel's] attempts to exclude the Local 1611 Representative from these meetings in a fashion which undermines Local 1611's status as the representative of the unit. The Employer's actions are contrary to s. 6(1) of the *Code*.
>
> It is clear from the negotiations held exclusively between the Employer and the other unions that Local 1611 has been excluded from its role in representing its members' interests. The Employer has pursued these negotiations despite Local 1611 protests. The Employer is clearly favouring a relationship with the other unions to the exclusion of Local 1611.
>
> * * *
>
> S. 54 however, is designed to address he needs and concerns of employees prior to a transfer/disposition.
>
> No employer is entitled to elect to skip the s. 54 process and head straight to discussions with the successor union. For sure, a successor can have those discussions but not to the exclusion of the incumbent.
>
> The incumbent has its own concerns and is not there simply to "provide some assistance to BCGEU and BCNU".
>
> *None of the Employer's submissions have identified what distinguishes the transfer/disposition of a business from the transfer/disposition of a business when the PSLRA is involved. The short answer is there is no such distinction. The PSLRA simply dictates the most likely outcome of the transfer as it relates to which of two Collective Agreements will continue to operate. Nothing in the PSLRA directs that s. 54 of the Code shall not apply because it is expected that there can only be one bargaining unit in the public service.* (emphasis added)

13 Local 1611 seeks the following remedies for the alleged contravention of Section 6(1):

a) an order that agreements relating to the future rights and benefits of Local 1611 members be suspended until such time as Nigel and Local 1611 meet in good faith under Section 54 and conclude an adjustment plan;

b) an order that agreements relating to the future rights and benefits of Local 1611 members be suspended until such time as a successorship has been declared or accepted, and the Board determines the remaining rights under Section 35(d) and (e) or the parties agree.

3. <u>Sections 6(3)(d) and 9</u>

Did Nigel contravene Sections 6(3)(d) or 9 of the Code by announcing to employees that only certain employees will be extended offers of employment without the benefit of having clearly determined what those offers will be or to whom they will be made?

14 Local 1611 submits in part as follows:

> ... This [the foregoing announcement] has created fear among employees who will in all respects continue to do their jobs in the same location with the same clients in the same fashion as has been done in the past.

The Employer has intimidated employees and caused them to fear their loss of employment if they work with Local 1611 to establish what rights and entitlements they may continue to receive as employees of Broadmead.

The Employer compounded the problem by refusing to address which employees will receive employment offers, and also by announcing offers of employment well in advance of the Employer's anticipated successorship commencement date. The short time frame in which to reply to offers of employment is likely to create fear of loss of employment if the employees wait until the matter of their rights is determined by the Board.

15 Local 1611 seeks the following remedy for the alleged contravention of Sections 6(3)(d) and 9: an order that the Employer cease and desist in its efforts to create fear and uncertainty in the bargaining unit and that it have no further communications with employees about pending job offers until the pending Section 54 process is complete.

4. Section 143

Is it appropriate to issue a declaration that Broadmead is not the successor to Nigel?

16 Local 1611 subsequently filed an application under Section 35 naming Nigel and Broadmead as respondents. Local 1611 seeks a declaration that there is no evidence the business of Nigel Services was transferred to Broadmead, within the meaning of Section 35 of the Code. Local 1611 seeks an order that Nigel and Broadmead provide all documents regarding the transfer of assets from Nigel to Broadmead; an interim order that Nigel and Broadmead stop acting as though a successorship has occurred between them; and an order that Nigel and Broadmead disclose all agreements made with the BCGEU regarding the future employment of Nigel's employees.

17 I find it is unnecessary to decide this application. That is because Local 1611 subsequently asked for time to file an application asserting there *was* a successorship, in order to invoke discretionary relief under Section 35(5) of the Code.

III. ANALYSIS AND DECISION

A. Relevant Statutory Provisions

1. The Code

18 Section 35 of the Code provides for the continuation of rights under a collective bargaining relationship and proceedings under the Code. Successorship arises by operation of law when an employer transfers its business or part of it, to another employer. Section 35 of the Code also provides mechanisms for sorting out competing rights after a transfer. Competing rights may arise in the form of a contest between two unions for bargaining rights, a dispute about the configuration of the resulting unit(s) with the successor or a difference about the rights of employees assigned to the successor's unit(s). Those goals are achieved by imposing a predecessor's collective agreement on a successor and by continuing Code proceedings (to which a predecessor was a party) against the successor. In summary, the successor employer is bound by all proceedings under the Code, including the predecessor's certification and collective agreement until the Board resolves competing rights.

19 Section 35 of the Code reads as follows:

Successor rights and obligations

35 (1) If a business or a part of it is sold, leased, transferred or otherwise disposed of, the purchaser, lessee or transferee is bound by all proceedings under this Code before the date of the disposition and the proceedings must continue as if no change had occurred.

(2) If a collective agreement is in force, it continues to bind the purchaser, lessee or transferee to the same extent as if it had been signed by the purchaser, lessee or transferee, as the case may be.

(3) If a question arises under this section, the board, on application by any person, must determine what rights, privileges and duties have been acquired or are retained.

(4) For the purposes of this section, the board may make inquiries or direct that representation votes be taken as it considers necessary or advisable.

(5) The board, having made an inquiry or directed a vote under this section, may

(a) determine whether the employees constitute one or more units appropriate for collective bargaining,

(b) determine which trade union is to be the bargaining agent for the employees in each unit,

(c) amend, to the extent it considers necessary or advisable, a certificate issued to a trade union or the description of a unit contained in a collective agreement,

(d) modify or restrict the operation or effect of a provision of a collective agreement in order to define the seniority rights under it of employees affected by the sale, lease, transfer or other disposition, and

(e) give directions the board considers necessary or advisable as to the interpretation and application of a collective agreement affecting the employees in a unit determined under this section to be appropriate for collective bargaining.

20 Section 54 of the Code requires that an employer notify a union about certain changes and negotiate in good faith toward an adjustment plan. The goal of that provision is to provide unions with an effective consultation mechanism under which an employer and its union(s) may agree on ways to address the impact of planned changes to the employment landscape. The resulting agreement is called an adjustment plan: Section 54(b). Section 54 gives legal effect to an adjustment plan by deeming it to be enforceable as a term of a collective agreement. The obligation is to negotiate in good faith to deal with the impact of the change. It is well established that the transfer of a business to a new employer is caught by this provision. A union may ask an employer to consider alternatives to selling or closing a business. However, it is not a contravention for an employer to take the position that its plans are irrevocable and to insist that negotiations proceed on that footing: *Health Employers' Association of British Columbia*, BCLRB No. B393/2004 (Leave for Reconsideration of BCLRB No. B415/2003, *[2003] B.C.L.R.B.D. No. 415*), 109 C.L.R.B.R. (2d) 128. Section 54 of the Code reads as follows:

Adjustment plan

54(1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,

(a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and

(b) after notice has been given, the employer and trade union must meet, in good faith, and endeavour to develop an adjustment plan, which may include provisions respecting any of the following:

(i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;

(ii) human resource planning and employee counselling and retraining;

(iii) notice of termination;

(iv) severance pay;

(v) entitlement to pension and other benefits including early retirement benefits;

(vi) a bipartite process for overseeing the implementation of the adjustment plan.

(2) If, after meeting in accordance with subsection (1), the parties have agreed to an adjustment plan, it is enforceable as if it were part of the collective agreement between the employer and the trade union.

(3) Subsections (1) and (2) do not apply to the termination of the employment of employees exempted by section 65 of the *Employment Standards Act* from the application of section 64 of that Act.

2. The PSA

21 Broadmead is a designated government agency under Section 3(b) of the PSA. It is governed by the labour relations regime established by the intersection of the Code, the PSA and the PSLRA. The BCGEU is the certified bargaining agent for employees of Broadmead.

3. The PSLRA

22 Section 4 of the PSLRA requires that every employee of Broadmead be included in one of three bargaining units: 1) a nurses unit, 2) a licensed professional unit; and 3) the public service unit, represented by the BCGEU. Section 4 of the PSLRA reads as follows:

Bargaining units

4 For the purpose of collective bargaining, every employee must be included in

(a) a nurses' bargaining unit, including all employees authorized under an enactment to practise as a registered nurse or registered psychiatric nurse, including those employees who are eligible to become so authorized,

(b) a licensed professional bargaining unit, including all employees in a professional classification in the public service classification structure who are members of an association that had, before July 1, 1998, statutory authority to license a person to practise that profession, other than those persons described in paragraph (a), or

(c) a public service bargaining unit including all employees other than those persons described in paragraph (a) or (b).

23 As set out above, Section 4 establishes bargaining units for "the purpose of collective bargaining". Section 1 of the PSLRA defines "collective bargaining" as negotiations for the renewal of a "collective agreement", among other things. The full definition reads as follows:

"collective bargaining" or **"bargain collectively"** means

(a) negotiating in good faith to conclude a *collective agreement*, or a renewal or revision of a collective agreement,

(b) reducing to writing the terms of agreement arrived at respecting matters required to be inserted in a *collective agreement* by this Act, and other matters agreed to by the parties, and

(c) negotiating to settle disputes and grievances of employees included in the agreement, or represented by an employees' bargaining agent; (emphasis added)

24 Section 1 of the PSLRA defines a "collective agreement" as an agreement between the government (which by definition includes Broadmead as a designated agency of the government) and a "bargaining agent for a bargaining unit". The full definition reads as follows:

"collective agreement" means a duly executed written agreement between the bargaining agent for the government and a bargaining agent for a bargaining unit containing provisions respecting the terms and conditions of employment of employees, including rates of wages or salary, hours of work or other working conditions of employees;

25 Section 1 of the PSLRA defines a "bargaining agent" as a union certified to represent one of the three units

defined under Section 4 of the PSLRA. That is the BCGEU for the public service unit and the BCNU for the nurses unit. The issues arise in respect of the BCGEU pubic service unit so I will not mention the BCNU again. There are no licensed professionals at issue. Section 1 of the PSLRA defines "bargaining agent" as follows:

> **"bargaining agent"** means
>
> (a) a union certified by the board as an agent to bargain collectively for a bargaining unit, or
>
> (b) the agent designated under section 3 (1) to bargain on behalf of the government;

26 Section 3(1) of the PSLRA designates the PSA as the bargaining agent for the Government.

4. Discussion

27 The foregoing definitions are exhaustive. Three conclusions can be drawn when Section 4 is read together with these definitions: 1) all employees of Broadmead must be in one of the designated units; 2) the only collective agreement applicable to employees in the public service unit is the collective agreement in place between Broadmead and the BCGEU; and 3) Nigel did not have the authority to enter into a collective agreement binding Broadmead, as that authority is vested in the PSA.

28 It follows that imposing the terms of Local 1611's collective agreement on Broadmead would conflict with these express requirements of the PSLRA. The same can be said for transferring Local 1611's certification as the exclusive bargaining agent for its unit. The PSLRA requires that all employees of Broadmead, even those formerly employed by Nigel at the Facility, be included in the BCGEU's unit, be represented by the BCGEU and be governed by the BCGEU's collective agreement with Broadmead (apart from Nurses as noted above). As explained below, the principle of exclusive bargaining agency precluded Local 1611 from playing any role in settling terms of employment for Broadmead's employees.

29 Section 35 preserves bargaining rights by law, when a business is transferred. Section 35(2) provides that the predecessor's collective agreement "continues to bind the purchaser, lessee or transferee to the same extent as if it had been signed by the purchaser, lessee or transferee, as the case may be". Section 35 also preserves representational rights attached to a predecessor's business. This puts the operation of Section 35 into conflict with the above noted requirements of the PSLRA. The Legislature decided to resolve that conflict in favour of the PSLRA. Section 23 of the PSLRA reads as follows:

> Other Acts
>
> 23 Unless otherwise provided in this Act, the *Labour Relations Code* applies, but, if this Act is contrary to, in conflict with or inconsistent with that or any other Act, this Act prevails.

30 In conclusion, the PSLRA prevails over the operation of Section 35 insofar as it would impose Nigel's collective agreement or Local 1611's bargaining rights onto Broadmead. That means an adjustment plan reached between Nigel and Local 1611 could not apply to persons employed by Broadmead. This constrained the scope of what Nigel and Local 1611 could achieve in negotiations for an adjustment plan to matters leading up to January 1, 2011. It was on that date that Broadmead began to employ persons working at the Facility.

31 The labour relations regime under the PSLRA is triggered by Broadmead's status as an employer, not whether it is a successor to Nigel within the meaning of Section 35.

32 I have considered Local 1611's submissions about the Board's decision in *Government of the Province of British Columbia*, *[1997] B.C.L.R.B.D. No. 76*, BCLRB No. 78/77. In that case Chair Paul C. Weiler addressed the Board's authority to review arbitration awards under collective agreements governed by the PSLRA. In the course of his reasons Chair Weiler comments on the interplay between the Code and the collective bargaining regime established under the PSLRA. He observed that the Code applies to public service employers unless there is a conflict with the PSLRA, in which case the PSLRA prevails. He also observed that there are gaps in the PSLRA that are capable of being filled by the Code. One of the examples cited is successorship.

33 In my view Chair Weiler offered a general observation. The question of successorship was not directly at issue and Chair Weiler offered no explanation for how successorship might apply in a way that assists Local 1611 in the case at hand. To the extent that Chair Weiler's reasons might be read so that Section 35 operates to preserve Local 1611's bargaining rights or its collective agreement with Broadmead, I must respectfully disagree for the reasons given above.

34 The parties rely on the Board's decision in *Narcotic Addiction Services*, *[1977] B.C.L.R.B.D. No. 6*, BCLRB No. 7/77 to support their respective positions. In that case, the parties agreed there was a successorship when a government agency "took over" the business of *Narcotic Addictions Services*. The union certified to represent the "predecessors" unit-the VRMEU-did not ask to preserve its bargaining rights. It simply asked for a declaration that its collective agreement would continue to apply in order to preserve its member's superior benefits under the BCGEU's collective agreement. The Board held that was impossible because the VRMEU's collective agreement became void once its certification was cancelled. However, the panel offered its comments in response to an argument that successorship does *not* apply to dispositions from the private sector to the public sector. The panel concluded for the same reasons set out here, that successorship did not apply because it was in conflict with the PSLRA. However, it also reasoned that the Board's authority under what is now Section 35(5) would apply where there is a transfer within the meaning of Section 35(1) (then 53(1)) without the new employer being bound by the predecessor's collective agreement. In that case, the Board would retain its authority to define seniority rights and to give directions interpreting the successor's collective agreement. That authority was not seen to be inconsistent with the PSLRA. Ultimately, that issue was never decided as there was no application for that sort of relief.

35 There may be cases where a successorship occurs within the meaning of Section 35(1) and a successor is not bound by the predecessor's subsisting collective agreement. However, that point does not assist Local 1611 in the present case. I have reached that conclusion for three reasons.

36 First, the issues in this case largely pertain to whether Nigel met its obligations to conclude an adjustment plan under Section 54 of the Code. An adjustment plan is enforceable as a term of Local 1611's collective agreement. Therefore, an adjustment plan reached between Nigel and Local 1611 could never apply to persons employed by Broadmead. That fact limited the scope of discussions under Section 54 to matters that Nigel was in a position to address in the days leading up to January 1, 2011. Those matters pertained to the proposed change; which I characterize as Nigel's decision to close its business and layoff its employees.

37 Therefore, even if the existence of a successorship is relevant to whether Local 1611 or its members may invoke Section 35(5), that was not a matter Nigel or Local 1611 were in a position to address under an adjustment plan. Put differently, an adjustment plan between Nigel and Local 1611 would not serve to advance Local 1611's claims in that respect. That claim must be raised with Broadmead and the BCGEU. Those parties have the authority to amend the seniority list under their collective agreement, not Nigel.

38 Second, to the extent this case is about dealing with the seniority rights of former Nigel employees, it appears Nigel always viewed that as a legitimate topic for discussion. Nigel's counsel indicated as much in his letter dated September 20, 2010 to Local 1611 where he wrote as follows:

> In your September 8, 2010 letter to Ms. Lew, you requested certain documents relating to whether there has been a transfer of Nigel's business to Broadmead. I don't see the relevance of those documents, given that the essential point here is not whether there has been a successorship under the Code, but, rather, that the employees of Nigel will become employees of Broadmead. There is no doubt about this occurrence. ***Thus, the only issue that needs to be discussed is how the former Nigel employees will be integrated into the BCGEU bargaining unit.*** There is no question or issue about their inclusion in that bargaining unit. (emphasis added)

39 Third, for the reasons given above, I find it would conflict with the express requirements of the PSLRA to apply Local 1611's certification or its collective agreement to Broadmead. Local 1611's recent submissions have downplayed the fact its request for documents was based on a claim to preserve its bargaining rights and collective

agreement with Broadmead. My review of the correspondence on file (at the relevant time) reveals that Local 1611 advanced that position as the basis for its request. The Employer did not contravene Section 54 by insisting that discussions and any production of documents pertain to matters relevant to the impact of the proposed change. In this unique context, preserving Local 1611's bargaining rights/collective agreement, dealing with the terms on which Broadmead might offer employment at the Facility, including the seniority of persons hired into the Broadmead-BCGEU unit were matters outside the reach of an adjustment plan between Nigel and Local 1611.

40 The principle of exclusive bargaining agency is also a relevant consideration. This case involves two collective bargaining relationships, not simply the relationship between Nigel and Local 1611. Broadmead consulted the BCGEU about its acquisition of Nigel's assets and service contract, as well as the hiring of new employees.

41 Section 27 of the Code sets out the principle of exclusive bargaining agency. It provides that a certified union is vested with exclusive authority to negotiate and bind the unit to a collective agreement. Only the BCGEU has the authority to negotiate and administer its collective agreement with Broadmead. This is significant in this case because Nigel and Local 1611 had no authority to settle the terms under which Broadmead hired employees to work at the Facility, including their seniority status. Those terms were established under the collective agreement between Broadmead and the BCGEU. Those terms could only be altered by agreement between Broadmead and the BCGEU. Broadmead and the BCGEU were entitled to consult Nigel (or another third party) in their negotiations at their own discretion. The fact Nigel was included and Local 1611 was excluded from that process (assuming for present purposes it was excluded) did not breach the Code.

B. Nigel's Conduct

42 By letter dated July 16, 2010, Nigel told Local 1611 (by letter to the Facilities bargaining Association) that it would dissolve. Nigel planned to transfer its service contract and sell its assets to Broadmead. Nigel said it planned to do that between October 2010 and January 2011. Nigel acknowledged that the plan triggered obligations under Section 54 of the Code and asked to begin negotiations toward an adjustment plan. Nigel appointed a representative and suggested a meeting on July 21, 2010. Nigel concluded that letter by recording its position that all employees of Broadmead must be in the BCGEU's bargaining unit. Nigel said its position was based on the PSA and PSLRA.

43 Ken Gower was Nigel's representative in the Section 54 process. Gower communicated to Local 1611 by e-mail dated July 16, 2010. That e-mail reads in part as follows:

> Nigel employees *who are offered employment with BCS* [Broadmead] will be required to become members of the BCGEU and be covered by the collective agreement between the Prov of BC and the BCGEU. *Therefore, our continuing consultation beyond meeting with Ms Moore July 21 will be with Jenny Ewing, Staff Representative, BCGEU who has been designated as their representative for the Section 54 consultation process.* ... (emphasis added)

44 Gower indicated in that e-mail that future discussions would take place with the BCGEU and BCNU. I do not read that e-mail as announcing Nigel's unequivocal intent to end all Section 54 discussions with Local 1611 after the July 21, 2010 meeting with Ms. Moore. The e-mail must be read with due regard for the surrounding context, including subsequent conduct. Gower acted as the Human Resource Manager for Nigel *and* Broadmead. The BCGEU and BCNU appear to have been involved in their own consultations with Broadmead. I read Gower's reference to continuing consultations after the July 21 meeting as tied to persons hired into the BCGEU's unit with Broadmead, not to persons employed in Local 1611's unit with Nigel. As explained above, Section 54 did not give Local 1611 a right to negotiate an adjustment plan setting the terms under which Broadmead would hire employees. Section 27 of the Code requires that Broadmead deal exclusively with the BCGEU regarding the terms under which persons were to be hired into the BCGEU's unit.

45 The fact that Gower subsequently met with Local 1611 supports this interpretation of Gower's e-mail. Had Gower believed that the circumstances negated any reason for Nigel to meet with Local 1611 it is unlikely he would have done that.

46 Local 1611's response by e-mail dated July 16, 2010 as follows:

> Dear Ken - I have just read your notice of a section 54 sent to Judy Darcy. I suggest we have further discussions before our July 21st meeting. There is no need to roll Nigel employees into BCGEU. We have existed harmoniously for almost a year and a half and can continue to do so. CSWU [Local 1611] will not allow this process to be rushed or considered a done deal. CSWU will continue to represent their membership at 846 Nigel Avenue to ensure their rights are protected and recognized.
>
> As presented, Broadmead's plans are not in CSWU's members best interests. This Union will continue to represent their members at Nigel, as we have done for the better part of 30 years.
>
> Please feel free to contact me to discuss this further.

47 Local 1611's submission indicates that the July 21, 2010 meeting was held as planned. Nigel explained that persons accepting employment with Broadmead would be placed in the BCGEU unit. Local 1611 submits:

> Local 1611 disagreed with the claim and requested an opportunity to discuss the matter of representation, as well as the details of the proposed merger, in order to meaningfully participate in an adjustment plan.
>
> During the meeting, Local 1611 requested that the management of Nigel Services refrain from needlessly frightening the workforce by expressing views that were not supported by the law and were being formed prematurely given the absence of meaningful consultation under s. 54.
>
> Nigel Services refused to provide Local 1611 with any details of the information to be conveyed at the staff meeting scheduled for 2:30 that afternoon. Nigel Services refused to delay notifying certain employees of Nigel Services of pending lay-offs. On July 26, 2010, a number of lay-offs were announced by Nigel Services in respect of certain positions. No prior details of the lay-off were provided to Local 1611, though such details were requested.
>
> During the July 21 meeting, Local 1611 requested information with respect to the planned integration, if any, of the Nigel Services and Broadmead units, Local 1611 received only vague, general indications that some house-keeping services might be integrated.

48 There is no indication Local 1611 proposed additional meeting dates.

49 Local 1611 sent a letter to Selina Lew of the PSA, dated September 8, 2010. The first heading of the September 8, 2010 letter is "Determination of a Successorship". Local 1611 said it could not determine if a successorship occurred between Nigel and Broadmead. Local 1611 confirmed that it would remain the bargaining agent for Nigel's employees for the time being. Local 1611 asked for documents to substantiate a successorship and to determine when Nigel would close. Local 1611 ended that heading as follows:

> It would be very useful if you could provide us with the foregoing information so that the Union will have a better idea when a successorship might actually occur, if at all, and what the timing for future discussions might be.

50 The next heading was "Representational Issues". Local 1611 disagreed that the PSLRA requires that the BCGEU represent employees of Broadmead. Local 1611 said that it believed the Board would preserve its unit with Broadmead and would be responsible for determining rights under Section 35(5) of the Code. Local 1611 ended that letter as follows:

> However, we believe than an interpretation of the *PSLRA* provisions in relation to the *Labour Code* is premature in the absence of an actual successorship.
>
> We reiterate our request for information relating to the existence or planned conclusion of a transfer of assets. We also request a copy of OIC 757/1992, if you have such a copy in your possession.

51 Lew responded to Local 1611 by a letter dated September 15, 2010. As far as I can determine, Lew was speaking on behalf of Broadmead as Nigel was not copied on the letter. The PSA is the bargaining agent for Broadmead.

52 In that letter Lew advised Local 1611 that Broadmead was the successor to Nigel and that the employer (referring to Broadmead) would continue to transition Nigel employees to Broadmead under the BCGEU collective agreement. Lew advised that a transfer date would be identified once confirmed and provide a copy of the requested Order in Council. I do not read that letter as evincing Nigel's intend to end all discussions with Local 1611 about the impact of its plans.

53 As set out above, counsel for Nigel and Broadmead also wrote in response to Local 1611 in a letter dated September 8, 2010. I have reproduced the pertinent part of that letter for convenience:

> In your September 8, 2010 letter to Ms. Lew, you requested certain documents relating to whether there has been a transfer of Nigel's business to Broadmead. I don't see the relevance of those documents, given that the essential point here is not whether there has been a successorship under the Code, but, rather, that the employees of Nigel will become employees of Broadmead. There is no doubt about this occurrence. *Thus, the only issue that needs to be discussed is how the former Nigel employees will be integrated into the BCGEU unit.* There is no question or issue about their inclusion in that bargaining unit. (emphasis added)

54 I do not read this letter as signalling Nigel's intent to end discussions with Local 1611. Rather, it identifies the issues to be discussed.

55 I pause at this point in the narrative to observe that Nigel and Local 1611 might have discussed a number of legitimate topics in negotiations for an adjustment plan. However, it is fair to conclude that the parties' difference about Local 1611's request for documents pertaining to "determination of a successorship" and "representational issues" brought that process to an impasse. Local 1611 told Nigel in its October 8, 2010 letter that the existence of a successorship would help it determine the timing for further discussions and that discussion about the fate of its members was premature until the question of a successorship was settled. Nigel responded by correctly observing that the existence of a successorship was irrelevant and the issue was how former Nigel employees would be integrated into the BCGEU unit. That is how discussions ended.

56 In my view, the fact Nigel adopted this position does not show a refusal to discuss transition issues with Local 1611. Rather, it shows precisely the opposite. Nigel did not contravene Section 54 of the Code in taking that position. It remained focused on issues arising from its decision to dissolve and layoff its employees. It is critical to note that the timing of a successorship as well as the timing of layoffs and other impacts of the Transfer on Nigel's employees are not necessarily the same.

57 The Section 54 process is a two-way street. It is open to both parties to propose meetings, ask questions and discuss concerns. If Local 1611 believed that it was acceptable to park the dispute about successorship and proceed to other topics (e.g., the precise timing of the layoffs or closure), it could have sent Nigel an agenda and proposed meeting dates. I see no indication that happened. Nor do I see any credible basis to conclude that Nigel had altogether foreclosed discussions about such topics. The end result was that the impasse about documents pertaining to successorship brought discussions to a standstill. Eventually, the opportunity to achieve an adjustment plan was lost.

58 I note that Local 1611 also complains about Nigel's refusal to provide documents relevant to the transitioning of employees from employment with Nigel to employment with Broadmead. As I understand it, that also refers to the documents listed in Local 1611's September 8, 2010 letter. Otherwise I see no basis to establish such a broad refusal (to the extent Nigel might have control over such documents).

59 On September 22, 2010 Nigel issued a memorandum to its staff entitled "News from Dave" (the "September 22 Memorandum"). The stated intent of the September 22 Memorandum was to summarize a Nigel staff meeting held the same day. The 60-day notice period under Section 54 had expired at that point in time. The re-line of the September 22 Memorandum reads as follows:

> Union representation for Nigel employees accepting employment with Broadmead Care Society (BCS)

60 It is important to note that the September 22 Memorandum was on letterhead bearing Nigel and Broadmead logos, so it is not fair to say that it was issued by Nigel alone. Regardless, the intended audience was Nigel's employees who accepted employment with Broadmead. The September 22 Memorandum also clarifies that Nigel recognized Local 1611's bargaining rights and that negotiations concerning the rights of new hires with Broadmead were between Broadmead and the BCGEU, not between Nigel and the BCGEU. Broadmead spoke on its own behalf in that regard.

61 The September 22 Memorandum went on to advise Nigel's employees that Broadmead would make offers of employment and Local 1611 could no longer represent them at that point due to the operation of the PSLRA:

> I also acknowledged the limited amount of communication that we have been able to provide to Nigel staff (and the resulting uncertainty this created) during the last 60 days (Section 54 time period). This was necessary due to our obligation to respond to the differing position between Nigel/Broadmead and the Construction and Specialized Workers Union (CSWU).
>
> It is our clear understanding that Nigel employees who are offered and accept employment with BCS [Broadmead] cannot continue to be represented by the CSWU [Local 1611] - the Public Service Labour Relations Act which applies to BCS does not allow this. Because the 60 day notice period required by Section 54 of the Labour Code has lapsed I can advise you that BCS's continuing discussions will be with the BCGEU and BCNU who represent BCS employees. (underlining in original)

62 The September 22 Memorandum further recognized Local 1611's subsisting rights. Nigel and Broadmead confirmed that negotiations to put new hires in the Broadmead unit were held with representatives of the BCGEU and the BCNU:

> * Your current unions [Local 1611] will continue to represent you and your current terms and conditions of employment with Nigel will continue to apply to you until you commence employment as a BCS employee (most likely January 1).
>
> We also introduced the BCGEU and BCNU union representatives who were present at the meeting:
>
> * Jenny Ewing, Staff Representative with the BCGEU
> * Suzanne Francoeur (also representing the BCGEU)
> * Irma de la Verde, Labour Relations Officer with the BCNU
> * Margo Wilton, South Island Co-Chair for BCNU
>
> *Jenny and Irma have been representing their respective unions in discussions with Ken Gower of BCS [Broadmead] and the Public Service Agency of the Provincial Government to consult on the terms and conditions of employment which will apply to Nigel employees who accept employment with BCS.*
>
> *I want to reassure you that BCS is confident that the Nigel program will be consolidated into BCS and that this will occur, subject to anything unforeseen, by no later than early January 1, 2011. All other key stakeholders are supportive and have provided approvals where required*:
>
> * VIHA has approved the assignment of Nigel's contract to BCS.
> * We are working with BC Housing to transfer Nigel's properties and operating agreements.
> * The Ministry of Health Services has provided their approval. We have also had very positive support from the BCNU and BCGEU.
>
> Discussions with the BCGEU and BCNU have progressed favourably. A further separate meeting with each of the unions is scheduled Oct 1. BCS is cautiously optimistic that at the Oct. 1 meetings agreement may be reached on the substantive issues. The following is the status of a number of key issues which have been discussed: (emphasis added, underlining in original)

63 The September 22 Memorandum then detailed the status of a number of issues applicable to employees of Broadmead.

64 The September 22 Memorandum was followed by another memorandum to Nigel's employees dated October 8, 2010. Again the communiqué bore Nigel and Broadmead logos. It was sent in response to unattributed "communications" about the consolidation of programs. The message reads in part as follows:

> As mentioned at the September 22 staff meeting, I wish to reinforce that Nigel employees will continue to be represented by your current unions and covered by your existing terms and conditions of employment until Nigel dissolves. We respect the unions' roles in representing Nigel staff until December 31, 2010 and wish to work together in good faith regarding employment related matters. We will continue to respond in a timely manner to any concerns from your union representatives about the appropriate application of your collective agreements.
>
> However, I also must reiterate that the issue of which union will represent Nigel employees who choose to accept employment with BCS, once Nigel Society dissolves, will be in accordance with the Public Service Labour Relations Act which is the legislation which applies to Broadmead Care Society as the employer under the Public Service Act. The unions that currently represent Broadmead Care Society employees (BCGEU and BCNU) will represent former Nigel Society employees who accept employment with BCS. Therefore, it is our hope that we will be able to work collaboratively with the existing unions during the next 2-3 months to ensure a smooth and supportive transition process for staff.

65 On October 15, 2010, Local 1611 filed its complaint under Sections 6(1), 6(3)(d), 9 and 54 of the Code.

66 The submissions indicate that a number of Nigel's employees accepted employment with Broadmead effective January 1, 2011. A number of Nigel's employees did not continue employment with Broadmead.

67 Nigel and Local 1611 agreed that the fact employees accepted employment with Broadmead did not prejudice their rights.

68 I now turn to the unfair labour practice complaints.

69 Local 1611 contends that Nigel contravened Section 6(1) of the Code by telling employees they would be represented by the BCGEU as a result of the Transfer. Local 1611 says that Nigel threatened loss of employment if employees seek representation by Local 1611. I do not see any credible basis to support that claim on the submissions before me.

70 The unfair labour practice complaints stem from confusion about the presumptive state of affairs and the unions' respective roles as exclusive bargaining agents. The BCGEU and BCNU are the exclusive bargaining agents for the units employed by Broadmead. The statutory regime left no room for Local 1611 to represent its members under those collective bargaining relationships. In fact, Broadmead would have contravened Section 6(1) of the Code had it dealt with anyone other than the BCGEU or BCNU in negotiating terms of employment for new employees of Broadmead. Thus, Nigel did not breach Section 6(1) by inviting representatives of the BCGEU and BCNU to talk to its employees about the terms under which Broadmead would offer them employment. That was not a matter within the scope of Local 1611's exclusive bargaining agency. It was a matter that fell under the bargaining relationship between Broadmead and its certified unions.

71 Further, it was not an act of coercion for Nigel to communicate its position that Local 1611 would not have bargaining rights with Broadmead. It must be noted that Nigel had communicated that position to Local 1611. This is not a case where Nigel sidestepped Local 1611 regarding matters within the scope of Local 1611's exclusive bargaining agency.

72 The authority to make offers of employment and the timing of those offers resided with Broadmead. That was

not a matter for Nigel to dictate, nor was it an act of coercion for Nigel to tell its employees Broadmead planned to offer them employment. I see no basis to find that Nigel contravened Sections 6(3)(d) or 9 of the Code by telling its employees Broadmead would hire some but not all of them to work at the Facility.

73 Finally, and on a completely independent note, I add that Nigel did not have the authority to act on Broadmead's behalf in concluding changes to the BCGEU's collective agreement. Section 1 of the PSLRA defines a collective agreement as a "duly executed written agreement between the bargaining agent for the government and a bargaining agent for a bargaining unit containing provisions respecting the terms and conditions of employment of employees, including rates of wages or salary, hours of work or other working conditions of employees". Section 3 of the PSLRA provides that the bargaining agent is the PSA.

C. Claims under the Nigel-Local 1611 Collective Agreement

74 Local 1611 requested declarations regarding access to arbitration for so-called *Verrin* rights. As I understand it, the rights at issue are found under Local 1611's collective agreement with Nigel. Those rights arise in connection with Nigel's decision to close down and layoff its employees.

75 The Board's policy is to defer to arbitration the resolution of disputes arising under a collective agreement: *Repap Carnaby Inc.*, BCLRB No. B31/94, *(1994), 22 CLRBR (2d) 100*. I see no basis for an exception in the present case. The question of whether employees have legitimate grievances against Nigel, the appropriate time period for exercising those rights or whether grievances are timely, are all matters an arbitrator is well situated to decide. That is also the case regarding the impact, if any, of an agreement between Nigel and Local 1611 about the consequences of accepting employment with Broadmead.

76 Nor do I see a reason for the Board to intervene based on an argument the Nigel-Local 1611 collective agreement is no longer in force. The cancellation or expiry of a collective agreement does not necessarily end access to arbitration. In *Weston Bakeries Limited - Boulangeries Weston Limitee*, *[1996] B.C.L.R.B.D. No. 12*, BCLRB No. B12/96 (Reconsideration of BCLRB No. B32/95, *[1995] B.C.L.R.B.D. No. 30*), the Board summarized the Supreme Court of Canada's decision on this point in *Dayco (Canada) Ltd.* v. *National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (1993), 102 DLR (4th) 609* (SCC):

> First, in *Dayco* the Supreme Court held that rights which accrue to employees during the life of a collective agreement can constitute vested rights which do not automatically become extinguished upon expiry of the collective agreement. Second, the Supreme Court drew a distinction between the accrual of the right to payment of a benefit and the triggering of the obligation to make payment. The Supreme Court held that where accrued or vested rights are concerned, the obligation to make payment may not be triggered until another event occurs, and that event may not occur until after the collective agreement has expired. *In each case, the answer to these questions turns on the proper interpretation of the parties' collective agreement.* (para. 29, emphasis added)

77 In my view, arbitration is the appropriate forum to decide the arbitrability of Local 1611's claims under its collective agreement with Nigel.

D. Orders against Broadmead and the BCGEU

78 Local 1611 also asked the Board to order Broadmead and the BCGEU to disclose to Local 1611 all terms agreed between those parties with respect to all job benefits/entitlements etc. to which the former Nigel employees would be entitled under their continuing employment with Broadmead. The Board does not have the jurisdiction to award remedies in the absence of a contravention: Section 133(1). I find no basis to conclude Broadmead or BCGEU contravened the Code. Nor am I satisfied those documents serve to prove or disprove a fact(s) material to the issues at hand. Therefore, that application is denied.

E. Section 35(5) Time Extension

79 Local 1611 also seeks a declaration that it has a further 30 day period in which to seek a determination under Section 35(5) as to what rights (such as seniority) continue to exist under the collective agreement between

Broadmead and the BCGEU. The Code does not put a specific time limit on such applications and I do not find there is any basis to impose one in this case.

80 Broadmead and the BCGEU have indicated they will listen to Local 1611's concerns. The Board will assist in providing mediation services if an agreement cannot be reached.

F. Costs

81 Local 1611 also seeks an order for costs. I conclude there are no exceptional and compelling circumstances to justify an order for costs: *Allan Kelland*, BCLRB No. 419/93 (Reconsideration of IRC No. C248/92, *[1992] B.C.L.R.B.D. No. 249*, and BCLRB No. 101/93, *[1993] B.C.L.R.B.D. No. 123*), *(1994), 21 CLRBR (2d) 254*. The application for costs is denied.

IV. CONCLUSION

82 Local 1611's applications are denied for the reasons given above.

KEN SAUNDERS
VICE-CHAIR

End of Document

British Columbia (Re)

British Columbia Labour Relations Board Decisions

British Columbia Industrial Relations Council

Panel: V.A. Pylypchuk, Vice-Chairman

October 26, 1989

No. C225/89

[1989] B.C.L.R.B.D. No. 224

Between British Columbia Government Employees' Union (the "Union"), and The Government of The Province of British Columbia (the "Government")

Counsel: David Blair for the Union Don Jordan for the Government

---

I

This matter concerns an application pursuant to Section 39(1) of the Industrial Relations Act (the "IRA") for certification of a bargaining unit consisting of "internal auditors working at and from 3284 East Broadway, Vancouver, B.C.". These employees perform internal auditing functions in the Liquor Distribution Branch of the B.C. Government.

The Government objects to the application on the ground that internal auditors do not have access to collective bargaining by virtue of their exclusion from the definition of "employee" under Section 1(1) of the Public Service Labour Relations Act (the "PSLRA"). The Union resists this objection on the ground that although internal auditors may be excluded from collective bargaining under the PSLRA, they nevertheless have access to collective bargaining under the IRA. It is common ground between the parties that the internal auditors who are the subject of the application are appointed to their positions under the Public Service Act (the "PSA"), and fall within the exclusion in the definition of "employee" contained in Section 1(1) of the PSLRA.

II

The Government characterizes the issue as whether or not a person who is an employee of or engaged by the Government has access to collective bargaining under the IRA when excluded from the PSLRA. The Government says in order to address this issue, it is necessary to understand the relationship between three statutes: the PSLRA, the IRA, and the PSA. With regard to the PSLRA, the Government invites the Panel to review the report and recommendations of the Commission of Inquiry Into Employer/Employee to inconsistencies. Consequently, when regard is had to Section 26 of the PSLRA, it is clear that the IRA cannot possibly apply.

Moreover, says the Government, the bargaining rights of employees who do have the right to bargain are restricted. These restrictions are contained in Section 13 of the PSLRA and they indicate that the subject matter of bargaining is limited. More importantly, the Government qua employer is not obliged to bargain regarding matters outside the limitation of Section 13. To allow access to collective bargaining under the IRA would defeat the Government's preferred position in this regard.

The object of all of these restrictions both in terms of circumscription of those with whom the Government is obliged to bargain and with respect to the content of what is bargainable, is to minimize disruption in the public service. Consequently, only the three groups identified in Sections 4(a), (b) and (c) of the PSLRA have access to collective bargaining with Government qua employer.

The Government relies on a number of authorities in support of its position. In these authorities, the Government says, the Panel will find more than a passing reference to the Higgins Report as well as a determination of what constitutes inconsistency between the IRA and the PSLRA. The Government refers to the Government of the

Province of British Columbia and the British Columbia Government Employees' Union, BCLRB No. 7/74 which was the first certification under the PSLRA. In that case, the Labour Relations Board (the "Board") stated:

> ...The language of Section 4(c) is clear and unequivocal.
>
> The Legislature plainly contemplated that a single
>
> bargaining unit would represent all employees in the public
>
> service save the professionals described in Sections 4(a)
>
> and (b).
>
> (at 6)

The Government says that this statement supports the proposition that employees who want to bargain with the Government qua employer, must bring themselves within one of the three bargaining units described in Section 4 of the PSLRA. The Government qua employer is not obliged to bargain collectively with anyone outside of the scope of Section 4. Putting this together with the definition of employee under the PSLRA, which excludes internal auditors, leads to the inescapable conclusion that internal auditors cannot bargain collectively with the Government.

For further support for this proposition, the Government relies on Inter Provincial Power Engineers Association, BCLRB No. 32/74. In that case, the union applied for certification for a group of professional power engineers under the PSLRA and in the alternative, under the then British Columbia Labour Code (the "Labour Code"). The argument that the subject employees could, in the alternative, be considered employees under the Labour Code was dismissed by the Board. This, says the Government, proves that an employee cannot be included under the IRA if excluded by the PSLRA.

The Government also submits the case of British Columbia Government Professional Employees' Association and The Public Service Commission and British Columbia Government Employees' Union, BCLRB No. 166/74; and the case of Public Service Commission, BCLRB No. 45/75 (the "Queen's Printer Case"), as examples of the relationship between the PSLRA and the IRA demonstrating that the two schemes of bargaining are totally inconsistent. The Government invites the Panel in reading these cases to refer to the Higgins Report. Further, the Government says that the case of Government Employee Relations Bureau and British Columbia Government Employees Union, BCLRB No. 10/77 demonstrates the obverse situation where there is no inconsistency between the two Acts and where the then Labour Code was found to be applicable to public service employees.

According to the Government, the point is best made in the case of Narcotic Addiction Services of Vancouver Resource Board, BCLRB No. 7/77. In that case, a group of employees was transferred from the Vancouver Resources Board to the Department of Health. These employees attempted to import under the successorship provision in Section 53(1) of the Labour Code, their private sector collective agreement into the public sector. The Board held that because of the completely inconsistent schemes of bargaining under the PSLRA and the Labour Code, there was no possibility of importing the collective agreement into the public sector. Although there was no explicit inconsistency in that case, the Government says the decision establishes that one must look at the whole scheme of bargaining to decide whether a provision of the IRA is inconsistent with the PSLRA. Clearly, says the Government, it is not obliged to bargain collectively outside the limits set out in Section 13 of the PSLRA, nor can there be any more collective agreements than specified in Section 11 of the PSLRA. If, in that case, the collective agreement had been imported, then the Government would have had to bargain collectively about matters which the Legislature had excluded, and there would have been in existence an agreement not contemplated in Section 11. This would have been an impossible result.

Finally, the Government also relies by analogy on three School Act cases in support of its proposition that the PSLRA is definitive with respect to bargaining units in the public service. Likewise, the PSLRA sets the limits for collective bargaining in which the Government qua employer is obliged to engage. For this reason, the only access to a collective agreement with the Government qua employer is by means of the kind of agreement specified by the PSLRA.

The Government concludes by saying that if the Union's argument is accepted, the Government qua employer would be obliged to bargain with thirty or more potential bargaining units not contemplated by the Legislature, the Government qua employer would be obliged to bargain on matters the Legislature intended to exempt under

Section 13 of the PSLRA, and the number of collective agreements which the Government qua employer would have in the public service would exceed those enumerated under Section 11 of the PSLRA.

The Union takes the position that persons who are employees under the IRA have a right to representation under that Act. The Union invites the Panel to apply the IRA's definition of employee, in view of the IRA's declaration under Section 2(1) of the freedom of employees to join the union of their choice. The Union says there is no basis for the Government's argument and that therefore the primacy of the rights of employees under the IRA should be recognized.

The Union says that the exclusion from statutorily mandated bargaining under the PSLRA is not exclusion from collective bargaining. The Union invites the Panel to review the Higgins Report with a view to the legislation that resulted from it, and says the recommendations of the Higgins Report are reflected in the PSLRA. The Union discounts the Government's focus on the concept of collective bargaining as defined by the PSLRA, because it argues the Government ignored the subtle differences between the definitions under the PSLRA and the IRA. The Union submits that an employee under the PSLRA in a PSLRA bargaining unit is entitled to public service Government bargaining rights. However, the bargaining unit as defined in the PSLRA is different than that defined in the IRA. For example, the bargaining unit as defined in the PSLRA includes managers and employees involved in a confidential capacity who would be excluded on that basis under the IRA. The PSLRA, Section 12, leaves it up to the parties to determine those managers and confidential employees whom they wish to exclude from the bargaining unit. The exclusions specified in the definition of employee under the PSLRA Section 1(1) are not necessarily managers or confidential people. The rationale for exclusions under that Section is clearly different than the basis for exclusion under the IRA. The Union submits, however, that the definition of employee under the PSLRA does exclude some people who would be managers or confidential exclusions per the definition in the IRA. Those people would ultimately be denied bargaining rights under the IRA. Other than those few exceptions which the Union recognizes, all others would meet the definition of employee under the IRA. Therefore, says the Union, there is no inconsistency between the two collective bargaining regimes.

The Union submits that Government employees outside the PSLRA boundary remain entitled to IRA representation. Where there are IRA employees excluded by Section 4 of the PSLRA, the Council has a duty to certify those employees pursuant to the IRA. That, says the Union, is the consequence of the finding in the Queen's Printer Case, supra, upon which the Union relies heavily. In that case, the Board said:

> Finally, it seems to be implicit in the positions taken by
>
> the B.C.G.E.U. and the Commission that the act of
>
> appointing these persons to clerical positions within the
>
> Public Service of British Columbia had somehow rendered
>
> them ineligible for inclusion in any other bargaining unit
>
> but that for which the B.C.G.E.U. is certified. I must say
>
> I can find no authority at law to support this proposition. (at 2)

The Union says employees excluded from the PSLRA such as Queen's Printer employees, who were employees as defined under the Labour Code, were entitled to representation under the Labour Code. The Union argues this is a historically sensible arrangement.

The Union suggests that under the definition of employee in PSLRA Section 1(1), (b) and (d) excluded professionals are entitled to representation under the IRA. The Union further suggests that employees excluded from the definition of employee in PSLRA Sections 1(1)(j) and (l), including employees of the Queen's Printer are likely to be entitled to representation under the IRA. The Union says that the Higgins Report fully supported this proposition and found it historically acceptable that public servants have bargaining rights under the Labour Code.

The Union dismisses the Government's reliance on Narcotic Addiction Services of Vancouver Resource Board, supra, by pointing out that the inconsistency in that case arose because the employees who entered Government service as a result of the successorship fell within the definition of a bargaining unit under Section 4(c) of the PSLRA. Once having met the definition under the PSLRA one cannot, at the same time, meet the definition under

the IRA because then there would be an inconsistency as contemplated under Section 26 of the PSLRA. But that would not preclude a person from meeting the definition of employee under the IRA if he or she is excluded from the definition of employee under the PSLRA.

The Union suggests that the rationale for excluding internal auditors from the definition of employee under the PSLRA is that they would be involved in administration of procedures to prevent and detect theft by other employees. Consequently, the rationale that they ought not to be in the same bargaining unit as employees whom they are auditing makes sense. The statutory interpretation urged to permit these employees to be in a bargaining unit represented by a Union certified under the IRA is consistent with this rationale, and consistent with the decision of the IRC in The Greater Victoria Hospital Society, IRC No. C283/88, reconsideration of BCLRB No. 75/87. In that case the Panel, in its discussion of exclusions and the resulting denial of collective bargaining, stated:

> Such exclusions are, however, to be applied restrictively.
>
> As noted in The Corporation of the District of Burnaby,
>
> supra, it is a serious matter to find that a non-managerial
>
> employee is excluded from collective bargaining. The
>
> exclusion of "employees" whose duties put them in conflict
>
> with their fellow employees should be narrowly interpreted
>
> to include only those who are closely aligned with the
>
> management team.... (at 13)

In that case, it was held that the fire security officers can be certified under the IRA and are not to be excluded from collective bargaining. The Union says it is a sensible labour relations policy to exclude internal auditors from the very large unit which they monitor. That labour relations policy, submits the Union, is reflected in the definition of employee in the PSLRA. Nothing in that definition, however, detracts from the rights of those employees under the IRA.

The Union argues that the restrictions in Sections 11 and 13 are of no relevance. Those restrictions apply to employees who are included under the PSLRA in Section 4, not to those who are not. The Union says there are other employees such as B.C. Hydro employees who are covered by the IRA who also have statutory restrictions in bargaining, for example, in respect of pensions. Consequently these provisions are of no interpretive assistance with respect to the issue before the Panel.

The Union says many employees in the public sector have rights under the IRA, including employees in B.C. Hydro, the Queen's Printer, and others. It makes no difference whether people are appointed under the PSA or not, because they are still paid by the public purse and they are still public servants. The Government is wrong to suggest the Queen's Printer employees were not employees of the Government.

The Government responds that the Queen's Printer Case, supra, is clearly distinguishable on the very fact that the employees excluded under the PSLRA Section 1(l) were not appointed by or employed by the Government qua employer. They were employed by a separate employer. Consequently, the Government says that case was the exception that proves the rule and is of no assistance to the Union. The list of exclusions from the definition of "employee" contained in the PSLRA Section 1(1) is a "mixed bag". However, it submits that without doubt employees of the Government qua employer, but for their exclusion, could only bargain collectively with the Government qua employer under the PSLRA. Once they are excluded from the PSLRA, they obtain no additional or greater inconsistency as set out in Section 26 of the PSLRA which essentially does not address the question of scope. The Union on the other hand, in its equally able response, discounted the arguments of the Government by pointing out that the Section 26 inconsistencies lie within the four corners of the PSLRA and its applicability to employees, who under that Act do have bargaining rights. The Union said that the inconsistencies do not apply to employees who are excluded from the definition of "employee" under the PSLRA. The Union, after discounting the inconsistency theory, went on to argue from the premise that if one is excluded from the PSLRA, one is automatically included in the IRA by a literal reading of the definition of "employee" in the IRA. Therefore, the Union also did not address the question of scope.

Normally one would begin interpreting a statute by looking at the grammatical and ordinary sense of the words used. Here the application for certification is brought pursuant to Section 39(1) of the IRA and therefore the departure point would be a literal reading of the IRA. Indeed, the Union invites the Panel to do just that.

In this instance, the plain and ordinary meaning of the words "employer", "employee", and "person" as used in the IRA are so broad so as to, at first blush, encompass the Government and all of its employees in the broadest sense, whether or not they are covered by the PSLRA. There is no specific provision in the IRA stating that it does not apply to Government employees or to persons under the PSLRA. The only exclusion on the basis of statute are those persons covered by the Canada Labour Code. Such a broad interpretation based on a plain reading of the IRA would enable employees, even if covered by the PSLRA, to elect to unionize under the IRA. This would render the PSLRA entirely redundant which is, of course, absurd.

The "Golden Rule" of interpretation requires that where a literal interpretation would lead to an absurdity, something more must be examined in order to determine the true intention of the Legislature (Vacher Sons Ltd. v. London Society of Compositors, [1913] A.C. 107 (H.L.)). Since the predecessors of the IRA and PSA were in existence for some time prior to the enactment of the PSLRA fifteen years ago, one interpretive device permitted by the "Golden Rule" is to consider the relationship between these Acts in their historical context. As Fletcher Moulton L.J. said in MacMillan v. Dent, [1907] 1 Ch. 107 at 120 cited in Craies on Statute Law (Sweet & Maxwell London, 1971) at p. 96:

> In interpreting an Act of Parliament you are entitled, and in many cases bound to look to the state of the law at the date of the passing of the Act; not only the common law but the law as it then stood under previous statutes, in order to properly interpret the statute in question.

An historical approach was adopted by Chief Justice Laskin in a concurring opinion while resolving a problem of the relationship between the Public Service Staff Relations Act ("PSSRA") and the Canada Labour Code ("CLC") in Canada Labour Relations Board and Public Service Alliance of Canada v. City of Yellowknife (1977, *77 CLLC 14,073*). Chief Justice Laskin stated as follows:

> ...[V]iewing Part V of the present Canada Labour Code, 1972
>
> (Can.) c. 18, s. 1 historically, and looking at the
>
> interlocking effect of ss. 108 and 109 of that Code,
>
> covering both the private sector and public sector, the
>
> latter either under s. 109(1) or under the Public Service
>
> Staff Relations Act, R.S.C. 1970, c. P-35, it would be
>
> incongruous to declare a gap in the application of
>
> collective bargaining advantages to employees who are
>
> employed by a municipality in the Northwest Territories.... (at 14,617; emphasis added)

Both parties recognized the need to look to more than just the IRA to resolve this issue as well as the validity of an historical approach in urging the Panel to refer to the Higgins Report. It is well established that such a report may be used to determined the mischief which the Legislature sought to cure by the enactment of legislation. In Laidlaw v. The Municipality of Metropolitan Toronto, *[1978] 2 S.C.R. 736* at 743, Mr. Justice Spence speaking on behalf of the Court quoted with approval BlackClawson International Ltd. v. Papierwerke Waldhof-Aschaffensburg AG, [1975] 1 All E.R. 810 (H.L.) per Lord Reid at p 814:

> But the principle is that if the enactment is ambiguous,
>
> that meaning which relates the scope of the Act to the
>
> mischief should be taken rather than a different or wider
>
> meaning which the contemporary situation did not call for.
>
> The mischief which this Act was intended to remedy may have
>
> been common knowledge 40 years ago. I do not think that it

> is today. But it so happens that a committee including many eminent and highly skilled members made a full investigation of the matter and reported some months before the Act was passed. I think that we can take this report as accurately stating the "mischief" and the law as it was then understood to be, and therefore we are fully entitled to look at those parts of the report which deal with those matters.
>
> (at 743; emphasis added)

That approach may be summarized as the "purpose" or "mischief" approach to statutory interpretation. What then was the state of the law and the mischief, if any, to be cured in 1973? The Higgins Commission (the "Commission") was appointed to look into employer/employee relations in the public service in the Province of British Columbia. In the Higgins Report, the Commission described the then "current scene", the public servants that were the object of its inquiry, and ultimately the mischief which it was required to address. The Higgins Report says:

Wages, salaries and working conditions in the public service of British Columbia are determined unilaterally by the Lieutenant-Governor in Council. Such decisions are usually made following the receipt of recommendations from the Civil Service Commission which has the statutory responsibility under the Civil Service Act and Order-in-Council 2204/67 to review employee representations on "...matters affecting the general welfare and conditions of employment".

> ...
>
> ...[T]he present system is a very poor substitute indeed for real collective bargaining. The present system has been most aptly described by the former Chairman of the Civil Service Commission as "legal paternalism".
>
> ...
>
> La Reine ne negocie pas (The Queen does not negotiate) is the classic statement of the principle of sovereignty. It was from this principle that those who opposed collective bargaining in the public service drew theoretical sustenance. They relied upon the orthodox position on sovereignty that maintains that government has the sole authority to govern and that this authority cannot be given to, taken by, or shared with anyone.
>
> The orthodox position on sovereignty permitted only the government to establish terms and conditions of employment. Clearly, genuine collective bargaining is incompatible with such a position....
>
> ...
>
> ...[T]his denial of basic rights to provincial government employees had led to deleterious side effects. Relationships between the government and the major organizations representing provincial employees were not as constructive or as meaningful as they should have been. Furthermore, there was quite clearly a degree of hostility felt by a number of major employee groups towards their employer that could in no way be considered in the best interest of the people of the province. Virtually all of this discontent and ill will could be traced directly to the annoyance on the part of the employees and their organizations that they were being denied fundamental rights enjoyed by all other workers in the province.
>
> ...
>
> At the outset of its deliberations, the Commission of Inquiry had to determine the meaning intended by the term

> "public service" in its terms of reference. The Commission concluded that collective bargaining existed in the major Crown agencies of the British Columbia Hydro and Power Authority and the British Columbia Railway and, as such, these jurisdictions should be excluded from its inquiry. Clearly, then, the Commission's main concern was with the approximately 31,000 employees holding appointments under the Civil Service Act who are engaged in a variety of tasks within the departmental structure of government and who do not have the right to bargain collectively.... (at 2, 3, 6, 7, and 11)

The Commission found that collective bargaining was a complex process which had been developing in the private sector in the Province of British Columbia for a number of years. In that context, the Commission considered certain agencies established by the Government but which operated independently from the Government. The Commission felt that such agencies which operate on a profit and loss basis or which are funded externally and which hire staff independently ought to be permitted collective bargaining pursuant to the Labour Relations Act. At that time, employees of the Queen's Printer, B.C. Hydro and B.C. Rail, had already achieved that goal.

The Commission, in noting the Queen's Printer situation, as well as that of the B.C. Hydro and Power Commission and B.C. Rail, recognized a disparity in the public service. Some public servants had collective bargaining rights while the vast majority did not. Whether or not public servants were entitled to bargain collectively depended on the characterization of the particular employer in the public service. Where the Government qua employer was exercising its Crown prerogative, public servants were denied access to collective bargaining. Where the "Government" was a Crown agency or a Crown corporation or an entity of the Crown exercising an independent right to employ, whether mandated by statute or whether exercised in its own independent capacity, employees acquired private sector bargaining rights even though they were, in the broadest sense, public servants.

The notion of being able to characterize the Crown or the Government as somehow distinct from its own agencies or emanations operating independently from it has long been recognized in law. This point was made in Craies on Statute Law, at p. 424:

> In 1949, Denning L.J. (now Lord Denning) held that the property of the British Transport Commission was not Crown property although controlled by the Minister of Transport and that its property was subject to the Rent Restrictions Acts. "In considering whether any subordinate body is entitled to this Crown privilege the question is not so much whether it is an 'emanation of the Crown' but whether it is properly to be regarded as the servant or agent of the Crown. When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly as it did in the case of the Central Land Board by the Town and Country Planning Act 1947. In the absence (as here) of any such expressed provision, the proper inference, in the case at any rate of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department."

This synopsis of affairs as they existed in 1972 leads this Panel to conclude that the state of the law at the inception of the PSLRA was as follows. Collective bargaining in the private sector had been developing for a number of years. Employees in the private sector had access to collective bargaining pursuant to the Labour Relations Act, which was the predecessor to the Code. Public servants, on the other hand, had no access and were not covered by the Labour Relations Act. Moreover, the employer of public servants, the Crown in right of the Province of British Columbia, i.e. the Government qua employer, was also not covered nor bound by the Labour Relations Act and therefore not the subject of any statutory compulsion under that Act to engage in collective bargaining. The Government, based on the principle of sovereignty, exercised its right to unilaterally set wages and terms and conditions of employment for public servants. This right was, by and large, declared in the Civil Service

Act, RSBC 1960 Chap. 56, which was the predecessor of the PSA. However, B.C. Hydro and Power Authority, a Crown agency, was directed by the Legislature by its enabling statute into the fold of the Labour Relations Act. There were other agencies of the Government which operated independently, such as B.C. Rail and the Queen's Printer, the employees of which had also obtained collective bargaining rights pursuant to the Labour Relations Act.

The mischief to be remedied was the Government qua employer's use of its Crown prerogative to unilaterally set terms and conditions of employment, thereby denying the right to engage in collective bargaining to those public servants who were neither entitled by statute to bargain collectively under the Labour Relations Act, nor employed by agencies of Government acting in an independent capacity. The Legislature, in remedying the mischief identified by the Commission, did not elect to amend the private sector legislative scheme to encompass the Government qua employer. The Commission recognized, at page 2 of the Higgins Report, that the difficulty facing the Legislature was, "...that there are differences between employer/employee relations in the public and private sectors. These differences...caution against adopting, unchanged, the private sector bargaining practices in order to cope with the peculiar problems associated with Government employment...", and at page 4, "...should there be a special statute to govern collective bargaining and if so, what should it cover?" The Legislature elected to address this mischief by passing into law a special Act, the PSLRA.

This Panel concludes that by enactment of a special statute the Legislature intended to proceed cautiously in extending compulsory collective bargaining to Government. A careful reading of the PSLRA reveals that this caution is exemplified by the circumscription of the number of bargaining units, the numbers and types of collective agreements, and the scope of what is bargainable. All of the Government's arguments with respect to provisions and limitations in the PSLRA support both this notion of a cautious approach, and the view that the Legislature intended to expose the Government qua Employer to collective bargaining only in a limited way, the scope of which was entirely contained in the PSLRA.

An equally careful reading of the Labour Code which was enacted contemporaneously with the PSLRA, reveals that no changes material to this issue were made to the definition of "employer" or "employee" as previously found in the Labour Relations Act nor was the addition of the definition of "person" significant. Given that the Government qua employer was not subject to the Labour Relations Act, as clearly evident from the Higgins Report, and given that no material changes relative to this issue occurred upon the enactment of its successor the Labour Code contemporaneously to the passage of the PSLRA, this Panel concludes that the Government qua employer was thus no more subject to the Labour Code following the passage of the PSLRA and the Labour Code than it had been subject to the previous Labour Relations Act. This Panel concludes that the Legislature in its cautious approach to extending compulsory collective bargaining, made the Government qua employer compellable to bargain collectively only within the framework of the PSLRA with a union representing those employees defined therein, who hitherto had no collective bargaining rights, nor had any potential of obtaining them under the private sector legislation. Thus it is only PSLRA that addresses the mischief identified in the Higgins Report, and only to the extent specified in the provisions. The scope of the private sector scheme under the Labour Code was, and continues to be, limited to the "private sector" as it had been under the Labour Relations Act.

This Panel further concludes that as a result, there are two mutually exclusive collective bargaining regimes in the Province of British Columbia today. The first, under the umbrella of the IRA, successor to the Labour Code, can be loosely termed private sector but includes some public sector employees. The second regime governs the public service in the truest sense and brings under compulsion of statute, the Government qua employer. That second regime, contained in the PSLRA, incorporates the IRA by virtue of Section 26. The IRA as incorporated by the PSLRA takes on the character of the latter when applied in that statutory regime (Township of Goulbourn et al v. Regional Municipality of Ottawa-Carleton et al *(1979), 101 D.L.R. (3d) 1*). The Union is thus correct in its submission when it says Section 26 only applies to those inconsistencies between the IRA and the PSLRA which arise by virtue of the application of the IRA to employees who are, in fact, included in collective bargaining under the PSLRA, Sections 4(a), (b) and (c). This Panel concurs with the Union's interpretation of this point. However, that particular view is of no assistance to the Union because it confines the scope of the IRA's applicability to the Government qua employer within the framework of the PSLRA. By implication, and as the Panel has already concluded, the scope of the IRA standing alone does not encompass the Government qua employer.

In defining "employee" under the PSLRA, the Legislature began by including more than simply those public servants who hitherto had no bargaining rights. The Board in Robert Enoch and the Public Service Commission,

BCLRB 24/76 recognized this at page 10 of that decision, "...the legal net was cast much wider by the actual language used in the statutory definition of 'employee' [in the PSLRA]."

But in so doing, the Legislature did not intend to erase the rights of those public servants who already bargained collectively in the private sector as described in the Higgins Report. There was no mischief which needed to be cured with respect to these public servants who bargained under the Labour Relations Act, the successor Labour Code and continue to bargain today under the umbrella of the IRA. This intention was manifested when the Legislature excluded them from that broader legal net thus narrowing the focus and the scope of the PSLRA.

The Union latches onto this fact and says if these employees by virtue of their exclusion come under the umbrella of the IRA, then all the exclusions must come under that umbrella subject to any exclusions that are found in the IRA. This thesis turns on the erroneous assumption that it is the act of exclusion from the PSLRA which creates rights under the IRA which flows in part, from an effort to isolate a common denominator amongst those exclusions. The common denominator to which the Union's argument is directed is the right to bargain collectively under the IRA, i.e. if some public servants who bargain under the IRA are excluded from the PSLRA, then all who are excluded from the PSLRA must be able to bargain under the IRA. However, the Board equally recognized in British Columbia Government Professional Employees' Association and Public Service Commission, BCLRB No. 166/74 at page 8, that some of the exclusions from the definition of "employee" in the PSLRA were intended to preclude collective bargaining altogether. In that decision the Board held:

> First of all, in the definition of "employee" in Section 1 of the Public Service Labour Relations Act, government lawyers are excluded by this wording: "a person qualified under the Legal Professions Act...who is engaged and working in the practice of such profession." Almost exactly the same language is used in the Labour Code in its general exclusion of professionals from the scope of collective bargaining:
>
> > "employee" means a person employed by an employer, and includes a person engaged in police duties, and a dependent contractor included in an appropriate bargaining unit under section 48, but does not include a person who, in the opinion of the board,
> >
> > ....
> >
> > (iii) is qualified in a profession, trade, or calling and is licenced under the Architectural Profession Act, Chartered Accountants Act, Chiropractic Act, Dentistry Act, Engineering Profession Act, Insurance Act, Land Surveyors Act, Legal Professions Act, Medical Act, Naturopathic Physicians Act, Optometry Act, Podiatry Act, Real Estate Act, Securities Act, 1967, or Veterinary Medical Act, or is an enrolled student under any such Act, and is engaged and working in the practice of such profession, trade, or calling;
>
> In each provision, by contract with Section 4 of the
>
> P.S.L.R.A., the statute made it clear that it was referring
>
> only to those licensed professionals who were actually
>
> practicing their profession. The need for the Legislature
>
> to be explicit on that point was brought home by the
>
> decision of the B.C. Court of Appeal in Scotton and Office
>
> and Technical Employees Union, Local, Local 378 *(1974) 39 DLR (3d) 392*
>
> . In that case, dealing with the somewhat
>
> different wording in the predecessor Labour Relations Act,
>
> the Court held that a student engineer was excluded from
>
> the statute though he was not doing engineering work in his
>
> job. That decision was issued on June 12, 1973. It led to
>
> the revised wording, quoted earlier, of the professional

> exclusion in the new Labour Code which was enacted at the Fall 1973 session of the B.C. Legislature. The same language was inserted in the Public Service Labour Relations Act to exclude lawyers in the public service from collective bargaining.... (at 8-9; emphasis added)

Consequently, the common denominator which the Union says is present, is really not there.

There is, however, another common denominator that is present, which the Commission identified in the Higgins Report as separating most public servants who had no bargaining rights at all, and those others that did acquire bargaining rights under the then Labour Relations Act, and which the Government says is the focus of its case namely: the characterization of the Employer. All of the exclusions from the definition of "employee" in the PSLRA are precluded from collective bargaining with the Government qua employer. The term Government qua employer is used in the narrower sense excluding those agencies of Government which act in an independent capacity in hiring employees or which by enabling statute, are covered by the IRA.

The Panel concludes that this distinction continues to be key. It must be remembered that the object of certification is to enlist the aid of statutory compulsion to bring an employer to the bargaining table. Employees cannot obtain collective bargaining representation under a statute which does not apply to their employer. Where the Government qua employer is under the umbrella of the PSLRA and where certain independent agencies of Government fall under the umbrella of the IRA, so that "public service" in the broad sense of the term spans both statutory regimes, the identification of the Employer becomes critical in determining under which scheme a union representing a particular group of public servants can compel their particular employer to bargain. Similarly, the characterization of the Employer becomes critical in determining whether a particular exclusion under the PSLRA is denied collective bargaining altogether because it is employed by Government qua employer which is only compellable under the PSLRA, or whether a particular exclusion has the ability to belong to a union certified under the Industrial Relations Act because he or she actually works for another kind of employer, albeit an agency of the Crown acting in an independent capacity as an employer. In other words, all exclusions under the PSLRA are precluded from having a union bargaining on their behalf with the Government qua employer under the PSLRA. But some, who are not employed by the Government qua employer, may well be able to compel their particular employer to bargain through union representation under the IRA.

That is indeed the pivotal point of the Queen's Printer case. In that case, the Queen's Printer acting in its independent capacity, hired employees who were represented by printing unions certified under the Labour Code. The Legislature in enacting the PSLRA recognized this historical fact and it excluded those employees from the definition of "employee" in the PSLRA. However, the Legislature reserved to the Government the right to hire clerical or administrative staff for the Queen's Printer under to the PSA. The Government then proceeded to hire five employees purportedly as such clerical or administrative staff, but who, in actual fact, were no different than employees hired independently by the Queen's Printer. The Board in considering the issue did not feel constrained from going behind the simple act of hiring to determine the true nature of the employment relationship. The formality of hiring was not determinative of the issue. The Board's statement at page (2) of that decision which is so heavily relied upon by the Union in this case, means no more than that. The Board in fact determined that the five employees were no different than all the others who had been hired by the Queen's Printer who were represented by unions certified under the Labour Code. For those five employees, exclusion from the definition of "employee" under the PSLRA resulted in inclusion within the bargaining unit under the Labour Code which bargained directly with the Queen's Printer as a separate employer from the Government. Although the Board did not directly consider the question whether or not employees excluded under the PSLRA definition of "employee" could then be "employees" in a bargaining unit represented by a union with collective bargaining rights under the Code, the reconsideration panel certainly recognized the presence of that issue. At page 11, the reconsideration panel said:

> Although this disposes of the chief point raised in the appeal, the Board has also considered a point raised for the first time at the hearing and not thoroughly argued by the parties. That is whether or not it necessarily follows that the employees are within the bargaining unit of the Printing Unions. As the Board has pointed out the Printing Unions were certified for "employees of the B.C. Printing Bureau" and it is

common ground that the five persons involved in this appeal - unlike other "printing personnel" within the Queen's Printer - were appointed by the Commission and are employees in the Public Service. As such can they be "employees of the B.C. Printing Bureau"?

It should be obvious from a consideration of s. 1(1) of the Public Service Labour Relations Act that public servants may not fall within the compass of that statute and that that was the effect of Vice-Chairman Peck's ruling in the present case. Since this is so, it would be within the power of the Board to include these employees within a bargaining unit certified under the private sector provisions of the Labour Code. Similarly, the Board could even now vary the Certificate of March 27th, should it conclude that the wording of the Certificate is too narrow to encompass the five individuals whose status is presently in issue. However, the Board need not make any determination as to whether such a variance is now necessary. This is because the Commission stated at the hearing that, should it be unsuccessful in its appeal, the five individuals would be "terminated" as public servants but continue to work as employees of the Queen's Printer. When that occurs there will be no doubt but that the employees fall within the Certificate of March 27th. Hence, the Board need not determine the neat issue of whether a public servant holding office at the pleasure of the Crown and appointed by the Commission in contradistinction to the other "printing staff" who are employed directly by the Queen's Printer, - may nevertheless be an employee of the B.C. Printing Bureau. Suffice it to say that even if the Board had answered that question in the negative it would have been prepared to vary the Certificate of March 27 to include these persons. (at 11-12; emphasis added)

It is quite apparent from the passage cited, that the issue before that panel did not receive the full argument that it did be fore this one. Moreover, it is apparent that the Government in that case curtailed the necessity of a decision on the point by taking a position consistent with the one which it holds before the present Panel. I am not prepared, in this case, to speculate on the reasons behind that panel's remarks in the last sentence of its reasons. Suffice it to say that that panel quite readily recognized the characterization of the employer has a significant impact on the status of the employee concerned. It may well have been necessary for that panel, in answering the question posed, to delve into the related issue of who was the real employer, and from that to find sufficient ground to determine that notwithstanding the act of hiring by the Public Service Commission, the real employer was the

Queen's Printer which would enable the Labour Code certificate to be varied accordingly. For the above reasons, the Queen's Printer decision, in my view fully supports the Government's position in the instant matter.

Decisions of the Courts also support the notion that for purposes of determining whether an employee falls under the public sector or private sector legislation a public servant draws his colour from the character of his or her employer. The British Columbia Supreme Court in Re City of Revelstoke and Local 213 of the International Brotherhood of Electrical Workers A.F.L. *(1953), 8 W.W.R. (NS) 462*, dealing with the issue whether costs could be recovered by a Conciliation Board appointed by the Labour Relations Board said:

> The conciliation board was appointed by the Labour Relations Board. That Board is established by the Lieutenant-Governor in Council, pursuant to Section 55 of the said Act. I have no doubt and, indeed, it is not disputed that the Labour Relations Board is a servant or agent of the Crown.
>
> The Labour Relations Board, in its turn appointed the conciliation board under powers given it by Sec. 48 of Industrial Conciliation Arbitration Act. Having read the appropriate Sections of that Act and particularly Sect. 24, which requires the conciliation board to report its findings to the Labour Relations Board, I think its clear that the conciliation board is a servant and agent of the Labour Relations Board.
>
> Thus, I have only to decide whether the servant or agent of
>
> a servant or agent of the crown is himself a servant or
>
> agent of the crown. In a case like this, where the statute
>
> clearly authorizes the crown's servant or agent to appoint
>
> servants or agents I think the position is clear, and that
>
> therefore the conciliation board is a servant or agent of
>
> the Crown and not entitled to costs.
>
> (at 463; emphasis added)

This same point was made by Mr. Justice Pigeon speaking for a unanimous Court in Canada Labour Relations Board and Public Service Alliance of Canada v. City of Yellowknife, supra:

> ...In my view, it would be contrary to the whole concept of
>
> classifying employees for jurisdictional purposes by
>
> reference to the character of the operation, to attempt to
>
> make a distinction depending upon whether the employer is a
>
> private company or a public authority. Different
>
> considerations may obtain where the employer is a
>
> government or government corporation and this is apparent
>
> from s. 109 of the Labour Code. However, this is a
>
> question with which we are not concerned in this case. (at 14,616; emphasis added)

This approach was adopted by the Canada Board in The Government of the Northwest Territories and Housing Corporation and Northwest Territories and Public Service Alliance of Canada and Attorney General of Canada, *[1979] 2 Can LRBR 521*, as well as another Canada Labour Relations Board case Retail Clerks Union, Local 1518 and Canadian Forces Exchange System (Canex), *[1978] 1 Can LRBR 219*. In the former case, the Board stated the critical question as follows:

> A more conclusive answer to the jurisdictional question can
>
> be found by asking who is the employer of the employees of
>
> the public service of the Northwest Territories. (at 463; emphasis added)

Turning then to the internal auditors in the Liquor Distribution Branch, it is common ground between the parties that they are indeed excluded from the PSLRA. It is also common ground that they are appointed under the PSA. Given that the PSA is declaration of a Crown prerogative exercised by the Government, and reviewing the Liquor Distribution Act, it is clear the internal auditors are servants of the Government qua employer. They are not employees of an independent agency nor a corporation under a statutory mandate which is subject to the IRA. The Board in Robert Enoch, supra, recognized that minimally all appointments under the PSA were prima facie employees of the Government qua employer. Internal auditors thus fall into that class of public servants, who if they are to bargain collectively must be entitled to do so under the PSLRA and no other statute. For internal auditors, being excluded from the PSLRA, and failing to identify any other employer which is compellable under the IRA, means that these particular public servants have no access to collective bargaining.

The Canada Labour Relations Board in Public Service Alliance of Canada and The House of Commons, *[1985] 6 CLRBR (NS) 354* considered the relationship between the Canada Labour Code and the Public Service Staff Relations Act while being mindful of the comments of Chief Justice Laskin in The City of Yellowknife, supra, concluded that certain public servants were indeed deprived of collective bargaining rights.

> Also in the City of Yellowknife, the late Chief Justice Laskin had the following to say at p. 731, in his concurring judgement:
>
> > It would be incongruous to declare a gap in the application of collective bargaining advantages to employees who are employed by a municipality in the Northwest Territories. In view of the all-encompassing legislative authority of the Parliament of Canada in the Northwest Territories, I do not think there is any justification for assessing the scope of Part V of the Labour Code, in its application to the Northwest Territories, in exactly the same way in which the respective limits of federal and provincial legislative jurisdiction in relation to labour relations would be measured. Moreover, having regard to the definition of "federal work, undertaking or business" in s. 2 of the Labour Code, R.S.C. 1970, c. L-1, and especially s. 2(i) ("a work, undertaking or business outside the exclusive legislative authority of the Province") any ambiguity or doubt whether the federal statute covers the employees of a municipality, organized in federal and federally administered territory, and such municipalities in their relations with their employees, should be resolved in favour of inclusion rather than of exclusion.
>
> There is jurisprudence of this Board where it has concluded that it is without jurisdiction even where no other statutory scheme of collective bargaining applied:
>
> > Cdn. Union of Professional and Technical Employees v. Cdn. Advisory Counsel on the Status of Women, unreported Board decision, file 555-16245.
> >
> > Retail Clerks Union v. Cdn. Forces Exchange System (CANEX) (1977), *24 di 183*; [1978] 1 Canadian L.R.B.R. 219.
> >
> > Public Service Alliance of Canada v. Gov't of the Northwest Territories and Housing Corp. of the Northwest Territories (1978) *31 di 165*; [1979] 2 Canadian L.R.B.R. 521; *78 C.L.L.C. 16,171*.
>
> In all these cases, the Board concluded that it was without jurisdiction because the employees were employees of Her Majesty and, therefore, specifically excluded by operation of s. 109(4) of the Code:
>
> > Except as provided by this section, this Part does not
> >
> > apply in respect of employment by Her Majesty in right of
> >
> > Canada.
> >
> > (at 362-362; emphasis added)

Notwithstanding the fact that in the instant case there is no specific provision in the IRA excluding employees of her Majesty in right of the Province of British Columbia, given the state of the law when the PSLRA was enacted and given the historical analysis herein the same result obtains.

It would be incongruous, indeed, if the Union's view of the world were true, that is, by being excluded from the definition of "employee" under PSLRA, a person obtained collective bargaining rights under the IRA. One of the examples offered by the Union in its argument to whom such a premise would apply was "a person employed for a

period of less than sixty days". That would mean a person with a short term and at best a tenuous employment relationship to the Government and, by comparison to public servants employed for more than sixty days or on a permanent basis, having virtually no stake in the job, would obtain broader collective bargaining rights under the IRA than career public servants employed in identical jobs who were confined to bargaining under the PSLRA. The incongruity of that result flies in the face of common sense and good labour relations policy. Moreover, this would lead to the proposition that the Legislature best helped public servants obtain bargaining rights by excluding them from the very statute (the PSLRA) which was intended to give them those bargaining rights. By extension, at a time when there was no PSLRA, all public servants should have been able to bargain collectively under the Labour Relations Act. As the Higgins Report so clearly established, that was not the state of the law and that reinforces this Panel's conclusion that internal auditors cannot obtain certification under the IRA.

For the foregoing reasons, the application is dismissed.

V.A. PYLYPCHUK
VICE-CHAIRMAN

End of Document

British Columbia (Re)

British Columbia Labour Relations Board Decisions

British Columbia Industrial Relations Council

Panel: Edward R. Peck, Commissioner Duncan Wilkins, Member Monty Alton, Member

March 6, 1990

No. C55/90

(Reconsideration of IRC No. C225/90)

[1990] B.C.L.R.B.D. No. 52

Between Government of the Province of British Columbia (the "Government" or "Employer"), and British Columbia Government Employees' Union (the "Union" or "BCGEU")

Counsel: Donald J. Jordan, QC for the Government David Blair for the Union

---

I

The Panel is concerned here with an application by the Union under Section 36 of the Industrial Relations Act (the "IRA") to reconsider IRC Decision No. C225/89 of October 26, 1989. The Union, through an application for certification under Section 39(1) of the IRA, seeks to certify a bargaining unit of persons employed by the B.C. Government Liquor Distribution Branch as internal auditors at 3284 East Broadway, Vancouver. In general, the Union represents Government employees under the Public Service Labour Relations Act, R.S.B.C. 1979, c. 346 (the "PSLRA"); but any "internal auditor in a ministry" is excluded from that legislation by Section 1(1)(x). Consequently, this application must be brought under another enactment, here the IRA, if it is to succeed.

The legal issue in this case is whether internal auditors who are excluded from the PSLRA can be represented by a union in a bargaining unit under the IRA, or whether their collective bargaining rights are limited to the PSLRA. If these employees' bargaining rights are limited to the PSLRA, the certification application fails; if they possess rights under the IRA, the application may succeed.

II

The original panel decided that the internal auditors are not subject to the IRA only because they are excluded from the operation of the PSLRA: exclusion from one statutory regime does not automatically create rights under another. The original panel began with the proposition that if the Union's argument is correct and employees covered by the PSLRA also have rights under the IRA, "[t]his would render the PSLRA entirely redundant which is, of course, absurd" (at 9). In order to discern the intention of the Legislature in passing both pieces of legislation, that panel used the "Golden Rule" of interpretation, which allows a tribunal or court to determine the "true" intention of the Legislature in passing the legislation where a literal interpretation of the enactment leads to an absurdity. The background to the legislative intention was gleaned from the historic relationship of the Crown to its employees, and the Report and Recommendations of the Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia, December 1972 (the "Higgins Report") which examined public sector bargaining (and the lack of it) in the Province. The original panel concluded that there were two collective bargaining regimes in the Province, one for the private sector (and certain elements of the public sector) and another for the public sector:

> The mischief to be remedied was the Government qua employer's use of its crown prerogative to unilaterally set terms and conditions of employment, thereby denying the right to engage in collective bargaining to those public servants who were neither entitled by statute to bargain collectively under the Labour Relations Act, nor employed by agencies of Government acting in an independent capacity. The Legislature, in remedying the mischief identified by the Commission, did not elect to amend the private sector legislative scheme to encompass the Government qua employer. The Commission recognized, at

page 2 of the Higgins Report, that the difficulty facing the Legislature was, "... that there are differences between employer[/]employee relations in the public and private sectors. These differences ... caution against adopting, unchanged, the private sector bargaining practices in order to cope with the peculiar problems associated with [G]overnment employment ...", and at page 4, "... [s]hould there be a special statute to govern collective bargaining and if so[,] what should it cover?" The Legislature elected to address this mischief by passing into law a special Act, the PSLRA.

This Panel concludes that by enactment of a special statute the Legislature intended to proceed cautiously in extending compulsory collective bargaining to Government. A careful reading of the PSLRA reveals that this caution is exemplified by the circumscription of the number of bargaining units, the numbers and types of collective agreements, and the scope of what is bargainable. All of the Government's arguments with respect to provisions and limitations in the PSLRA support both this notion of a cautious approach, and the view that the Legislature intended to expose the Government qua Employer to collective bargaining only in a limited way, the scope of which was entirely contained in the PSLRA.

An equally careful reading of the Labour Code which was enacted contemporaneously with the PSLRA, reveals that no changes material to this issue were made to the definition of "employer" or "employee" as previously found in the Labour Relations Act nor was the addition of the definition of "person" significant. Given that the Government qua employer was not subject to the Labour Relations Act, as clearly evident from the Higgins Report, and given that no material changes relative to this issue occurred upon the enactment of its successor the Labour Code contemporaneously to the passage of the PSLRA, this Panel concludes that the Government qua employer was thus no more subject to the Labour Code following the passage of the PSLRA and the Labour Code than it had been subject to the previous Labour Relations Act. This Panel concludes that the Legislature in its cautious approach to extending compulsory collective bargaining, made the Government qua employer compellable to bargain collectively only within the framework of the PSLRA with a union representing those employees defined therein, who hitherto had no collective bargaining rights, nor had any potential of obtaining them under the private sector legislation. Thus it is only PSLRA that addresses the mischief identified in the Higgins Report, and only to the extent specified in the provisions. The scope of the private sector scheme under the Labour Code was, and continues to be, limited to the "private sector" as it had been under the Labour Relations Act.

(at 14-15; emphasis in original)

According to the original panel, the IRA (successor to the Labour Code) applies to the private sector and certain parts of the public sector, whereas the PSLRA applies exclusively to formerly ineligible public servants in their dealings with the Crown qua the Employer. The question of jurisdiction is settled by asking whether a person is an employee of the Crown or an employee of one of its agents. The original panel states:

> Whether or not public servants were entitled to bargain collectively depended on the characterization of the particular employer in the public service. Where the Government qua employer was exercising its Crown prerogative, public servants were denied access to collective bargaining. Where the "Government" was a Crown agency or a Crown corporation or an entity of the Crown exercising an independent right to employ, whether mandated by statute or whether exercised in its own independent capacity, employees acquired private sector bargaining rights even though they were, in the broadest sense, public servants.

(at 12-13)

Certain employees on the periphery of the public service (with an agency of the Crown, e.g., B.C. Hydro) are covered by the IRA, whereas those employed by the Government qua the Employer were entirely excluded from collective bargaining until passage of the PSLRA.

The Union claims that the original panel misinterpreted the IRA and the PSLRA, made material errors in fact, and incorrectly interpreted a previous LRB decision (Public Service Commission -and- Graphic Arts International Union, BCLRB No. 45/75 (reconsideration of Letter Decision of February 21, 1975) ("Queen's Printer"). It also claims that the original panel was incorrect when it preferred policy considerations and the scope of the Act over the legislation's literal meaning.

As this Panel understands the argument advanced by the Union, Section 13 of the Interpretation Act, S.B.C. 1974, c. 42, means that the IRA applies to the Government's relationship with its employees:

> 13. Unless an enactment otherwise specifically provides, every Act, and every enactment made thereunder, is binding on Her Majesty.

(We note that under R.S.B.C. 1979, c. 206, the above provision became, in part, Section 14(1).) Thus some employment relationships with the Crown are governed by the IRA while others fall under the PSLRA. Any conflicts which arise under the IRA and the PSLRA are resolved by Section 26 of the PSLRA:

> 26. Unless otherwise provided in this Act, the Industrial Relations Act applies, but, where this Act is contrary to, in conflict with or inconsistent with that or any other Act, this Act prevails.

Thus the PSLRA overrides. The Union argues that because internal auditors are excluded from the PSLRA, there can be no conflict, and consequently the IRA applies and the certification application succeeds. According to the Union, there can only be an inconsistency between the two enactments where an employee is covered by the PSLRA in the first place, and that does not arise here. Mixing of the two statutes was foreseen in the Higgins Report and should not be avoided by the Council for policy reasons, says the Union. Moreover, leaving excluded employees unrepresented is inconsistent with the admonition of the Supreme Court of Canada in LRB (Can.) v. City of Yellowknife *(1977), 77 CLLC 14,073* at p. 81 , that "it would be incongruous to declare a gap in the application of collective bargaining advantages to employees" covered by both public sector and private sector legislation. The Union defended its reliance on the Queen's Printer decision by saying that at no time did anyone in that case cast doubt on the propriety of the certification under the Labour Code.

The Employer supports the reasoning of the original panel that employees excluded from the definition of "employee" under the PSLRA do not have access to collective bargaining under the IRA. This conclusion, says the Employer, is "self-evident" from the language of the IRA which in turn is consistent with the historical development of collective bargaining rights for public servants in British Columbia. The Government qua the Employer is subject only to the PSLRA which is obvious from the fact that several provisions in that legislation differ significantly from corresponding provisions in the IRA. For example, the Employer cites the conflict in the definitions of "bargaining agent", "collective agreement", and "bargaining unit" in the PSLRA when compared to those in the IRA.

Criticizing the Union's reliance on Queen's Printer as authority for the proposition that employees not subject to the PSLRA are subject to the Labour Code, the Employer notes that the earlier decision did not squarely address the issue addressed here. It points out that Queen's Printer arose in the context of five employees seeking to be included in one of two bargaining units, one represented by the Union under the PSLRA or by one of several printing unions under the Labour Code. Ultimately, the Board concluded that these employees were more properly included in the bargaining unit represented by the printing unions under the Code; but it only addressed the issue of which of two bargaining units was appropriate, not whether this group had collective bargaining rights under the predecessor Labour Code. Since the earlier decision does not address the same issue, the Employer says the decision cannot stand as a precedent in favour of the Union's case.

III

The difficulty in this case stems from the imperfectly meshed provisions of two pieces of legislation in the same general policy area, and is compounded by the unusual legal status of "Government" employees who are either employed by the Crown or an agency of the Crown. There is a superficial appeal in the interpretation offered by the Union; after all, the IRA definitions prima facie cover the Government's relationship with its employees and there is nothing explicit in either piece of legislation to address the status of PSLRA excluded employees under the IRA. On the other hand, as pointed out by the original panel, the Union's argument, if successful, would render the PSLRA redundant. If persons excluded from the definition of "employee" in the PSLRA have collective bargaining privileges under the IRA, there was no reason for the Legislature to have passed the PSLRA in the first place since all employees in the Province would fall under the umbrella of the IRA.

More subtle problems arise if the Union's argument were to succeed. For example, the Government could be obliged to bargain with a whole spectrum of bargaining units, groups otherwise excluded by Section 1(1). One such

bargaining unit could be comprised of persons employed as justices, or in the Office of Legislative Counsel, or those employed for a period of less than 60 days. As stated by the original panel:

> That would mean a person with a short term and at best a tenuous employment relationship to the Government and, by comparison to public servants employed for more than sixty days or on a permanent basis, having virtually no stake in the job, would obtain broader collective bargaining rights under the IRA than career public servants employed in identical jobs who were confined to bargaining under the PSLRA.

(at 23-24)

Such a proliferation of bargaining units becomes even more curious in light of the comments of Weiler P.C. in British Columbia Government Professional Employees Association, BCLRB No. 166/74, who noted that the structure of PSLRA bargaining units severely limits the number of bargaining units to three and gives this tribunal no discretion to determine appropriateness. Moreover, it "provides for quite an unusual bargaining unit structure ... that there should be one trade union representing one bargaining unit composed of the more than 30,000 employees in the Public Service, despite the wide variations in their work, qualifications, and background" (at 11).

The interpretation in C225/89 strikes a balance between these two extremes: each piece of legislation has an independent application but simultaneously fits the historic development of labour relations legislation in British Columbia. Furthermore, the interpretation is tempered by an understanding of the unique position of the Crown, as an employer, in contrast with that of a private employer. Unlike the private employer, the public employer's overriding responsibility is to the public interest, so that different considerations arise when it bargains with its employees. Different legislative schemes are appropriate.

Following the reasoning of the original panel, it is essential to understand the background of public sector collective bargaining as it is affected by the related issue of Crown immunity. It is to be recalled that at common law, those employed directly by the Crown had no right to bargain with their employer, but rather were subject to unilateral imposition of terms and conditions of employment. That was clearly explained by the Higgins Report:

> "La Reine ne negocie pas" (The Queen does not negotiate) is the classic statement of the principle of sovereignty. It was from this principle that those who opposed collective bargaining in the public service drew theoretical sustenance. They relied upon the orthodox position on sovereignty that maintains that government has the sole authority to govern and that this authority cannot be given to, taken by, or shared with anyone.
>
> The orthodox position on sovereignty permitted only the government to establish terms and conditions of employment. Clearly, genuine collective bargaining is incompatible with such a position.

(at 6-7)

But it has long been accepted that not all governmental entities fall within the meaning of "Crown", and employment law is not an exception to the general rule: some employees who might be characterized as Crown employees really work for agents of the Crown. Employees in the latter category are akin to employees in the private sector and thus properly subject to the collective bargaining regime of the IRA. Those employed directly by the Crown occupy a different position. Prior to enactment of the PSLRA, they had no collective bargaining rights.

Thus the question of which legislative scheme covers the employment relationship of those loosely referred to as "public servants" is a matter of characterizing the Employer as either the "Crown" or one of its agencies. This was the approach of the Labour Relations Board (the "LRB") in Workmen's Compensation Board Employees, [1974] 1 Can LRBR 135 at 138-39, which involved an application by the employers (Workmen's Compensation Board and Insurance Corporation of British Columbia) for a determination of "appropriateness" under the Labour Code. The application was opposed by the unions on the basis that the two organizations as the "Crown" qua the employer were not "employers" as defined in the Code and therefore lacked status to bring the application. In determining that the two organizations were "employers", the LRB said this of the collective bargaining regime then in place:

> If we step back for a moment, the total picture which appears is essentially this: collective bargaining is now the legal policy for private businesses, for independent public bodies such as universities, for elected municipal governments, and for the provincial government itself ... I would hold that the Crown agencies, such as the WCB and the ICBC are subject to the general labour legislation (and thus the earlier Board decisions denying jurisdiction were incorrect) ... Now, in British Columbia, the Crown itself is required by

> statute to engage in collective bargaining with its own employees. In the Public Service Labour Relations Act, the legislature expressly imposed this obligation on Her Majesty in right of the Province and agencies of the Crown. When it excluded Crown corporations such as ICBC and the WCB from coverage under that statute, it did not intend to leave them outside the scope of the province's labour laws. Instead, it intended and provided that they should each be treated as an "employer" under the Labour Code ... To hold otherwise would be to treat one branch of the traditional Crown prerogative as still alive and flourishing long after the main trunk has been cut down at its roots.

(at 138-140)

Like the current legislation, that scheme provided certification rights for three types of employees: those in the private sector, those in the "quasi-public" sector (i.e., Government agencies), and those in the "public" sector (i.e., Crown qua employer). The first two properly sought bargaining rights under the Labour Code while the last sought them under the PSLRA. The conclusions of the original panel reinforce the continued existence of this system. The IRA (and its predecessor) was intended to apply to private sector and quasi-public sector employees of Crown agents, while the PSLRA was intended to confer collective bargaining rights on previously ineligible employees of the Crown itself. To now find that the mere act of exclusion from the PSLRA automatically creates rights under the IRA, is, with respect, straining the language of that enactment. If the Legislature had intended such a drastic change in the state of the law, surely it would have said so in explicit terms.

Regarding Queen's Printer, supra, and the argument that the original panel misinterpreted and consequently failed to grasp the import of this case, we go first to the Higgins Report:

> The Queen's Printer is a branch of the Department of the Provincial Secretary, but it operates relatively independently and on a profit and loss basis. While appointments to its small clerical and allied staff are made under the Civil Service Act, appointments to its plant staff are not. The plant staff has had some semblance of bargaining over the years in that there has been an arrangement that employees would be paid whatever rates were negotiated by printing trades unions in the Victoria area.
>
> The Commission considers that the role and function of the Queen's Printer are such that it should be established as a separate agency. From this thinking follows the view that its employees should be granted bargaining rights on the same basis as employees in the private sector.
>
> The Commission recommends that:
>
> (a) the Queen's Printer be established as a separate government agency; and
>
> (b) employees of the Queen's Printer be granted the right to collective bargaining under the Labour Relations Act.

(at 12; underlining added)

Analysis of the foregoing leads us to two conclusions in this matter:

1) the original panel erred when it declared that at the time of the Higgins Report employees of the Queen's Printer had already achieved the goal of collective bargaining rights (at 12);

2) the Higgins Report clearly intended that, as the Queen's Printer was an agency of an independent character, its employees should be granted bargaining rights on the same basis as employees in the private sector, through the medium of the Labour Relations Act (later the Labour Code).

And the avenue to bargaining rights under the Labour Code was made clear by the exclusion from the definition of "employee" under the PSLRA (R.S.B.C. 1973, c. 144) of a portion of the employees of the Queen's Printer; Section 1(1)(x)(B) then provided:

> 1(1) In this Act, unless the context otherwise requires ...
>
> "employee" means a member of the public service, as the expression "public service" is defined in the Public Service Act, or a person employed by, or holding office at the pleasure of, the Crown, but does not include ...
>
> (x) a person employed by, or in the service of ...
>
> (B) the Queen's Printer under the Public Printing Act, other than clerical or administrative employees ...

(emphasis added)

The Queen's Printer issue which subsequently arose before the LRB concerned five employees who were engaged as copy-typists and stockmen. The printing unions claimed them under the terms of the certification order which had been issued in their favour, while the BCGEU claimed them as clerical staff included within the Administrative Support Component. Beyond this the BCGEU argued that as "clerical" employees these persons were distinguishable from other Queen's Printer employees by virtue of the exclusion incorporated in Section 1(1)(x)(B). In Queen's Printer the LRB found that the work the five performed was closely related to the work of the printing trades, that they were not clerical and administrative employees within the meaning of Section 1(1)(x)(B), and consequently were properly included in the certification awarded to the printing unions.

It is clear from the foregoing that Queen's Printer did not have as its focus the issue of certification under the IRA where the employees had been excluded from the jurisdiction of the PSLRA. Rather, the issue was in which of two competing bargaining units certain employees should reside. Next, unlike internal auditors and certain other persons excluded from the provisions of the PSLRA, Queen's Printer employees (excepting clerical and administrative) were specifically identified by the Higgins Report as employees who "should be granted bargaining rights on the same basis as employees in the private sector." Finally, the original panel in this case did not rely on Queen's Printer because the issue before it was not fully argued before the LRB, a fact openly acknowledged by the Queen's Printer reconsideration panel (at 11).

IV

The original panel in this case resolved a relatively complex structure of interlocking statutory provisions while retaining the integrity of the two pieces of legislation and adhering to statutory history. There is no reason to overturn it. In the result, the Union's application for reconsideration is dismissed.

EDWARD R. PECK
COMMISSIONER

DUNCAN WILKINS
MEMBER

MONTY ALTON
MEMBER

End of Document

British Columbia (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: Richard S. Longpre, Vice-Chair

Heard: April 17, 2014.

Decision: April 25, 2014.

Case No.: 66390

[2014] B.C.L.R.B.D. No. 79 | 244 C.L.R.B.R. (2d) 160 | BCLRB No. B79/2014

The Government of the Province of British Columbia (the "Employer" or the "Government"), and Association of Judicial Administrative Assistants (the "Association"), and B.C. Government and Service Employees' Union (the "BCGEU")

(54 paras.)

Appearances

Peter A. Gall, Q.C., for the Employer.

Shona A. Moore, Q.C., for the Association.

Kenneth R. Curry, for the BCGEU.

REASONS FOR THE BOARD'S DECISION

I. NATURE OF THE APPLICATION

1 The Association applies under Section 18 of the *Labour Relations Code* (the "Code") for certification to represent a unit described as "employees working as judicial administrative assistants to the superior courts judiciary in British Columbia".

2 The Employer submits the application should be dismissed because judicial administrative assistants are excluded from collective bargaining under the *Public Service Labour Relations Act, R.S.B.C. 1996, c. 388* (the "*PSLRA*"). The Association submits the *PSLRA* does not bar its application under the Code. The BCGEU made a brief submission supporting the Association's application.

3 I am able to decide this matter on the basis of the parties' written submissions.

II. BACKGROUND

4 The proposed bargaining unit consists of 41 judicial administrative assistants employed by the Government at superior courts across British Columbia. Twenty-three work in Vancouver, four in New Westminster, four in Victoria, two in Kamloops, two in Kelowna, and one each in Chilliwack, Cranbrook, Nanaimo, Nelson, Prince George and Smithers. They work in the non-public area of superior courthouses in those locations, providing secretarial administrative support to judges, masters and registrars of the British Columbia Supreme Court and Court of Appeal.

5 The judicial administrative assistants perform a variety of duties including: preparing, editing and proofreading reasons for judgment; preparing court orders and other documents for judicial signature; and providing confidential secretarial services to judges, including drafting correspondence, coordinating meetings, processing mail, reviewing invoices, and completing expense forms. The Association submits their work is analogous to that of a legal secretary or legal assistant employed by a law firm.

6 Section 1(1) of the *PSLRA* expressly excludes a list of persons from the definition of "employee" under that legislation, including "(y) a person employed to provide administrative or clerical support services to a judge of a court in British Columbia".

III. POSITIONS OF THE PARTIES

The Association

7 The Association acknowledges that, as a result of Section 1(1)(y) of the *PSLRA*, judicial administrative assistants are excluded from accessing collective bargaining under the *PSLRA*. It submits, however, that their exclusion from the *PSLRA* does not prevent the judicial administrative assistants from pursuing collective bargaining rights under the Code. There is nothing in the Code, the *PSLRA*, or any other statute that explicitly prohibits the judicial administrative assistants from engaging in collective bargaining.

8 The Association submits the Code is a statute of general application that sets out a comprehensive scheme by which employees may access bargaining. The *PSLRA* sets up a statutory regime regulating bargaining between the Government, as an employer, and certain Government employees. The Association submits the *PSLRA* is not a separate and parallel regime to the Code. Judicial administrative assistants are excluded from the definition of "employee" in the *PSLRA*, and therefore, they do not fall under a specific statutory regime for collective bargaining. Instead, the Association submits, they fall under the more general statutory regime for collective bargaining established by the Code.

9 The Association submits the Code remains available to all employees who satisfy its certification requirements, except those who are covered by specific alternate regimes. In this case, judicial administrative assistants fall within the Code's definition of "employee", and therefore, the proposed bargaining unit satisfies the Code definition of "unit". The Association satisfies the Code definition of "trade union" and the Government satisfies the Code definition of "employer". Accordingly, the Board has jurisdiction to grant its application for certification under the Code.

10 The Association further submits that Section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") protects the judicial administrative assistants' right to collective bargaining, whether or not the *PSLRA* applies to them. In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("*Health Services*"), the Supreme Court of Canada held that Section 2(d) of the *Charter* "protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues" (para. 19). In coming to this conclusion, the Court explicitly disagreed with its earlier view that collective bargaining did not fall within the scope of Section 2(d) protection. The Association submits that part of the Court's rationale for this changed perspective was a recognition that the right to bargaining collectively does not arise from statute, but existed long before legislatures enacted statutory labour relations regimes. In *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 ("*Fraser*"), the Supreme Court of Canada reaffirmed that Section 2(d) of the *Charter* protects the right of employees acting collectively to associate to achieve collective goals.

11 The Association submits this Supreme Court of Canada jurisprudence makes it clear that the judicial administrative assistants have a *Charter*-protected right to associate in order to achieve workplace goals. Accordingly, while the Government has excluded judicial administrative assistants from a specific statutory regime that could have allowed the judicial administrative assistants to exercise their Section 2(d) rights (the *PSLRA*), the general labour relations scheme (the Code) exists to allow such employees the right to pursue collective bargaining.

The legislature has not expressly stated that the Code does not apply to judicial administrative assistants, and accordingly it applies to them.

12 The Association submits that if the Code is interpreted as not applying to the judicial administrative assistants, therefore not permitting them access to collective bargaining, this would constitute a "substantial interference" with collective bargaining rights as described in *Health Services* and *Fraser*. Such an interpretation would require the Government to establish that the breach of the *Charter*-protected right constitutes a reasonable limit justified under Section 1 of the *Charter*.

13 The Association acknowledges that the Board (and its predecessor, the Industrial Relations Council) issued decisions holding that there is no jurisdiction under the Code to certify a bargaining unit of Government employees who fall outside of the *PSLRA* definition of employee. However, the Board's understanding of the relationship between the *PSLRA* and the Code on this issue must be revisited for two reasons: first, the Board's analysis was "wholly dependent on a historical analysis and common law principles that have since been rendered constitutionally impermissible"; and second, the Board "erred in privileging the historical and common law perspective over all other considerations, including the ordinary meaning of the *PSLRA* itself".

14 The Association submits that in *The Government of the Province of British Columbia*, *[1989] B.C.L.R.B.D. No. 224* , IRC No. C225/89 (Application for Reconsideration Dismissed, *[1990] B.C.L.R.B.D. No. 52* , IRC No. C55/90) ("*Internal Auditors Case*"), and two other decisions which followed the reasoning in that decision, the Board found the purpose of the *PSLRA* was to provide access to collective bargaining to certain Government employees who would not otherwise have access to bargaining. In coming to this conclusion, the Board relied on a historical analysis of the legislation in the context of the common law principle that the Crown has no legal obligation to negotiate with its employees. The Association submits these decisions can no longer be considered good law, because the Supreme Court of Canada has made it clear that the constitutional right of employees to pursue common employment goals and the corresponding duty on employers to negotiate in good faith, exist independently of any statute. The *PSLRA* and the Code did not create collective bargaining rights but merely regulated these *Charter*-protected rights. The Association submits the *PSLRA* "did nothing more than regulate the Government's collective bargaining relationship with some of its public sector employees".

15 The Association further submits the common law principle that the Government as the employer, has no legal obligation to negotiate with its employees, no longer has legal force. The Government as the employer, is bound by the *Charter* and cannot refuse to negotiate with its employees. Accordingly, the Board's interpretation of its jurisdiction in decisions such as the *Internal Auditors Case* is clearly wrong, in light of the Supreme Court of Canada's recent jurisprudence to the effect that the right to bargain collectively is not dependent on statute and is *Charter*-protected. It is no longer open to the Board to find that the mere exclusion of a group of employees from one statutory collective bargaining regime indicates an intention to extinguish the *Charter*-protected right to bargain collectively under another regime from which those employees are not explicitly excluded.

16 The Association further submits that in previous decisions, the Board failed to properly analyze the relationship between the general regime under the Code and the specific regime under the *PSLRA*. Section 23 of the *PSLRA* sets out a specific regime that applies to a segment of public sector employees. This does not mean that Government employees excluded from that regime are excluded from the Code. It is not evident why certain Government employees were excluded from the *PSLRA* regime, but it likely resulted from a number of different considerations, including "the fact that certain groups of employees do not fit well into the structure of bargaining set out in the *PSLRA*". The Board erred "because it subjugated both the *Code* and the *PSLRA* to the principle of Crown prerogative".

17 The Association submits the Board's prior decisions characterized the *PSLRA* as a public sector collective bargaining regime and the Code as a private sector regime. With the changes in patterns of unionization over the last few decades and the growth in public sector bargaining under the Code, it is "simply not possible to still understand the *Code* and the *PSLRA* as two mutually exclusive regimes, one pertaining to the private sector and the other to the public sector". The Association therefore urges the Board to "revisit its interpretation of the *Code*

and the *PSLRA* and the relationship between the two statutes in order to give them an interpretation consistent with the *Charter* and modern labour law principles". This means the exclusion of the judicial administrative assistants from the *PSLRA* does not have the effect of excluding them from the Code. Any such exclusion would have to be explicit, and the Government would be required to justify such an infringement of the *Charter*-protected right to bargain collectively under Section 1 of the *Charter*.

The Employer

18 The Employer submits the Board has correctly determined in its previous decisions that the legislature intended the *PSLRA* to be a comprehensive code governing access to collective bargaining for Government employees. Accordingly, Government employees who are excluded from collective bargaining under the *PSLRA* cannot be certified under the Code. If the Association believes precluding judicial administrative assistants from accessing statutory collective bargaining rights is contrary to the *Charter*, the Association would have to bring a *Charter* challenge to their exclusion from the *PSLRA*, which the Association has not done.

19 The Association acknowledges that judicial administrative assistants do not have a right to seek access to collective bargaining under the *PSLRA*. The Employer submits that, in light of this exclusion, the judicial administrative assistants do not have a right to seek certification outside that regime. Further, the application under the Code seeks a separate bargaining unit and a separate bargaining agent; both are inconsistent with the collective bargaining regime for public sector employees under the *PSLRA* which mandates three statutory bargaining units represented by statutorily mandated bargaining agents.

20 The Employer submits the *Charter* "cannot be used to override the clear legislative intention that the *PSLRA* is a complete code for certification of Government employees". It cites the Supreme Court of Canada's decision in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paragraphs 62-64 ("*Bell ExpressVu*").

21 The Employer submits that the seminal Board decision on this issue is the *Internal Auditors Case*. In that case, the original panel held that the *PSLRA* is a complete code for the certification of Government employees and therefore Government employees excluded under the *PSLRA* could not be certified under the Code. In coming to that conclusion, the original panel noted that, prior to the passage of the *PSLRA*, public sector employees had no access to collective bargaining through the predecessor to the Code, the *Labour Relations Act* (the "*LRA*"), which applied only to private sector employees. The panel noted that, rather than amending the *LRA* to apply to public sector as well as private sector employees, the Government chose instead to extend collective bargaining rights to certain public sector employees under the *PSLRA* on certain conditions, and to exclude other public sector employees from its ambit.

22 The original panel in the *Internal Auditors Case* further found that the contemporaneous enactment of the Code in 1974 was not intended to extend statutory collective bargaining rights to public sector employees more broadly:

> ... This Panel concludes that the Legislature in its cautious approach to extending compulsory collective bargaining, made the Government *qua* employer compellable to bargain collectively *only within the framework of the PSLRA* with a union representing those employees defined therein, who hitherto had no collective bargaining rights, nor had any potential of obtaining them under the private sector legislation. Thus it is only PSLRA that addresses the mischief identified in the Higgins Report, and only to the extent specified in the provisions. The scope of the private sector scheme under the Labour Code was, and continues to be, limited to the "private sector" as it had been under the Labour Relations Act. (p. 15, emphasis in original)

23 The Employer submits that the reconsideration panel in the *Internal Auditors Case* found that, if the Code was interpreted as permitting Government employees excluded from the scope of the *PSLRA* to apply for certification, a proliferation of bargaining units would result. This would be contrary to the legislative intent expressed in the *PSLRA* that the number of bargaining units and agents representing Government employees be limited and regulated by the statute. The conclusions in the *Internal Auditors Case* have been confirmed in subsequent Board decisions which all recognized the legislative intent that the *PSLRA* comprise a complete code for the certification of Government employees.

24 The Association argued that such an interpretation of the Code interferes with the judicial administrative assistants' *Charter*-protected right to bargaining collectively. The Employer submits that absent a *Charter* challenge addressing exclusion of the judicial administrative assistants from the *PSLRA*, the legislative intent cannot be "finessed" by using the *Charter* to argue that these employees should be permitted to apply for their own bargaining unit and agent under the Code. Absent a *Charter* challenge, provisions must be interpreted consistent with the intention of the legislature, and the *Charter* cannot be used to give them a meaning the legislature did not intend: *Bell ExpressVu.*

25 The Employer submits that the Association's ability to obtain certification for its members under the Code would frustrate the legislative intention that collective bargaining for Government employees be governed exclusively by the *PSLRA*, that there be only three bargaining units of Government employees, that certain subjects are not open to collective bargaining in the public service, and other statutory limitations on collective bargaining that are set out in the *PSLRA*.

26 The Employer submits that if a constitutional challenge to the exclusion of the judicial administrative assistants from the *PSLRA* were raised, the Government would lead evidence that they were excluded for the same reasons other Government employees are excluded; that is, because of the nature of their jobs, and the conflict for them to be included in a bargaining unit. In *Health Services* and *Fraser*, the Supreme Court of Canada did not hold that government employees have a constitutional right to engage in collective bargaining under either the Code or the *PSLRA*. Rather, the Court confirmed in *Fraser* that Section 2(d) of the *Charter* protects the right of employees to collectively make representations to their employer which must be considered in good faith by the employer in discussions with employees. The Association has not shown or claimed the judicial administrative assistants have been denied the ability to do this. The Employer submits there is no constitutional right to be included in a collective bargaining statute, let alone a particular collective bargaining statute.

27 The Employer submits there is also no constitutional right to a particular bargaining unit or bargaining representative. Accordingly, even if the exclusion of the judicial administrative assistants from collective bargaining was a breach of the *Charter*, which it denies, this would mean they would be included in the BCGEU bargaining unit under the *PSLRA*. It would not mean that the judicial administrative assistants could obtain certification for their own separate bargaining unit and agent under the Code.

28 The Association has not raised a constitutional challenge to the provision in the *PSLRA* excluding the judicial administrative assistants. The Employer argues the Association cannot finesse their exclusion from that collective bargaining regime by applying for a separate bargaining unit under the Code. The *Charter* cannot be used to give these Government employees a right to engage in collective bargaining under the Code, contrary to the intention of the legislature. Accordingly, the application should be dismissed.

The Association's Final Reply

29 In its reply, the Association maintains its position that the *Internal Auditors Case* and subsequent decisions misread the legislative intent of the *PSLRA* and the Code in finding that they were intended to be two separate statutory regimes for establishing collective bargaining rights. It also maintains its position that, in light of recent Supreme Court of Canada decisions such as *Fraser*, the Board's earlier interpretation cannot be upheld. It also maintains that the *Internal Auditors Case* must be revisited because of its "reliance on obsolete common law principles of little application and its failure to recognize the *Code* as a statute of general application". The Board failed to appreciate that allowing certain Government employees certification under the Code does not render the *PSLRA* redundant. The Board did not address Section 23 of the *PSLRA*, which the Association submits expresses the legislative intent that the Code remain the statute of general application and the "prevalent" collective bargaining regime where the *PSLRA* does not apply.

30 The Association submits that, notwithstanding their express exclusion from the definition of "employee" under the *PSLRA*, some Government employees do nonetheless engage in collective bargaining with the Government. Crown counsel engage in collective bargaining regulated by the *Crown Counsel Act, R.S.B.C. 1996, c. 87* (the

"*Crown Counsel Act*"), which sets out that the British Columbia Crown Counsel Association is their statutory bargaining agent. The "specific nature of the Crown counsel regime is not relevant to this application", but the Association submits, "its existence is demonstrative of the fact that employees who are excluded from the *PSLRA* are not, by operation of that *Act*, barred from collective bargaining".

31 The Association further submits that it is not raising a *Charter* challenge to legislation in this case because it is not asserting any infringement of the judicial administrative assistants' *Charter*-protected rights. Rather, it is asserting that these Government employees have access to collective bargaining under the Code. It is asking the Board to revisit and decline to follow its previous misinterpretation of the Code as precluding judicial administrative assistants from applying for certification under it. The only barrier to these employees exercising their *Charter*-protected rights lies in the Board's previous decisions; therefore, the Board "should revisit this issue and remove this archaic hurdle once and for all".

32 The Association submits its arguments and position are not in breach of the principle of statutory interpretation expressed in *Bell ExpressVu*. There is no ambiguity whatsoever in the relevant statutory provisions of the *PSLRA* and the Code - the former clearly excludes judicial administrative assistants from the ambit of the *PSLRA* whereas the Code equally clearly does not exclude them from its ambit. Accordingly, it is not seeking to rely on a "*Charter* values" approach to interpretation.

33 Alternatively, if the Board finds any ambiguity in the relevant statutory provisions, the Association submits that its interpretation is a "differing, but equally plausible" interpretation from the one in the Board's previous decisions. As its interpretation is consistent with the *Charter* whereas an interpretation which denies judicial administrative assistants access to collective bargaining is not, its interpretation should be preferred.

34 The Association submits it is not claiming a right to its own separate bargaining unit or bargaining agent. Rather, it submits that, while judicial administrative assistants are excluded from the particular statutory collective bargaining regime established under the *PSLRA* for certain Government employees, they are nonetheless subject to the general statutory collective bargaining regime established under the Code. If the legislature intended that they be covered by a different regime, it would have legislated to that effect, as it did with respect to Crown counsel.

35 The Association "acknowledges that the *Charter* does not give any employee a statutory right to access collective bargaining under a specific statute such as the *Code* or the *PSLRA*". It submits, however, that the Supreme Court of Canada in *Fraser* held that employees' freedom of association under Section 2(d) of the *Charter* does not merely mean being able to collectively make representations to their employer which must be considered in good faith in discussions with employees, as the Employer asserts. Employees have a right to a "process of engagement" that permits this to occur (*Fraser* at para. 2). In the present case the legislature enacted the regime under which the Association may engage in collective bargaining, namely, the Code.

IV. ANALYSIS AND DECISION

36 It is not disputed that judicial administrative assistants are excluded from the statutory collective bargaining regime under the *PSLRA* and this application for certification is not challenging that exclusion. Rather, the issue is whether the Code is a statute of general application and with an exclusion from the *PSLRA*, the judicial administrative assistants are included in the Code.

37 I start with the assumption that judicial administrative assistants would have the right to certification under the Code if they are not covered by the *PSLRA*. Under the Code, "employee" includes "a person employed by an employer" except "a manager or superintendent" and those employed in a "confidential capacity in matters relating to labour relations or personnel". Under the *PSLRA*, employee "means an employee as defined in the *Public Service Act*, or a person employed by or holding office at the pleasure of the government" and then excludes a list of positions. Section 1(1)(y) of the *PSLRA* specifically excludes judicial administrative assistants from the definition of employee. Section 23 of the *PSLRA* applies in these circumstances but not in the way the Association promotes. Section 23 of the *PSLRA* reads:

> Unless otherwise provided in this Act, the *Labour Relations Code* applies, but, if this Act is contrary to, in conflict with or inconsistent with that or any other Act, this Act prevails.

38 The *PSLRA* excludes judicial administrative assistants from the definition of employee, while the Code definition includes judicial administrative assistants. The definitions of employee in the *PSLRA* and the Code are therefore, in conflict and are inconsistent in their respective definitions of employee as they apply to judicial administrative assistants. Section 23 states that where such a conflict or inconsistency exists, the definition of employee in the *PSLRA* prevails. I do not accept the Association's argument that if the judicial administrative assistants are excluded from the *PSLRA* they are therefore covered by the Code. The position is covered by the *PSLRA* and is specifically excluded from the definition of employee.

39 Inherent in the Association's arguments is the acknowledgement that "employee" is defined differently in the *PSLRA* and the Code. Board jurisprudence has consistently concluded that the *PSLRA* specifically excluded a list of Government employees, including the judicial administrative assistants, from the *PSLRA*. As the Employer argued, a constitutional challenge is necessary to overturn the language of the legislation.

40 I turn now to the Association's submissions that the Board's previous decisions on this issue should be revisited. The *Internal Auditors Case* addressed an application by the BCGEU to be certified under the Code as the bargaining agent for a group of internal auditors employed by the Government. The Government objected to the BCGEU's application on the basis that the internal auditors did not have access to collective bargaining by virtue of their exclusion from the definition of "employee" under Section 1(1) of the *PSLRA*. The BCGEU argued that, while the internal auditors were excluded from collective bargaining under the *PSLRA*, they nevertheless had access to collective bargaining under the Code.

41 The *Internal Auditors Case* acknowledged that "the plain and ordinary meaning of the words 'employer', 'employee', and 'person' as used in the [Code] are so broad so as to, at first blush, encompass the Government and all of its employees in the broadest sense, whether or not they are covered by the PSLRA", and that there is "no specific provision in the [Code] stating that it does not apply to Government employees or to persons under the PSLRA" (p. 9). Nonetheless, the *Internal Auditors Case* concluded that it would not be correct to interpret the Code as permitting the application before it.

42 Applying a purposive approach to the issue of statutory interpretation, the *Internal Auditors Case* found the mischief the *PSLRA* was intended to address when it was enacted in 1974 was the lack of access to collective bargaining for public sector employees. At that time, the *LRA*, the predecessor legislation to the Code, granted access to collective bargaining to private sector employees. The Government as employer, was not covered by the *LRA* and accordingly was not subject to any statutory compulsion to engage in collective bargaining with its employees. The *Internal Auditors Case* noted that the legislature could have addressed this issue by amending the *LRA* to encompass public sector employers and their employees but chose not to. Instead, it "elected to address this mischief by passing into law a special Act, the PSLRA" (p. 14).

43 The *Internal Auditors Case* further noted that the enactment of the *PSLRA* followed the Higgins Report, which had recommended caution in extending compulsory collective bargaining to the Government as an employer. Noting provisions in the *PSLRA* that circumscribed the number of bargaining units, the numbers and types of collective agreements, and the scope of what was bargainable, the *Internal Auditors Case* found that in passing the *PSLRA*, "the Legislature intended to expose the Government *qua* Employer to collective bargaining only in a limited way, the scope of which was entirely contained in the PSLRA" (p. 14).

44 The Code was enacted contemporaneously with the *PSLRA* and the Code was not intended to be inconsistent with the intention of the *PSLRA*. The *Internal Auditors Case* concluded that there were "two mutually exclusive collective bargaining regimes" in British Columbia, one under the Code which it stated "can be loosely termed private sector but includes some public sector employees", and the other under the *PSLRA* (p. 15). While some public sector employees have rights under the Code, namely those whose employers were public sector agencies

and not the Government *qua* employer, the *Internal Auditors Case* found that access to a statutory collective bargaining regime for Government employees was determined by the *PSLRA*.

45 The *Internal Auditors Case* was upheld on reconsideration and followed in two subsequent Board decisions: *Government of the Province of British Columbia*, IRC No. C62/90 (Application for Reconsideration Dismissed, IRC No. C214/90) and *The Government of the Province of British Columbia*, BCLRB No. B375/93. In all of these decisions, the Board accepted that Government employees excluded from the *PSLRA* cannot access collective bargaining rights under the Code.

46 The *Internal Auditors Case* considered the argument that the Code does not expressly exclude Government employees, and that the definitions of "employee" and "employer" in the Code are broad enough to encompass Government employees and the Government as the employer. The panel found that interpreting the Code in this manner would, however, result in absurdity and be inconsistent with the legislative intent evident on a purposive interpretation of both the *PSLRA* and the Code - a legislative intent that statutory collective bargaining rights would be extended to Government employees only in the manner and on the terms expressed in the *PSLRA*. The Association's submission does not convince me there was an error in that conclusion.

47 The Association submits that the *Internal Auditors Case* was based on outmoded common law principles and a historical, "archaic" analysis of the legislation. I disagree. I am satisfied that, as explained in the *Internal Auditors Case*, the legislative intent in simultaneously passing the *PSLRA* and the Code was not to allow some Government employees access to collective bargaining under the *PSLRA* and allow those excluded from the *PSLRA* access under the Code. The intent was to extend statutory collective bargaining rights to certain Government employees under the terms of the *PSLRA* who were excluded by the Code.

48 The predecessor to the Code, the *LRA*, extended statutory bargaining rights to private sector employees. With the introduction of the Code and the *PSLRA*, as the *Internal Auditors Case* states: "there are two mutually exclusive collective bargaining regimes in the Province of British Columbia" (p. 15). The purpose of the *PSLRA* was to grant access to a particular statutory collective bargaining regime to certain Government employees, but not to others. On a purposive reading of the Code and the *PSLRA*, the legislative intent was not to allow Government employees, excluded from the statutory bargaining regime established under the *PSLRA*, to apply for bargaining rights under the Code. Such an interpretation would produce results contrary to the intent of the legislature in passing these two pieces of legislation.

49 The Association's arguments do not persuade me that the Board's analysis in the *Internal Auditors Case* is an incorrect interpretation of the Code in light of recent Supreme Court of Canada decisions. It is important to note that the Association does not argue that the Government is in breach of the *Charter*. Rather, in light of recent decisions of the Supreme Court of Canada, it is clear the judicial administrative assistants have access to collective bargaining under the Code. In *Fraser*, the Court recognized that freedom of association in Section 2(d) of the *Charter* protects employees' rights to bargaining collectively with their employers. The employees' right to bargain collectively did not arise from legislation but existed long before statutory collective bargaining regimes were established. The Association submits that the Board erred in concluding that Government employees did not have the right to bargain collectively except to the extent that such a right was granted under the *PSLRA*.

50 I find this argument fails to distinguish between a *Charter*-protected, non-statutory right of employees to bargain collectively with their employers, and the right to access a particular collective bargaining regime established by a statute. Section 1(1) of the *PSLRA* excludes practicing lawyers from the definition of "employee", yet under the *Crown Counsel Act*, practicing lawyers employed by the Government are granted access to the statutory collective bargaining regime established by that legislation. The Association submits that this demonstrates that merely because a Government employee is excluded under Section 1(1) of the *PSLRA*, it cannot be inferred that the legislature intended that employee to have no access to collective bargaining. I find that the existence of the *Crown Counsel Act* is further evidence that exclusion from the *PSLRA* under Section 1(1) demonstrates a legislative intention that the excluded employees do not have access to collective bargaining under the Code.

51 If the legislature decides a particular category of excluded Government employees should have access to collective bargaining, it can either remove them from the list of Government employees excluded under Section 1(1), in which case those employees become subject to the *PSLRA*, or it can establish a separate statutory bargaining regime which specifically applies to that category of excluded Government employee (as in the *Crown Counsel Act*). As long as a category of Government employees is excluded from the definition of employee under the *PSLRA*, and no other statutory collective bargaining regime has been established for them, the legislative intent is that they not have access to collective bargaining under the Code. Indeed, even where another statutory collective bargaining regime has been established, they may not have access to collective bargaining under the Code. Even assuming for the purposes of this decision that Government employees have a *Charter*-protected right to bargain collectively with their employer, as the Association concedes, this does not give them a right to do so under the auspices of a particular statutory regime. Crown counsel, for example, have access to the statutory regime for collective bargaining established under the *Crown Counsel Act*.

52 The Association acknowledges in its final reply that "the *Charter* does not give any employee a statutory right to access collective bargaining under a specific statute such as the *Code* or the *PSLRA*". In *Fraser*, employees have a right to a "process of engagement" that permits them to collectively make representations to their employer which must be considered in good faith by their employer in discussions with employees. The Court did not say that this "process of engagement" must take place under the auspices of a statutorily mandated collective bargaining regime. As the Association concedes, there is no *Charter*-protected right to access to collective bargaining under a specific statute such as the Code.

53 In these circumstances, I find that the judicial administrative assistants do not have access to collective bargaining under the Code. Absent a successful *Charter* challenge, the Board is bound by the legislative intent expressed in the *PSLRA* and the Code. Government employees, such as the judicial administrative assistants, who are excluded from the *PSLRA* do not have access to statutory collective bargaining rights under the Code. I find this legislative intent is unambiguous and therefore a *Charter* values approach cannot be used to interpret the legislation to achieve a result which the legislature clearly did not intend: *Bell ExpressVu*.

V. CONCLUSION

54 For the reasons given, the Association's application for certification of a bargaining unit of judicial administrative assistants is dismissed.

LABOUR RELATIONS BOARD

RICHARD S. LONGPRE
VICE-CHAIR

End of Document

British Columbia (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: Brent Mullin, Chair; Jitesh Mistry, Vice-Chair; Leah Terai, Vice-Chair

Decision: May 27, 2014.

Case No.: 67230

[2014] B.C.L.R.B.D. No. 92 | 244 C.L.R.B.R. (2d) 178 | BCLRB No. B92/2014

The Government of the Province of British Columbia (the "Employer"), and Association of Judicial Administrative Assistants (the "Association"), and B.C. Government and Service Employees' Union (the "Union")

(1 para.)

Case Summary

Appeal From:

Leave for Reconsideration of BCLRB No. B79/2014.

Appearances

Shona A. Moore, Q.C., for the Association.

DECISION OF THE BOARD

1 The Association applies under Section 141 of the *Labour Relations Code* for leave and reconsideration of BCLRB No. B79/2014, *[2014] B.C.L.R.B.D. No. 79*, We find the application does not disclose a good, arguable case of reviewable error. Accordingly, leave is denied: *RG Properties Ltd.*, *[2003] B.C.L.R.B.D. No. 378*, BCLRB No. B378/2003 (Leave for Reconsideration of BCLRB No. B252/2003), *[2003] B.C.L.R.B.D. No. 272*.

LABOUR RELATIONS BOARD

BRENT MULLIN
CHAIR

JITESH MISTRY
VICE-CHAIR

LEAH TERAI
VICE-CHAIR

End of Document

Ontario (Attorney General) v. G

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, S. Côté, R. Brown, M. Rowe, S.L. Martin and N. Kasirer JJ.

Heard: February 20, 2020;

Judgment: November 20, 2020.

File No.: 38585.

[2020] S.C.J. No. 38 | *[2020] A.C.S. no 38* | *2020 SCC 38* | *469 C.R.R. (2d) 272* | *67 C.R. (7th) 340* | *451 D.L.R. (4th) 541* | *395 C.C.C. (3d) 277* | *2020 CarswellOnt 17020* | *2020EXP-2614* | *EYB 2020-366568*

Attorney General of Ontario, Appellant; v. G, Respondent, and Attorney General of Canada, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, David Asper Centre for Constitutional Rights, Empowerment Council and Canadian Mental Health Association, Ontario, Interveners

(294 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Constitutional law — Constitutional validity of legislation — Level of government — Provincial or territorial legislation — Constitutional exemptions — Appeal by Attorney General of Ontario from judgment that declared Christopher's Law invalid as it applied to individuals found not criminally responsible on account of mental disorder (ôNCRMDö) who had been granted absolute discharge dismissed — G, found NCRMD of two sexual offences, had received absolute discharge — Application judge dismissed G's application challenging Christopher's Law — Court of Appeal allowed G's appeal — Christopher's Law drew discriminatory and unjustified distinctions between people found guilty and people found NCRMD of sexual offences on basis of mental disability, contrary to s. 15(1) of Charter — Declaration of invalidity was properly suspended for 12 months — Granting G individual exemption from suspension deserved deference — Christopher's Law (Sex Offender Registry).

Constitutional law — Canadian Charter of Rights and Freedoms — Reasonable limits on Charter rights — Demonstrably justified in free and democratic society — Oakes test — Minimal impairment — Equality rights — Discrimination, what constitutes — Grounds of discrimination — Enumerated — Remedies for denial of rights — Legislative remedies — Nullification or declaration of invalidity — Temporary suspension of declaration of invalidity — Constitutional exemption — Appeal by Attorney General of Ontario from judgment that declared Christopher's Law invalid as it applied to individuals found not criminally responsible on account of mental disorder (ôNCRMDö) who had been granted absolute discharge dismissed — G, found NCRMD of two sexual offences, had received absolute discharge — Application judge dismissed G's application challenging Christopher's Law — Court of Appeal allowed G's appeal — Christopher's Law drew discriminatory and unjustified distinctions between people found guilty and people found NCRMD of sexual offences on basis of mental disability, contrary to s. 15(1) of Charter — Declaration

of invalidity was properly suspended for 12 months — Granting G individual exemption from suspension deserved deference — Christopher's Law (Sex Offender Registry).

Criminal law — Sex offender registry — Duration — Appeal by Attorney General of Ontario from judgment that declared Christopher's Law invalid as it applied to individuals found not criminally responsible on account of mental disorder (ôNCRMDö) who had been granted absolute discharge dismissed — G, found NCRMD of two sexual offences, had received absolute discharge — Application judge dismissed G's application challenging Christopher's Law — Court of Appeal allowed G's appeal — Christopher's Law drew discriminatory and unjustified distinctions between people found guilty and people found NCRMD of sexual offences on basis of mental disability, contrary to s. 15(1) of Charter — Declaration of invalidity was properly suspended for 12 months — Granting G individual exemption from suspension deserved deference — Christopher's Law (Sex Offender Registry).

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Reasonable limits — Oakes test — Proportionality test — Equality rights — Discrimination, what constitutes — Grounds of discrimination — Enumerated — Remedies for denial of rights — Specific remedies — Constitutional exemption — Appeal by Attorney General of Ontario from judgment that declared Christopher's Law invalid as it applied to individuals found not criminally responsible on account of mental disorder (ôNCRMDö) who had been granted absolute discharge dismissed — G, found NCRMD of two sexual offences, had received absolute discharge — Application judge dismissed G's application challenging Christopher's Law — Court of Appeal allowed G's appeal — Christopher's Law drew discriminatory and unjustified distinctions between people found guilty and people found NCRMD of sexual offences on basis of mental disability, contrary to s. 15(1) of Charter — Declaration of invalidity was properly suspended for 12 months — Granting G individual exemption from suspension deserved deference — Christopher's Law (Sex Offender Registry).

Appeal by the Attorney General of Ontario from a judgment of the Ontario Court of Appeal that declared Christopher's Law to be of no force of effect as it applied to individuals found not criminally responsible on account of mental disorder (ôNCRMDö) who had been granted an absolute discharge. Christopher's Law required those convicted or found NCRMD of a sexual offence to report to a police station to have their personal information added to the province's sex offender registry and to report annually to update their information. No one found NCRMD could ever be removed from the registry or exempted from reporting, even if they received a discharge from a review board. In 2002, G, the respondent, was found NCRMD of two sexual offences that occurred while G experienced his first and only manic episode. In 2003, he received an absolute discharge by the Ontario Review Board. G was placed on the provincial sex offender registry in 2004. G had not engaged in criminal activity since being absolutely discharged. He had adhered to treatment and his symptoms had been in full remission. G brought an application challenging Christopher's Law as it applied to persons found NCRMD who had been absolutely discharged. The application judge found no violation of ss. 7 and 15(1) of the Charter and dismissed G's application. The Court of Appeal upheld the application judge's finding that there was no s. 7 violation but allowed the appeal on the basis of G's s. 15(1) claim. It suspended its declaration of invalidity for 12 months to allow the legislature to determine the appropriate response but exempted G from the suspension by ordering that he be immediately removed from and relieved of obligations under the registry.
HELD: Appeal dismissed.

Christopher's Law drew discriminatory distinctions between people found guilty and people found NCRMD of sexual offences on the basis of mental disability, contrary to s. 15(1) of the Charter. It was determinative that those found NCRMD had no opportunity to be exempted from initial registration, removed from the registry or relieved of the obligation to report while opportunities for exemption, removal and relief were available to those found guilty of the same offences. The distinctions arose because of the NCRMD regime. The distinctions drawn by Christopher's Law reinforced the stigmatizing idea that those with mental illness were inherently and permanently dangerous and perpetuated the disadvantage they experienced. The discriminatory distinctions could not be justified in a free and democratic society. Christopher's Law did not minimally impair the s. 15(1) rights of those found NCRMD of a sexual offence who had been absolutely discharged. The declaration of invalidity was properly limited to those who

had been found NCRMD of a sexual offence and absolutely discharged. Tailored remedies that addressed the precise constitutional flaw permitted the court to safeguard the constitutional rights of all those affected and preserved the constitutional aspects of the law. The effect of a declaration should not be suspended unless the government demonstrated that an immediately effective declaration would endanger a compelling public interest that outweighed the importance of immediate constitutional compliance and an immediately effective remedy for those whose Charter rights would be violated. In this case, the declaration of invalidity was properly suspended for 12 months, since granting an immediate declaration would endanger the public interest in safety and could risk compromising the legislature's ability to fulfil its role and restrict the effectiveness of the new version of Christopher's Law eventually enacted. There was no set rule against combining s. 24(1) and s. 52(1) remedies. Where the effect of a declaration was suspended, an individual remedy for the claimant would often be appropriate. The Court of Appeal's discretion in granting G an individual exemption from the suspension deserved deference. Since G's record since his release had been spotless, there was no indication he posed a risk to public safety.

Statutes, Regulations and Rules Cited:

Bill C-16, Sex Offender Information Registration Act, 3rd Sess, 37th Parl., 2004, s. 20

Canadian Bill of Rights, *S.C. 1960, c. 44*

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 2, s. 3, s. 4, s. 7, s. 15, s. 15(1), s. 24(1), s. 24(2), s. 32(1), s. 33

Christopher's Law (Sex Offender Registry), 2000, *O. Reg. 69/01, s. 1.2*, s. 2, s. 2(1)10, s. 2(3)

Christopher's Law (Sex Offender Registry), 2000, *S.O. 2000, c. 1, s. 1*(1), s. 1(1), s. 2, s. 3, s. 3(1), s. 3(1)(f), s. 3(1)(g), s. 3(2), s. 4(2), s. 7(1)(a), s. 7(1)(b), s. 7(1)(c), s. 7(4), s. 8(1)(c), s. 9.1, s. 10(2), s. 10(3), s. 11

Christopher's Law (Sex Offender Registry) Amendment Act, 2011, S.O. 2001, c. 8, s. 1(1), s. 6

Constitution Act, 1867, s. 17, s. 40, s. 55, s. 91, s. 95

Constitution Act, 1982, s. 44, s. 45, s. 52(1)

Constitution of South Africa, s. 172(1)(a), s. 172(1)(b), s. 172(1)(b)(ii)

Criminal Code, *R.S.C. 1985, c. C-46, s. 16*(1), s. 490.012(4), s. 490.016(1), s. 490.023(2), s. 672.1(1), s. 672.34, s. 672.35, s. 672.47, s. 672.54, s. 672.54(a), s. 672.54(b), s. 672.55, s. 672.81, s. 730, s. 730(3), s. 748, s. 748(3)

Criminal Records Act, *R.S.C. 1985, c. C-47, s. 4*, s. 4.1

Human Rights Act 1998 (U.K.), 1998, c. 42, s. 4(4), s. 4(6)

Police Services Act, *R.S.O. 1990, c. P.15, s. 41*(1.1), s. 41(1.2)

Protecting Victims from Sex Offenders Act, S.C. 2010, c. 17, s. 5

Scotland Act, 1998 (U.K.), 1998, c. 46, s. 102(2), s. 102(3)

Sex Offender Information Registration Act, *S.C. 2004, c. 10*

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Charter of Rights -- Right to equality -- Discrimination based on mental or physical disability -- Ontario's sex offender registry regime requiring that individuals either convicted or found not criminally responsible on account of mental disorder ("NCRMD") of sexual offences have their personal information added to registry and report to police station at least once a year to keep information up to date -- Opportunities for exemption from requirements available to individuals found guilty of sexual offences but not to those found NCRMD who have been granted absolute discharge -- Whether provincial sex offender registry regime infringes right to equality of such NCRMD individuals -- If so, whether infringement justified -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) -- Christopher's Law (Sex Offender Registry), 2000, S.O. 2000, c. 1.

Constitutional law -- Remedy -- Declaration of invalidity -- Suspension of declaration of invalidity -- Individual exemption from suspension -- Applicant seeking declaration that Ontario's sex offender registry regime infringes right to equality of NCRMD individuals who have been granted absolute discharge -- Court of Appeal granting declaration of invalidity, suspending declaration for 12 months and exempting applicant from suspension -- Proper approach to determining remedy for unconstitutional legislation -- Canadian Charter of Rights and Freedoms, s. 24(1) -- Constitution Act, 1982, s. 52(1).

Court Summary:

In Ontario, *Christopher's Law* requires those who are either convicted or found not criminally responsible on account of mental disorder ("NCRMD") of a sexual offence to physically report to a police station to have their personal information added to the province's sex offender registry. Registrants must continue to report in person at least once a year and every time certain information changes. Registrants must comply for 10 years if the maximum sentence for the sexual offence they committed is 10 years or less, or for life, if the maximum sentence is greater than 10 years or if they committed more than one sexual offence. There is some opportunity, based on an individualized assessment, for those found guilty of sexual offences to be removed or exempted from the registry or relieved of their reporting obligations. By contrast, no one found NCRMD of sexual offences can ever be removed from the registry or exempted from reporting, even if they have received an absolute discharge from a review board.

In June 2002, G was found NCRMD of two sexual offences. In August 2003, he was absolutely discharged by the Ontario Review Board on the basis that he no longer represented a significant risk to the safety of the public. Despite this discharge, G was placed on the provincial sex offender registry in August 2004, as required by *Christopher's Law*. G brought an application challenging *Christopher's Law* as it applies to persons found NCRMD in respect of sexual offences who have been absolutely discharged. He argued that the inability of people in his situation to be granted an exemption or be removed from the provincial registry or relieved of reporting requirements, as compared to those found guilty of the same offences, violates ss. 7 and 15(1) of the *Charter*.

The application judge dismissed G's application, but the Court of Appeal allowed G's appeal on the basis of his s. 15(1) claim, and concluded that the s. 15(1) breach was not justified under s. 1 of the *Charter*. It declared *Christopher's Law* to be of no force or effect as it applies to those found NCRMD who were granted an absolute discharge, suspended the declaration of invalidity for 12 months, and exempted G from that suspension by relieving him of further compliance with the legislation and ordering that his information be deleted from the registry immediately. The Attorney General of Ontario appealed to the Court.

Held (Côté and Brown JJ. dissenting in part): The appeal should be dismissed.

Per Wagner C.J. and Abella, Moldaver, **Karakatsanis**, Martin and Kasirer JJ.: *Christopher's Law* draws discriminatory distinctions between people found guilty and people found NCRMD of sexual offences on the basis

of mental disability, contrary to s. 15(1) of the *Charter*. These discriminatory distinctions cannot be justified in a free and democratic society. The remedy granted by the Court of Appeal was appropriate, and its orders should be upheld.

The first step in determining whether a law infringes s. 15(1) of the *Charter* asks whether the law, on its face or in its impact, creates a distinction based on enumerated or analogous grounds. In the present case, there are clear distinctions drawn based on the enumerated ground of mental disability. Offenders found guilty of sexual offences can be exempted from having to report and register in the first place by receiving a discharge in their sentencing hearing. Convicted registrants can also be removed from the sex offender registry by receiving a free pardon, and can be relieved of the obligation to continue to report upon receipt of a free pardon or record suspension. However, those found NCRMD of the same offences have no such opportunities, even if they have received an absolute discharge. NCRMD individuals are plainly subjected to different treatment.

The second step asks whether the challenged law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including historical disadvantage. By denying those found NCRMD opportunities for exemption, removal, or relief from the sex offender registry, *Christopher's Law* effectively presumes that they are inherently and permanently dangerous. It considers NCRMD individuals a perpetual threat to the public. *Christopher's Law* imposes a burden on people found NCRMD in a manner that violates s. 15(1) in two respects: the law itself invokes prejudicial and stereotypical views about persons with mental illnesses; and the law puts those found NCRMD in a worse position than those found guilty. Both effects perpetuate the historical and enduring disadvantage experienced by persons with mental illnesses. The distinctions drawn by *Christopher's Law* are thus discriminatory.

The burden of establishing that the infringement of s. 15(1) is justified under s. 1 of the *Charter* belongs to the Attorney General, on a balance of probabilities. First, there must be a pressing and substantial objective for the infringing measure. Second, the infringing measure must not disproportionately interfere with the s. 15(1) right; it must be rationally connected to the objective, the means chosen must interfere as little as possible with the s. 15(1) right, and the benefits of the infringing measure must outweigh its negative effects. In the present case, the parties agree that the purpose of *Christopher's Law* is to assist in the investigation and prevention of sexual offences, that this purpose is pressing and substantial, and that the limits it places on *Charter* rights are rationally connected to that purpose. However, *Christopher's Law* is not minimally impairing of the s. 15(1) rights of NCRMD individuals. The inclusion of any method of exempting and removing those found NCRMD from the registry based on individualized assessment would be less impairing. Thus, the Attorney General has not justified the s. 15(1) infringement.

The determination of appropriate remedies for legislation that violates the *Charter* must follow a principled approach. Section 52(1) of the *Constitution Act, 1982*, provides in absolute terms that laws inconsistent with the Constitution are of no force or effect to the extent of the inconsistency. A general declaration is the means by which courts give full effect to the broad terms of s. 52(1). A court faced with a constitutional challenge to a law must determine to what extent it is unconstitutional and declare it to be so. A measure of discretion is inevitable in determining how to respond to an inconsistency between legislation and the Constitution. While s. 52(1) recognizes the primacy of the Constitution, including the fundamental rights and freedoms of individuals and groups guaranteed by the *Charter*, fashioning constitutional remedies inevitably implicates other -- at times competing -- constitutional principles. Courts must strike an appropriate balance between these principles in determining how to give effect to s. 52(1) in a manner that best aligns with Canada's constitutional order.

The Court's leading decision on remedies for laws that violate the *Charter*, *Schachter v. Canada, [1992] 2 S.C.R. 679*, provides helpful guidance on how to craft a responsive and effective remedy for unconstitutional laws. *Schachter* set out a general approach to granting remedies. It endorsed remedies tailored to the breadth of rights violations, thereby allowing constitutionally compliant aspects of unconstitutional legislation to be preserved, and recognized that, in rare circumstances, the effect of a declaration of invalidity could be suspended for a period of time to protect the public interest. *Schachter* also considered how s. 52(1) remedies can be combined with individual remedies for *Charter* violations, including whether the claimant should receive an individual exemption

from a suspension, thereby ensuring that successful claimants can enjoy the immediate benefit of a declaration of invalidity.

By employing and building on *Schachter*'s guidance in determining the form and breadth of declarations of invalidity, suspending the effect of those declarations, and exempting individuals from suspensions, the Court's jurisprudence has coalesced around a group of core remedial principles that structure the exercise of principled remedial discretion and provide the groundwork for meaningful remedies in different contexts. First, safeguarding rights lies at the core of granting *Charter* remedies because the *Charter* exists to protect rights, freedoms, and inherent dignity. Second, the public has an interest in legislation that is constitutionally compliant. Third, the public is entitled to the benefit of legislation, which individuals rely upon to organize their lives and protect them from harm. Fourth, courts and legislatures play different institutional roles: the legislature is sovereign in the sense that it has exclusive authority to enact, amend, and repeal any law as it sees fit, while courts remain guardians of the Constitution and of individuals' rights under it. These principles provide guidance to courts and encourage them to transparently explain remedial results.

As the language of s. 52(1) directs, the first step in crafting an appropriate remedy is determining the extent of the legislation's inconsistency with the Constitution. The nature and extent of the *Charter* violation lays the foundation for the remedial analysis because the breadth of the remedy ultimately granted will reflect at least the extent of the breach. The second step is determining the form that a declaration should take. Remedies other than full declarations of invalidity should be granted when the nature of the violation and the intention of the legislature allows for them. However, if granted in the wrong circumstances, tailored remedies can intrude on the legislative sphere. To respect the differing roles of courts and legislatures, determining whether to strike down legislation in its entirety or to grant a tailored remedy of reading in, reading down, or severance, depends on whether the legislature's intention was such that it would have enacted the law as modified by the court.

When an immediately effective declaration of invalidity would endanger an interest of such great importance that, on balance, the benefits of delaying the effect of that declaration outweigh the cost of preserving an unconstitutional law, the court may suspend the effect of the declaration. The power to suspend the effect of a declaration of invalidity arises from accommodation of broader constitutional considerations and is included in the power to declare legislation invalid. Suspensions of declarations of invalidity should be rare; the effect of a declaration should not be suspended unless the government demonstrates that an immediately effective declaration would endanger a compelling public interest that outweighs the importance of immediate constitutional compliance and an immediately effective remedy for those whose *Charter* rights will be violated. The period of suspension, where warranted, should be long enough to give the legislature the amount of time it requires to carry out its responsibility diligently and effectively, while recognizing that every additional day of rights violations will be a strong counterweight against giving the legislature more time.

When the effect of a declaration of invalidity is suspended, an individual remedy for the claimant under s. 24(1) of the *Charter* in the form of an individual exemption from the suspension will often be appropriate and just. A s. 24(1) remedy should meaningfully vindicate the right of the claimant, conform to the separation of powers, invoke the powers and function of a court, be fair to the party against whom the remedy is ordered, and allow s. 24(1) to evolve to meet the challenges of each case. A court's approach to s. 24(1) remedies must stay flexible and responsive to the needs of a given case. The public is well served by encouraging litigation that furthers the public interest by uncovering unconstitutional laws, and claimants invest time and resources to pursue matters in the public interest. Thus, if an exemption is otherwise appropriate and just, claimants should be exempted from suspensions in the absence of compelling reasons not to.

In the present case, the declaration of invalidity was properly limited to those who have been found NCRMD of a sexual offence and absolutely discharged. A tailored remedy was clearly appropriate here, since granting such a remedy better protects the public's interest in legislation enacted for its benefit, like *Christopher's Law*, and better respects the role of the legislature while also safeguarding *Charter* rights and realizing the public's interest in constitutionally compliant legislation.

The declaration of invalidity was also properly suspended for a 12-month period. Although the terms of s. 52(1) and the need to safeguard *Charter* rights and ensure constitutional compliance of all legislation weigh heavily in favour of an immediately effective declaration, those factors must be balanced against protecting the public's interest in legislation passed for its benefit. To do so requires considering the nature and extent of both the continued rights violations and the danger to an identified public interest that could flow from an immediate declaration of invalidity.

In the instant case, public safety has been identified as the public interest that justifies a suspension. NCRMD persons are at a statistically higher risk of offending than the general population. Granting an immediate declaration would therefore endanger the public interest in safety to some extent. The registry contributes to public safety by enhancing the ability of police to prevent and investigate sexual offences. Immediately relieving people who may pose some risk of committing sexual offences from the obligation to report or permitting them to seek removal of their information could detract from this enhanced ability. The threat to public safety is therefore meaningful. However, given that persons found NCRMD who pose the highest demonstrable risk to reoffend are not given absolute discharges, this threat is limited. The other public interest at stake is respect for the legislature: granting an immediate declaration of invalidity could risk compromising the legislature's ability to fulfil its role and restrict the effectiveness of whatever new version of *Christopher's Law* is eventually enacted. Balanced against these considerations is the significance of the rights violation that the suspension would temporarily prolong: *Christopher's Law* treats those found NCRMD in accordance with a persistent, demeaning stereotype without providing an opportunity to determine whether they pose sufficient risk. On balance, the combination of these two interests justifies temporarily depriving those affected of the immediate benefit of the declaration.

Finally, the exercise of the Court of Appeal's discretion in granting G an individual exemption from the suspension deserves deference. G's record since his release 17 years ago has been spotless and there is no indication that he poses a risk to public safety. An exemption ensures that G receives an effective remedy and is not denied the benefit of his success on the constitutional merits.

Per **Rowe** J.: The appeal should be dismissed. There is agreement with Côté and Brown JJ. regarding s. 15(1) of the *Charter*, and regarding the general approach to ordering an individual exemption under s. 24(1) from the suspended effect of a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*. However, there is disagreement on the proper approach to suspending a declaration of invalidity under s. 52(1). The Court's approach in *Schachter* should be reaffirmed.

The majority's principled discretion approach to suspended declarations of invalidity lacks analytic structure, and its four principles are so indeterminate and truistic as to provide no meaningful guidance. This discretionary approach could lead to a continuation of current trends in which declarations of invalidity are suspended in a way that varies with the length of the Chancellor's foot. There is no legitimate basis to read remedial discretion into s. 52(1). The absence of remedial discretion in s. 52(1) is not an oversight, and the inherent jurisdiction of a court is not a sound or sufficient legal basis to depart from the immediate effect of s. 52(1). The only basis on which a court can order a constitutionally invalid statute to be enforced notwithstanding its illegality is if an immediate declaration of invalidity would offend some other constitutional principle.

Schachter is grounded in a view that suspended declarations are exceptional and should be ordered only where: (1) an immediate declaration of invalidity would pose a potential danger to the public; (2) it would otherwise threaten the rule of law; or (3) the impugned law is underinclusive and the court cannot determine properly whether to cancel or extend its benefits. These categories exemplify circumstances in which countervailing constitutional principles constitute a valid basis to suspend an immediate declaration of invalidity. While not exhaustive, the *Schachter* categories should be extended only where an immediate declaration would infringe some constitutional principle.

In the case at bar, the declaration of invalidity was suspended on the basis of public safety concerns. However, as the 12-month suspension of the declaration of invalidity ordered by the Court of Appeal has expired, this issue is now moot, as is the issue of the individual exemption order for G. Consequently, there is no cause to decide whether the declaration was properly suspended, or whether the individual exemption was rightly ordered.

Per **Côté** and **Brown** JJ. (dissenting in part): There is agreement with the majority that *Christopher's Law* infringes G's s. 15(1) *Charter* right to equal treatment, and that the declaration of invalidity was properly suspended for a period of 12 months. However, the suspension of the declaration of invalidity should be grounded solely on the threat to the rule of law that would otherwise manifest, in the present case, in the form of a threat to public safety. Consistent with the limited role of the judiciary vis-à-vis the legislature, an individual exemption from the suspended declaration of invalidity should not be granted. The appeal should therefore be allowed in part.

The section 15(1) issue is easily disposed of. *Christopher's Law* draws a distinction between persons found NCRMD and persons found guilty. That distinction exacerbates pre-existing disadvantage by perpetuating the stereotype that persons with mental illness are inherently dangerous. Persons found guilty of sexual offences have several exit ramps leading away from the obligation to comply with *Christopher's Law* but persons found NCRMD do not, even where the Ontario Review Board determines that they no longer pose a significant threat to public safety and grants them an absolute discharge. This constitutes differential treatment on the basis of an enumerated ground: mental disability. The proper remedy is to require the legislature to provide persons found NCRMD who have been absolutely discharged with an opportunity for exemption and removal from the *Christopher's Law* registry.

Suspended declarations of invalidity are only warranted when there is a threat to the rule of law, for three principal reasons. First, this was what the Court envisioned in assuming for the first time the power to issue a suspended declaration in *Reference re Manitoba Language Rights*, *[1985] 1 S.C.R. 721*. The Court in *Manitoba Reference* tightly constrained the use of suspended declarations to situations where they are necessary to preserve the rule of law under conditions of emergency, when it is impossible to comply with constitutional rights. Since *Manitoba Reference*, however, the Court has lost its way and has suspended declarations of invalidity almost as a matter of course, often with no justification or attention to the rule of law.

Secondly, the Constitution contemplates immediate declarations as the norm, subject only to a rule of law concern. Once it is found that a statute is inconsistent with the Constitution, s. 52(1) limits the role of courts to declaring a law is of no force or effect. While the Constitution does not expressly permit courts to suspend a declaration of invalidity, it does provide a means for Parliament and legislatures to do so in certain cases under s. 33(1). Courts must therefore be judicious, measured and principled when exercising the judicially created power to suspend a declaration of invalidity. Rights under the *Charter* may be temporarily judicially displaced by the operation of a suspended declaration of invalidity only where necessary to preserve the rule of law and to ensure its continuity. In such instances, courts are not fulfilling an impermissible legislative role as they otherwise would be by granting a suspended declaration, but an assuredly judicial role.

Thirdly, lessons that follow from *Schachter*'s jurisprudential progeny show why it is essential to confine judicial discretion. Restraint is imperative because suspending a declaration will often pull a court beyond its institutional competence and capacity, and into the role of the legislature. As well, courts are ill-equipped to determine the period of time during which a suspended declaration should govern. Further, allowing an unconstitutional law to remain in force not only withholds the immediate relief to which a successful claimant is expressly entitled under s. 52(1), but also sustains the invalidated law's capacity to produce harm. Finally, suspended declarations can exacerbate pre-existing disadvantage and discourage rights holders from bringing *Charter* claims forward in the first place.

If used improperly, suspended declarations can undermine the rule of law they were meant to preserve in two ways: they can lead to uncertainty in the law during the period of suspension; and they can lessen the consequences for lawmakers of enacting laws that violate the *Charter*, which in turn, reduces the incentives for complying with rights when making law.

In the present case, granting an immediate declaration of invalidity would threaten public safety and, therefore, the rule of law, as it would mean that the *Christopher's Law* registry would not apply to all persons found NCRMD and who have been granted absolute discharges by the Ontario Review Board. While *Christopher's Law* likely captures

persons who do not pose a significant risk of reoffending, it also captures many who do. More importantly, it must be remembered that the recidivism risk is that of committing sexual offences, which are violent crimes that cause profound harm to the most vulnerable members of society. Given that an immediate declaration of invalidity would remove persons found NCRMD who are potentially dangerous from the registry, it would create a lacuna in the regime that would undoubtedly pose a danger to the public and thus threaten the rule of law.

If a suspended declaration of invalidity should be rare, then an individual exemption from that suspension must be exceedingly so. There is disagreement with the majority that judges are well-suited to conduct an individualized assessment as to whether an exemption would endanger public safety. Rather, a helpful consideration in determining whether an individual exemption should be granted is to ask whether an exemption is necessary to prevent irreparable harm to the interests the *Charter* was designed to protect during the suspension. The case for irreparable harm must be so significant that it overcomes the weighty need to leave the manner of addressing a constitutional infringement to the legislature.

Although G has shown that he is entitled to the opportunity for exemption and removal from the registry, this is not one of those rare cases where an individual exemption is warranted. A delayed remedy will not deprive G of an effective one, nor preclude him from accessing the new opportunity for exemption in whatever form that may take. Further, G will, at most, have to report to the police station one more time as part of his obligation to report annually, a far cry from irreparable harm. In G's case, as in most, crafting an individual exemption will exceed the competence of the Court and encroach on what is an issue for resolution by the legislature, which is in a far better position to determine what the appropriate mechanism is to provide persons found NCRMD with the opportunity for exemption.

Granting G an individual exemption also raises concerns of horizontal unfairness -- that is, of treating G better than others who are similarly situated. In a constitutional case involving the validity of a statute of general applicability, a litigant should not be entitled to a better or more immediate constitutional remedy than all other persons similarly situated merely because they brought the case.

Cases Cited

By Karakatsanis J.

Discussed: *Schachter v. Canada, [1992] 2 S.C.R. 679* ; **considered:** *R. v. Swain, [1991] 1 S.C.R. 933*; *Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721*; **referred to:** *R. v. Dyck, 2008 ONCA 309, 90 O.R. (3d) 409* ; *R. v. Long, 2018 ONCA 282, 45 C.R. (7th) 98* ; *Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625*; *Hinse v. Canada (Attorney General), 2015 SCC 35, [2015] 2 S.C.R. 621* ; *Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497*; *Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143*; *Quebec (Attorney General) v. A, 2013 SCC 5, [2013] 1 S.C.R. 61* ; *Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624*; *Centrale des syndicats du Québec v. Quebec (Attorney General), 2018 SCC 18, [2018] 1 S.C.R. 522*; *Kahkewistahaw First Nation v. Taypotat, 2015 SCC 30, [2015] 2 S.C.R. 548*; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17, [2018] 1 S.C.R. 464*; *Fraser v. Canada (Attorney General), 2020 SCC 28*; *Vriend v. Alberta, [1998] 1 S.C.R. 493*; *Withler v. Canada (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396*; *R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483*; *Egan v. Canada, [1995] 2 S.C.R. 513* ; *R. v. Campbell, 2013 BCCA 43, 334 B.C.A.C. 16* ; *R. v. C.C., 2007 ABPC 337, 435 A.R. 215* ; *R. v. Redhead, 2006 ABCA 84, 384 A.R. 206*; *R. v. Oakes, [1986] 1 S.C.R. 103*; *Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567*; *RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199*; *Toronto Star Newspapers Ltd. v. Canada, 2010 SCC 21, [2010] 1 S.C.R. 721* ; *R. v. Ndhlovu, 2020 ABCA 307*, rev'g *2016 ABQB 595, 44 Alta. L.R. (6th) 382*; *Canada (Attorney General) v. Hislop, 2007 SCC 10, [2007] 1 S.C.R. 429* ; *Nova Scotia (Workers' Compensation Board) v. Martin, 2003 SCC 54, [2003] 2 S.C.R. 504*; *Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21* , *[2014] 1 S.C.R. 433*; *R. v. Lloyd, 2016 SCC 13* , *[2016] 1 S.C.R. 130*; *Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157*; *Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69*; *R. v. Nur, 2015 SCC 15, [2015] 1 S.C.R. 773*; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 S.C.R. 524*;

Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 1101; *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764; *Reference re pan-Canadian securities regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 ; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 ; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *R. v. Barabash*, 2015 SCC 29, [2015] 2 S.C.R. 522; *R. v. Appulonappa*, 2015 SCC 59 , [2015] 3 S.C.R. 754; *R. v. Rajaratnam*, 2019 BCCA 209 , 376 C.C.C. (3d) 181; *R. v. Smith*, 2015 SCC 34 , [2015] 2 S.C.R. 602; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 ; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *R. v. Généreux*, [1992] 1 S.C.R. 259; *Attorney-General v. Taylor*, [2018] NZSC 104, [2019] 1 N.Z.L.R. 213; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503; *R. v. Hall*, 2002 SCC 64 , [2002] 3 S.C.R. 309; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 ; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 ; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687 ; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 ; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *R. v. Laba*, [1994] 3 S.C.R. 965; *R. v. Grant*, [1993] 3 S.C.R. 223 ; *R. v. Morales*, [1992] 3 S.C.R. 711; *R. v. Hess*, [1990] 2 S.C.R. 906; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116 ; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180 ; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 ; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Tse*, 2012 SCC 16 , [2012] 1 S.C.R. 531; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208 ; *Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 ; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 ; *M. v. H.*, [1999] 2 S.C.R. 3; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *R. v. Heywood*, [1994] 3 S.C.R. 761; *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Sit*, [1991] 3 S.C.R. 124 ; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 ; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *R. v. Arkell*, [1990] 2 S.C.R. 695; *R. v. Martineau*, [1990] 2 S.C.R. 633 ; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591 ; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 ; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Corporation professionnelle des médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033 ; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342; *Koo Sze Yiu v. Chief Executive of the HKSAR*, [2006] 3 H.K.L.R.D. 455; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207; *Coetzee v. Government of the Republic of South Africa*, [1995] ZACC 7, 1995 (4) S.A. 631; BVerfG, 2 BvC 62/14, Decision of January 29, 2019 (Germany); *Carter v. Canada*

(Attorney General), 2016 SCC 4, [2016] 1 S.C.R. 13; *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995); *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *R. v. Debidin*, 2008 ONCA 868, 94 O.R. (3d) 421.

By Rowe J.

Applied: *Schachter v. Canada*, [1992] 2 S.C.R. 679; **considered:** *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; **referred to:** *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Morales*, [1992] 3 S.C.R. 711; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *Ontario (Attorney General) v. G*, 2019 SCC 36.

By Côté and Brown JJ. (dissenting in part)

Schachter v. Canada, [1992] 2 S.C.R. 679; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R 721; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208; *Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *M. v. H.*, [1999] 2 S.C.R. 3; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Heywood*, [1994] 3 S.C.R. 761; *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. Zundel*, [1992] 2 S.C.R.

731; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Attorney General of the Republic v. Mustafa Ibrahim*, [1964] Cyprus Law Reports 195; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 S.C.R. 13; *Scott v. Scott*, [1913] A.C. 417; *R. v. Swain*, [1991] 1 S.C.R. 933; *Ferguson v. Regional Mental Health Care St. Thomas*, 2010 ONCA 810, 271 O.A.C. 104; *Kassa (Re)*, 2019 ONCA 313; *R. v. Friesen*, 2020 SCC 9; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. Peckham* (1994), 93 C.C.C. (3d) 443; *R. v. Redhead*, 2006 ABCA 84, 384 A.R. 206; *R. v. R.L.*, 2007 ONCA 347; ; *R. v. Debidin*, 2008 ONCA 868, 94 O.R. (3d) 421; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524; *Miron v. Trudel*, [1995] 2 S.C.R. 418.

Statutes and Regulations Cited

Bill C-16, *Sex Offender Information Registration Act*, 3rd Sess., 37th Parl., 2004, s. 20.

Canadian Charter of Rights and Freedoms, preamble, ss. 1, 2, 3, 4, 7 to 15, 24(1), (2), 32(1), 33.

Christopher's Law (Sex Offender Registry), 2000, O. Reg. 69/01, ss. 1.2, 2.

Christopher's Law (Sex Offender Registry), 2000, S.O. 2000, c. 1, ss. 1(1) "offender", "pardon", 2, 3, 4(2), 7(1)(a), (b), (c), (4), 8(1)(c), 9.1, 10(2), (3), 11.

Christopher's Law (Sex Offender Registry) Amendment Act, 2011, S.O. 2011, c. 8, ss. 1(1), 6.

Constitution Act, 1867, preamble, ss. 17, 40, 48, 55, 91 to 95.

Constitution Act, 1982, ss. 44, 45, 52(1).

Constitution of South Africa, s. 172(1)(a), (b).

Criminal Code, R.S.C. 1985, c. C-46, ss. 16(1), 490.012(4) [ad. 2004, c. 10, s. 20], 490.016(1), 490.023(2), Part XX.1, 672.1(1), 672.34, 672.35, 672.47, 672.54, 672.55, 672.81, 730, 748.

Criminal Records Act, R.S.C. 1985, c. C-47, ss. 4, 4.1.

Human Rights Act 1998 (U.K.), 1998, c. 42, s. 4(4), (6).

Police Services Act, R.S.O. 1990, c. P.15, s. 41(1.1), (1.2).

Protecting Victims from Sex Offenders Act, S.C. 2010, c. 17, s. 5.

Scotland Act, 1998 (U.K.), 1998, c. 46, ss. 102(2), (3).

Sex Offender Information Registration Act, S.C. 2004, c. 10.

Authors Cited

Barrett, Joan, and Riun Shandler. *Mental Disorder in Canadian Criminal Law*. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2019, release 4).

Barnes, Elizabeth. *The Minority Body: A Theory of Disability*. Oxford: Oxford University Press, 2016.

Bird, Brian. "The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity" (2019), 42 Man. L.J. 23.

Blakeney, Allan E. "The Notwithstanding Clause, the *Charter*, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010), 19 *Constitutional Forum* 1.

Bracken, Patrick, and Philip Thomas. *Postpsychiatry*. Oxford: Oxford University Press, 2005.

Brammal, Brendan. "A Comment on *Doucet-Boudreau v. Nova Scotia (Minister of Education)* and *R. v. Demers*" *(2006), 64 U.T. Fac. L. Rev. 113*.

Burningham, Sarah. "A Comment on the Court's Decision to Suspend the Declaration of Invalidity in *Carter v. Canada*" *(2015), 78 Sask. L. Rev. 201*.

Canada. Department of Justice. Research and Statistics Division. *The Costs of Charter Litigation*, by Alan Young. Government of Canada, 2016.

Canada. Department of Justice. Research and Statistics Division. *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study*, by Jeff Latimer and Austin Lawrence. Government of Canada, 2006.

Choudhry, Sujit, and Kent Roach. "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" *(2003), 21 S.C.L.R. (2d) 205*.

Corrigan, Patrick W., and Amy C. Watson, "Understanding the impact of stigma on people with mental illness" (2002), 1 *World Psychiatry* 16.

Devlin, Richard, and Dianne Pothier. "Introduction: Toward a Critical Theory of Dis-Citizenship", in Dianne Pothier and Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*. Vancouver: UBC Press, 2006, 1.

Hoole, Grant R. "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" *(2011), 49 Alta. L. Rev. 107*.

Jhaveri, Swati. "Sunsetting suspension orders in Hong Kong", in Po Jen Yap, ed., *Constitutional Remedies in Asia*. New York: Routledge, 2019.

Kelly, James B. *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*. Vancouver: UBC Press, 2005.

Leckey, Robert. *Bills of Rights in the Common Law*. Cambridge: Cambridge University Press, 2015.

Leckey, Robert. "Remedial Practice Beyond Constitutional Text" (2016), 64 *Am. J. Comp. L.* 1.

Leckey, Robert. *Suspended Declarations of Invalidity and the Rule of Law*, March 12, 2014 (online: https://ukconstitutionallaw.org/2014/03/12/robert-leckey-suspended-declarations-of-invalidity-and-and-the-rule-of-law/#:~:text=Robert%20Leckey%3A%20Suspended%20Declarations%20of%20Invalidity%20and%20and%20the%20Rule%20of%20Law,-In%20December%202013&text=It%20stipulates%20that%20any%20law,of%20no%20force%20or%20effect).

Leckey, Robert. "The harms of remedial discretion" (2016), 14 *I CON* 584.

Macfarlane, Emmett. "Dialogue, Remedies, and Positive Rights: *Carter v. Canada* as a Microcosm for Past and Future Issues Under the *Charter of Rights and Freedoms*" *(2017), 49 Ottawa L. Rev. 107*.

Martin's Annual Criminal Code, by Marie Henein, Marc Rosenberg and Edward L. Greenspan. Toronto: Thomson Reuters, 2019.

McIntyre, Sheila. "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter*, 2nd ed. Toronto: Irwin Law, 2009, 99.

Mouland, Carolyn. "Remedying the Remedy: *Bedford*'s Suspended Declaration of Invalidity" (2018), 41 Man. L.J. 281.

Newman, Dwight. "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions*. Cambridge: Cambridge University Press, 2019, 209.

Roach, Kent. *Constitutional Remedies in Canada*, 2nd ed. Toronto: Thomson Reuters, 2019 (loose-leaf updated October 2019, release 34).

Roach, Kent. "Dialogic Judicial Review and its Critics" *(2004), 23 S.C.L.R. (2d) 49*.

Roach, Kent. "Dialogic remedies" (2019), 17 *I CON* 860.

Roach, Kent. "Principled Remedial Discretion Under the Charter" *(2004), 25 S.C.L.R. (2d) 101*.

Roach, Kent. "The Separation and Interconnection of Powers in Canada: The Role of Courts, the Executive and the Legislature in Crafting Constitutional Remedies" (2018), 5 *J. Int'l Comp. L.* 315.

Russell, Peter H. "Standing Up for Notwithstanding" *(1991), 29 Alta. L. Rev. 293*.

Ryder, Bruce. "Suspending the Charter" *(2003), 21 S.C.L.R. (2d) 267*.

Scalia, Antonin. "The Rule of Law as a Law of Rules" (1989), 56 *U. Chicago L. Rev.* 1175.

Stavsky, Mark M. "The Doctrine of State Necessity in Pakistan" (1983), 16 *Cornell Int'l L.J.* 341.

Stuart, Heather, et al. "Stigma in Canada: Results from a Rapid Response Survey" (2014), 59 *Can. J. Psychiatry* S27.

Stuart, Heather, Julio Arboleda-Flórez, and Norman Sartorius. *Paradigms Lost: Fighting Stigma and the Lessons Learned*. New York: Oxford University Press, 2012.

Trotter, Gary T. "Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review" *(2001), 26 Queen's L.J. 339*.

van Kralingen, Alex. "The Dialogic Saga of Same-Sex Marriage: *EGALE*, *Halpern*, and the Relationship Between Suspended Declarations and Productive Political Discourse About Rights" *(2004), 62 U.T. Fac. L. Rev. 149*.

Wasserman, David, et al., "Disability: Definitions, Models, Experience", in E. N. Zalta et al., eds., *Stanford Encyclopedia of Philosophy*, 2016 (online: https://plato.stanford.edu/archives/sum2016/entries/disab ility/).

Webber, Grégoire C. N. "Originalism's Constitution", in Grant Huscroft and Bradley W. Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation*. New York: Cambridge University Press, 2011, 147.

Weiler, Paul C. "Rights and Judges in a Democracy: A New Canadian Version" (1984), 18 *U. Mich. J. L. Reform* 51.

Weinrib, Lorraine. *Suspended invalidity orders out of sync with Constitution*, August 21, 2016 (online: https://www.lawtimesnews.com/news/general/suspended-invalidity-orders-out-of-sync-with-constitution/258931).

Whyte, John D. "Sometimes Constitutions are Made in the Streets: The Future of the *Charter*'s Notwithstanding Clause" (2007), 16 *Constitutional Forum* 79.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, van Rensburg and Hourigan JJ.A.), *2019 ONCA 264*, *432 C.R.R. (2d) 97*, *145 O.R. (3d) 161*, *374 C.C.C. (3d) 55*, *54 C.R. (7th) 120*, *[2019] O.J. No. 1683* (QL), *2019 CarswellOnt 4915* (WL Can.), setting aside a decision of Lederer J., *2017 ONSC 6713*, *401 C.R.R. (2d) 297*, *[2017] O.J. No. 6355* (QL), 2017 CarswellOnt 19307 (WL Can.). Appeal dismissed, Côté and Brown JJ. dissenting in part.

Counsel

S. Zachary Green, for the appellant.

Marshall A. Swadron, *Joanna H. Weiss* and *Arooba Shakeel*, for the respondent.

Marc Ribeiro and *John Provart*, for the intervener the Attorney General of Canada.

Jill R. Presser and *Shakir Rahim*, for the intervener the Canadian Civil Liberties Association.

Anita Szigeti, *Andrew Menchynski*, *Ruby Dhand* and *Meaghan McMahon*, for the intervener the Empowerment Council.

Erin Dann and *Michelle Psutka*, for the intervener the Criminal Lawyers' Association (Ontario).

Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

Adam Goldenberg and *Ljiljana Stanic*, for the intervener the Canadian Mental Health Association, Ontario.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ. was delivered by

A. KARAKATSANIS J.

I. Introduction

1 People with mental illnesses face persistent stigma and prejudicial treatment in Canadian society, which has imposed profound and widespread social, political, and legal disadvantage on them. In particular, discriminatory perceptions that those with mental illnesses are inherently and indefinitely dangerous persist. These perceptions

have served to support some of the most unjust treatment of those with mental illnesses. As this case demonstrates, such perceptions still find some expression in legislation.

2 Section 15 of the *Canadian Charter of Rights and Freedoms* prevents such discrimination from being given the force of law. This appeal requires the Court to apply the equality guarantee to the manner in which those found not criminally responsible on account of mental disorder (NCRMD) of sexual offences are treated by Ontario's sex offender registry regime. It also provides an opportunity to set out a consistent set of principles applicable to granting remedies for legislation that violates the *Charter*.

3 In Ontario, *Christopher's Law (Sex Offender Registry), 2000*, S.O. 2000, c. 1 (*Christopher's Law*), requires those who are either convicted or found NCRMD of a sexual offence to physically report to a police station to have their personal information added to the province's sex offender registry. They must continue to report in person at least once a year to keep their information up to date. They must also report every time certain information changes. Even when individuals are no longer required to report or when they die, information previously gathered about them under the registry is retained.

4 Those who are found guilty of a sexual offence can be exempted from reporting in the first place by receiving a discharge under s. 730 of the *Criminal Code*, R.S.C. 1985, c. C-46, can be removed from the registry upon receipt of a free pardon, and can be exempted from continuing to report upon receipt of either a free pardon or criminal record suspension. There is therefore some opportunity, based on an individualized assessment, to be exempted from the sex offender registry. By contrast, everyone found NCRMD *must* report upon discharge by a provincial review board or court, without exception, no one found NCRMD can *ever* be removed from the registry, and no one found NCRMD can *ever* be exempted from reporting. This is so even if they have received a discharge from a review board.

5 G, the respondent, was found NCRMD of two sexual offences and then absolutely discharged by the Ontario Review Board (ORB). His record in the 19 years since those offences occurred has been spotless. Nevertheless, as *Christopher's Law* currently stands, G will have to report and will be a registered "sex offender" for the rest of his life. His information will remain in the registry even after he passes away. He has *no* opportunity for removal.

6 In my view, *Christopher's Law* draws discriminatory distinctions between people found guilty and people found NCRMD of sexual offences on the basis of mental disability, contrary to s. 15(1) of the *Charter*. These discriminatory distinctions cannot be justified in a free and democratic society. I would therefore dismiss the appeal and uphold the Court of Appeal's orders declaring *Christopher's Law* to be of no force or effect as it applies to those found NCRMD and granted an absolute discharge, suspending the declaration of invalidity for 12 months, and exempting G from that suspension by relieving him of further compliance with the legislation and ordering that his information be deleted from the registry immediately.

II. Background

7 In September 2001, G experienced his first and only manic episode. A month later, he was charged with two counts of sexually assaulting his then-wife, one count of unlawfully confining her, and one count of harassment. The two incidents underlying the charges occurred as a result of that manic episode.

8 In June 2002, G was found NCRMD. When G appeared before the ORB in July 2002, he received a conditional discharge. In August 2003, the ORB ordered that he be absolutely discharged on the basis that "[t]here is simply no evidence to find that [G] is a significant risk to the safety of the public" (2017 ONSC 6713, 401 C.R.R. (2d) 297, at para. 17). G has not engaged in criminal activity since being absolutely discharged approximately 17 years ago. He has adhered to treatment and his symptoms have been in full remission. He has maintained stable employment and has strong and supportive relationships with his family.

9 G was placed on the provincial sex offender registry in August 2004, and on the federal registry in January 2005. Since then, G has fully complied with his reporting obligations. He has reported in person annually as required by

Christopher's Law and has complied with other requirements imposed by the federal *Sex Offender Information Registration Act*, S.C. 2004, c. 10 (*SOIRA*).

10 G brought an application challenging *Christopher's Law* (and the federal registry, which is not at issue in this appeal) as it applies to persons found NCRMD who have been absolutely discharged under Part XX.1 of the *Criminal Code* in respect of offences giving rise to registration. He took the position that the inability of people in his situation to be granted an exemption or be removed from the registry violates ss. 7 and 15(1) of the *Charter*. G's application was dismissed at first instance, but his appeal was allowed in part.

A. *Ontario Superior Court of Justice (2017 ONSC 6713, 401 C.R.R. (2d) 297) (Lederer J.)*

11 Relying on the evidence of the government's expert witness, the application judge found that, although it is not possible to predict the risk of recidivism with certainty using actuarial data, the risk of reoffending for a person found NCRMD is no less than that of an individual found guilty. He concluded that, from the perspective of risk assessment, it makes little difference whether the sexual offence results in a criminal conviction or a finding of NCRMD, because people who have been found NCRMD have criminal recidivism rates that are substantially higher than the rates of first-time offending among individuals with no criminal history.

12 Dealing with the s. 7 claim, the application judge accepted that G's liberty interest is engaged but rejected G's argument that his security of the person interest is engaged. Relying on the conclusion of the Ontario Court of Appeal in *R. v. Dyck*, 2008 ONCA 309, 90 O.R. (3d) 409, at para. 106, that the registration and reporting requirements were "quite modest", the application judge concluded that any deprivation of liberty is in accordance with the principles of fundamental justice.

13 The application judge also found no violation of s. 15(1). He found that *Christopher's Law* does not distinguish between those found NCRMD and those found guilty of an offence, either on the face of the law or in its impact. This is because the distinction between those found guilty and those found NCRMD is not found in *Christopher's Law* and because the impact of *Christopher's Law* is "modest".

B. *Ontario Court of Appeal (2019 ONCA 264, 145 O.R. (3d) 161) (Doherty, van Rensburg and Hourigan JJ.A.)*

14 On appeal, Doherty J.A. for a unanimous Court of Appeal upheld the application judge's dismissal of G's s. 7 argument. He agreed with the application judge that *Christopher's Law* engages G's liberty interest but not his security of the person interest. He also agreed that the deprivation of liberty conforms to the principles of fundamental justice, relying on the Court of Appeal's prior decisions in *Dyck* and *R. v. Long*, 2018 ONCA 282, 45 C.R. (7th) 98.

15 However, Doherty J.A. allowed the appeal on the basis of G's s. 15(1) claim. He found that the effects of *Christopher's Law* distinguish between convicted persons and persons found NCRMD on the basis of disability. Convicted persons, Doherty J.A. reasoned, can access mechanisms that allow them to avoid registration in the first place, to be relieved of reporting requirements, or to be removed from the registry. Persons found NCRMD cannot access comparable "exit ramps", even once they have been absolutely discharged. Doherty J.A. concluded that those distinctions are discriminatory because they foster the stereotypical idea that persons found NCRMD are inherently and perpetually dangerous.

16 Doherty J.A. also concluded that the law violates the s. 15(1) right of those found NCRMD who receive an absolute discharge by failing to provide them with individualized treatment, citing *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625. Substantive equality, in his view, mandates that those found NCRMD and absolutely discharged have some opportunity for individualized assessment as a precondition for being subject to registry obligations.

17 Because the law does not minimally impair equality rights, Doherty J.A. concluded that the s. 15(1) breaches are not justified under s. 1. There was no evidence the public safety objective of *Christopher's Law* would be

undermined by extending exemptions to persons found NCRMD who have been absolutely discharged. He reasoned that exemptions have already been extended to convicted persons without apparent damage to this objective.

18 As to remedy, Doherty J.A. suspended the declaration of invalidity for 12 months to allow the legislature to determine the appropriate response. However, he exempted G from the suspension by ordering that he be immediately removed from and relieved of obligations under the registry. Doherty J.A. reached the same conclusions with respect to the federal sex offender regime under *SOIRA*; the Attorney General of Canada did not appeal the decision.

III. Issues

19 The Attorney General of Ontario appeals the order declaring *Christopher's Law* to be without force or effect as it applies to those found NCRMD and absolutely discharged, as well as the order that G be immediately removed from and relieved of his obligations under the registry.

20 The following issues, relating to whether the sex offender scheme infringes the rights of those found NCRMD, arise in this case:

A. Does *Christopher's Law* violate s. 15(1)?

B. If so, is it justified as a reasonable limit under s. 1 of the *Charter*?

C. Does *Christopher's Law* violate s. 7?

D. What is the appropriate remedy? Was the declaration of invalidity properly suspended for some period of time? If so, was G properly granted an individual exemption from that suspension?

21 I begin by outlining the relevant aspects of *Christopher's Law* and Part XX.1 of the *Criminal Code*, then turn to the issues in this appeal.

IV. *Christopher's Law*

22 *Christopher's Law* establishes a registry containing, among other things, the names, dates of birth, addresses, personal and business phone numbers, employers, descriptions, and photographs of Ontario residents who have been convicted or found NCRMD in respect of a sexual offence, along with the sexual offence in question (s. 2; *Christopher's Law (Sex Offender Registry), 2000*, O. Reg. 69/01 (*Christopher's Law Regulation*), s. 2).

23 *Christopher's Law* imposes three distinct types of burdens on registrants. First, registrants must comply with initial reporting requirements that, broadly, apply upon release into the community. Second, registrants must continue to report at least once a year and within seven days of specified events, such as changing their addresses or names. Third, registrants' information persists in the registry, subject to removal only in the event that a registrant receives a free pardon (s. 9.1; *Christopher's Law Regulation*, s. 2(3)). I explain these burdens in more detail below.

24 Registrants must present themselves in person at a police station or other designated place to comply with their initial reporting requirements within seven days of release from custody, release on parole, release following absolute or conditional discharge after being found NCRMD, and becoming resident in Ontario (s. 3(1); *Christopher's Law Regulation*, s. 1.2). This initial in-person reporting obligation takes 45-60 minutes to complete at a police station.

25 Registrants must present themselves at least once a year to fulfil their ongoing reporting obligations (s. 3(1)(f) and (g)). They must provide a wide variety of information identified in the regulations, including their name and any present or past aliases, their addresses, their personal and business phone numbers, the name of their employers, their photograph, their physical description, their driver's licence number, their licence plate number, the characteristics of the car they regularly use, and the educational institutions in which they are enrolled (s. 3(2); *Christopher's Law Regulation*, s. 2). It takes 30-60 minutes to fulfil the annual reporting obligation. Registrants are

also required to report every time they change their address, change their name, and become or cease to be an Ontario resident.

26 Registrants must comply with the reporting obligations for 10 years if the maximum sentence for the sexual offence of which they were convicted or found NCRMD is 10 years or less (s. 7(1)(a)). They must comply for life if the maximum sentence is greater than 10 years or if they were convicted or found NCRMD of more than one sexual offence (s. 7(1)(b) and (c)).

27 There is no reporting obligation for those who receive conditional or absolute discharges under s. 730 of the *Criminal Code*, because s. 730(3) deems those individuals not to have been convicted of the offence, and s. 3 of *Christopher's Law* only captures persons who have been convicted or found NCRMD of an offence.

28 Under s. 7(4) of *Christopher's Law*, a registrant is no longer required to report upon receiving either a free pardon or a criminal record suspension. A free pardon deems the recipient to have never committed the offence of which they were convicted (*Criminal Code*, s. 748(3)). A free pardon may be granted either under the Crown's prerogative of mercy or under s. 748 of the *Criminal Code*. Historically, the prerogative of mercy and the free pardon, one of the remedies the prerogative can provide, have been exercised to correct wrongful convictions and to compassionately ameliorate the impacts of convictions (*Hinse v. Canada (Attorney General)*, *2015 SCC 35*, *[2015] 2 S.C.R. 621*, at para. 28; G. T. Trotter, "Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review" *(2001), 26 Queen's L.J. 339*). A record suspension is granted by the National Parole Board to those who have been convicted of an offence. Good conduct in the period since the end of imprisonment or probation is among the circumstances to be considered in granting a record suspension (*Criminal Records Act*, *R.S.C. 1985, c. C-47, ss. 4* and 4.1).

29 Under s. 9.1 of *Christopher's Law*, a registrant will be removed from the registry upon receiving a free pardon. At the time of G's registration, s. 9.1 also provided that a registrant would be removed from the registry upon receiving what is now referred to as a record suspension. However, while a record suspension removes the reporting requirement, it no longer leads to removal from the registry (*Christopher's Law (Sex Offender Registry) Amendment Act, 2011*, S.O. 2011, c. 8, ss. 1(1) and 6). Finally, there is no mechanism for removing registrants' information upon a successful appeal, nor when they pass away. Instead, the registrant's date of death is added to the registry (*Christopher's Law Regulation*, s. 2(1) 10).

30 Information contained in the registry can be disclosed to police forces within and outside Canada for crime prevention and law enforcement purposes, and disclosed publically by a chief of police or designate under certain circumstances (s. 10(2) and (3); *Police Services Act*, *R.S.O. 1990, c. P.15, s. 41*(1.1) and (1.2)).

31 Significantly, *Christopher's Law requires* police forces to make reasonable efforts to verify an offender's address at least once a year, which may consist of attending at a registrant's home (s. 4(2)). It does not set limits on the number of checks that can be conducted for verification purposes and does not require police forces to give registrants notice of verification efforts.

32 Registrants who fail to comply with *Christopher's Law* are subject to a maximum fine of $25,000 or up to a year's imprisonment for a first offence and a maximum fine of $25,000 or up to two years' imprisonment less a day for a subsequent offence (s. 11).

V. *Criminal Code*, Part XX.1

33 Part XX.1 of the *Criminal Code* sets out the "assessment-treatment system" that applies to persons who are exempt from criminal responsibility and receive a verdict of NCRMD by virtue of ss. 16(1) and 672.34 (*Winko*, at para. 16). Part XX.1 provides for the establishment of provincial review boards, with the responsibility to hold hearings to determine whether to grant persons found NCRMD conditional or absolute discharges under s. 672.54.[1]

34 In *Winko*, at para. 20, this Court described the purposes of Part XX.1, a scheme founded on the "twin goals of fair treatment [for those found NCRMD] and public safety":

> ... the purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate treatment... . [The NCRMD finding] triggers a balanced assessment of the offender's possible dangerousness and of what treatment-associated measures are required to offset it. Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused. [para. 43]

35 Following a disposition or review hearing, a review board may order an absolute discharge, a conditional discharge, or a hospital detention (s. 672.54). In arriving at a disposition that is "necessary and appropriate in the circumstances", review boards must take into account the safety of the public, along with the mental condition of the person found NCRMD, their reintegration into society, and their other needs (s. 672.54). Conditions relating to treatment may only be included in a disposition if the accused consents to the condition (s. 672.55).

36 In general, disposition hearings are held within 45 days of an NCRMD verdict, and disposition review hearings are held no more than 12 months after the most recent disposition or disposition review hearing (ss. 672.47 and 672.81).

37 The review board *must* absolutely discharge any person found NCRMD unless it concludes, based on the evidence presented at the hearing, that the person poses a "significant risk of committing a serious criminal offence" (*Winko*, at para. 57; see also s. 672.54(a)). If the review board cannot make the required positive finding of significant risk, jurisdiction under Part XX.1 falls away -- the criminal law cannot legitimately restrain that individual's liberty any further (*Winko*, at para. 33).

38 This constitutional imperative, coupled with the individualized review that the review board must undertake at least annually in every person's case, illustrate Part XX.1's rejection of "invidious" stereotypical notions that persons with mental illnesses are inherently dangerous (*Winko*, at paras. 35, 47 and 89). Risk cannot be assumed; it must be positively found. And it must be found based on evidence considered within an individualized assessment of a person's circumstances.

VI. Analysis

A. *Does Christopher's Law Infringe the Equality Rights of Those Found NCRMD?*

(1) General principles

39 The equality guarantee has a powerful remedial purpose (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 3; see also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171). As Abella J. noted in *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, the "root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed" (para. 332) -- though, of course, *historical* discrimination need not be demonstrated for a court to find that a law infringes s. 15(1). The equality guarantee seeks to prevent and remedy discrimination against groups subject to social, political, and legal disadvantage in Canadian society (*R. v. Swain*, [1991] 1 S.C.R. 933, at p. 994; see also *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 54). It expresses a commitment to recognizing the essential, inalienable equal worth of all persons through the law (*Andrews*, at p. 171; *Eldridge*, at para. 54). In *Andrews*, the launching pad of the Court's *Charter* equality jurisprudence, McIntyre J. observed that the "worst oppression will result from discriminatory measures having the force of law" (p. 172). The equality guarantee means that discriminatory laws will have no force at all.

40 The Court asks two questions in determining whether a law infringes s. 15(1). First, does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground? If a law is facially neutral, it may draw a distinction indirectly where it has an adverse impact upon members of a protected group. Second, if it does draw a distinction, does it impose "burdens or [deny] a benefit in a manner that has the effect of reinforcing,

perpetuating or exacerbating ... disadvantage", including "historical" disadvantage? (See *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, at para. 22, citing *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20, and *Quebec v. A*, at paras. 323-24 and 327; see also *Quebec v. A*, at para. 332, *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at paras. 25-28, and *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at paras. 27 and 30, per Abella J.)

41 The first step -- whether the law creates a distinction based on enumerated or analogous grounds -- is not a preliminary merits test or "an onerous hurdle designed to weed out claims on technical bases" (*Quebec v. Alliance*, at para. 26). It is aimed at ensuring that those who access the protection of s. 15(1) are those it is designed to protect (*Alliance*, at para. 26). In cases involving laws that draw distinctions in their impact, the disproportionate impact on a protected group is enough -- the disproportionate impact need not be *caused* by the protected ground (*Fraser*, at para. 70).

42 The second step asks whether the challenged law imposes a burden or denies a benefit in a manner that is discriminatory. Importantly, it does not matter to either step of the analysis whether the challenged law *created* the social, political or legal disadvantage of protected groups (*Centrale des syndicats*, at para. 32, citing *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 84 and 97; *Fraser*, at para. 71). If the law reinforces, perpetuates, or exacerbates their disadvantage, it violates the equality guarantee and thereby gives discrimination the force of law.

43 The ultimate issue in s. 15(1) cases is whether the challenged law violates the animating norm of substantive equality (*Quebec v. A*, at para. 325, citing *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 2; *Fraser*, at para. 42; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 14). Substantive equality focuses both steps of the s. 15(1) analysis on the concrete, material impacts the challenged law has on the claimant and the protected group or groups to which they belong in the context of their actual circumstances, including historical and present-day social, political, and legal disadvantage. An appreciation of the role substantive equality has played in our jurisprudence is necessary to understand why many of the arguments the Attorney General presented to this Court must be rejected.

44 This Court's conception of substantive equality has developed in opposition to formal equality approaches. Formal equality is limited to equality "before the law", and sees equality as a principle fulfilled by "treating likes alike" (*Andrews*, at pp. 165-68 and 170; *Centrale des syndicats*, at para. 27). Formalist approaches to equality rights involve a "decontextualized application of objectified rules and definitions" that fails to account for, among others, conditions of material inequality, the concrete impacts that laws have on individuals and groups, and the manner in which individuals' choices are embedded in their social and economic surroundings (S. McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination", in F. Faraday, M. Denike and M. K. Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2nd ed. 2009), 99, at p. 105; *Fraser*, at para. 89; *Quebec. v. A.*, at para. 342, citing M. Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15", in S. Rodgers and S. McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (2010), 183, at pp. 190-91 and 196).

45 In *Andrews*, this Court interpreted the *Charter*'s broadly worded equality rights guarantee as a clear repudiation of the formalism that had dominated under the *Canadian Bill of Rights*, S.C. 1960, c. 44, whose more limited equality guarantee was rendered ineffectual by narrow interpretation (p. 170). Recognizing that identical treatment may produce inequality and that different treatment may not always produce inequality, the Court properly highlighted the law's impact on individual claimants and groups as the main consideration (pp. 164-65).

46 Since then, the Court has remained vigilant in its jurisprudence in guarding the s. 15(1) analysis from incursions by formal equality approaches (see *Centrale des syndicats*, at paras. 25-26; *Withler*, at para. 43). To this end, it has eschewed a formalistic analysis based on "mirror comparator groups" because the search for the "proper" comparator group obscured the oppressive nature of some laws (*Withler*, at para. 2); it has rejected discriminatory intent as a necessary element of discrimination in favour of focusing on a law's concrete impacts (*Eldridge*, at para.

62; *Andrews*, at p. 173); and it has held fast to the view that the adverse effects of a facially neutral law can constitute discrimination contrary to s. 15(1) (*Eldridge*, at paras. 77-78; *Andrews*, at p. 173).

47 Emerging from the foundation laid in *Andrews*, substantive equality concerns itself with historical or current conditions of disadvantage, products of the persistent systemic discrimination that continues to oppress groups (*Fraser*, at para. 42). Substantive equality demands an approach "that looks at the full context, including the situation of the claimant group and ... the impact of the impugned law" on the claimant and the groups to which they belong, recognizing that intersecting group membership tends to amplify discriminatory effects (*Centrale des syndicats*, at para. 27, quoting *Withler*, at para. 40) or can create unique discriminatory effects not visited upon any group viewed in isolation. It must remain closely connected to "real people's real experiences" (*Egan v. Canada*, *[1995] 2 S.C.R. 513*, at para. 53, per L'Heureux-Dubé J.): it must not be applied "with one's eyes shut" (McIntyre, at p. 103). Further, as Wilson J. reasoned in *Andrews*, at p. 153: "It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the 'unremitting protection' of equality rights in the years to come."

(2) Distinction Based on the Enumerated Ground of Mental Disability

48 The first step is to identify a distinction made on the face of the law or in its impact based on an enumerated or analogous ground.

49 The Attorney General submits before this Court that *Christopher's Law* does not draw a distinction by denying those found NCRMD access to exit ramps. The Attorney General says the denial of a benefit to those found NCRMD results from distinctions drawn by the federal legislation, which is outside the Ontario legislature's control.

50 Here, there are clear distinctions drawn based on the enumerated ground of mental disability. Offenders found guilty can be exempted from having to report and register in the first place by receiving a discharge in their sentencing hearing. Convicted registrants can be removed from the registry by receiving a free pardon, and can be relieved of the obligation to continue to report upon receipt of a free pardon or record suspension. A discharge, as a possible result of a sentencing hearing, is necessarily tailored to the individual circumstances of the accused (see *R. v. Campbell*, *2013 BCCA 43*, *334 B.C.A.C. 16*, at para. 27). Both free pardons and record suspensions are granted following some assessment of the offender's individual circumstances. These existing mechanisms, as they apply to those found guilty, provide opportunities, based on some level of individualized assessment, for exemption, removal, or relief from the sex offender registry. But there is no way for those found NCRMD to be exempted from having to report and register, to be removed from the registry once they have been put on it, or to be relieved of the obligation of continuing to report.

51 These distinctions flow from the manner in which *Christopher's Law* interacts with federal legislation, including the *Criminal Code* and *Criminal Records Act*. However, legislation does not exist in a vacuum -- *Christopher's Law* imposes a scheme of obligations on persons convicted of or found NCRMD in respect of sexual offences. It is layered on top of the consequences of findings made under the *Criminal Code* by design. Even if the legislature made these distinctions inadvertently, a substantive equality analysis considers distinctions that are unintentional or result from the law's interaction with other statutes or circumstances. These are core lessons of this Court's jurisprudence (*Fraser*, at paras. 31-34, 41-47 and 69; *Andrews*, at p. 173; *Eldridge*, at paras. 62 and 77-78). The combined effect of multiple statutes is particularly important for those with mental illnesses, as their lives are often regulated by what the intervener, the Canadian Mental Health Association, Ontario, calls a "complex web of statutes and regulations" (I.F., at para. 7).

52 Here, it is determinative that those found NCRMD have *no opportunity* to be exempted from initial registration, removed from the registry, or relieved of the obligation to report, whereas opportunities for exemption, removal, and relief are available to those found guilty of the same offences. This distinction arises precisely because of the NCRMD regime. NCRMD individuals are plainly subjected to different treatment based on the enumerated ground of mental disability.

53 The Attorney General argues that the distinction identified -- the lack of removal or exemption mechanisms -- could be cured by removing those mechanisms for *all* individuals, so those found criminally responsible for sexual offences are treated the same as those found NCRMD.

54 Such a proposal invites at least two other constitutional concerns.

55 First, the s. 15(1) analysis is not merely concerned with formal distinctions apparent on the face of a law. Eliminating overt distinctions may not amount to eliminating all relevant distinctions. Thus, I cannot accept the premise on which the Attorney General's argument appears to rest -- that withholding exit ramps from all persons to whom *Christopher's Law* applies would *necessarily* be consistent with s. 15(1). It does not follow inexorably from the fact that all who are subject to the sex offender registry would be treated the same on the face of the law that the law would not impose a heavier burden on persons found NCRMD.

56 Second, eliminating all removal and exemption mechanisms would invite the concern that such a scheme could fail s. 7 scrutiny in respect of all registrants. Of course, the Court need not address this hypothetical situation: whether the existing regime as it applies to those found guilty is compatible with s. 7 of the *Charter* is beyond the scope of this appeal.

(3) Discrimination

57 Step two of the s. 15(1) analysis asks whether the distinction drawn is a discriminatory one, that is, "whether it imposes burdens or denies benefits in a way that reinforces, perpetuates, or exacerbates disadvantage" (*Centrale des syndicats*, at para. 30).

58 The Attorney General argues that *Christopher's Law* includes persons found NCRMD in the registry based on actuarial data about risk, and therefore does not stereotype them. Highlighting that pardons and record suspensions are inappropriate for persons found NCRMD, who have not been convicted of a crime, the Attorney General submits that Doherty J.A. erred in finding that a process of individualized assessment is constitutionally required by s. 15(1). The Attorney General argues that the comparatively modest impact of the registry on individuals should allow the government to proceed based on statistical generalizations.

59 G supports Doherty J.A.'s analysis. He submits that, by denying those found NCRMD access to exit ramps, *Christopher's Law* effectively presumes that those found NCRMD have no prospect for rehabilitation and accordingly perpetuates disadvantage and negative stereotypes about persons with mental illness. Ontario has decided to subject persons found NCRMD of sexual offences to the registry, so G says it must consider the needs and circumstances of that group.

60 I have no difficulty concluding that the denial of exit ramps to those found NCRMD and discharged is discriminatory.

61 In our society, persons with disabilities regrettably "face recurring coercion, marginalization, and social exclusion" (R. Devlin and D. Pothier, "Introduction: Toward a Critical Theory of Dis-Citizenship", in D. Pothier and R. Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (2006), 1, at p. 1). As this Court has recognized, "[t]his historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw" (*Eldridge*, at para. 56). In reality, persons with disabilities are not flawed, nor can they all be painted with the same brush. While they may share experiences of "[s]tigma, discrimination, and imputations of difference and inferiority" (D. Wasserman et al., "Disability: Definitions, Models, Experience" in E. N. Zalta et al., eds., *Stanford Encyclopedia of Philosophy* (2016) (online), at s.3.2), diversity within those labelled disabled is not the exception but the rule (see, e.g., E. Barnes, *The Minority Body: A Theory of Disability* (2016), at p. 9). Section 15's promise of respect for "the equal worth and human dignity of all persons" (*Eldridge*, at para. 54) requires that those with disabilities be considered and treated as worthy and afforded dignity

in their plurality. And s. 15's guarantee that discrimination not be given the force of law requires careful attention to the diverse impacts that government action will have on those with disabilities.

62 The stereotyping, exclusion, and marginalization experienced by persons with disabilities is also visited on those with mental illnesses (P. Bracken and P. Thomas, *Postpsychiatry* (2005), at pp. 79-100). The prejudicial idea that those with mental illnesses are inherently and perpetually dangerous, along with other stigmatizing, prejudicial notions, has led to profound disadvantage for individuals living with mental illnesses (*Winko*, at paras. 35-37; *Swain*, at p. 994; P. W. Corrigan and A. C. Watson, "Understanding the impact of stigma on people with mental illness" (2002), 1 *World Psychiatry* 16). This disadvantage has deep historical roots (H. Stuart, J. Arboleda-Flórez and N. Sartorius, *Paradigms Lost: Fighting Stigma and the Lessons Learned* (2012), at pp. 103-11):

> Mental illnesses are not like other illnesses, because they regularly cause people to lose their rights and freedoms in ways that are unimaginable in other health conditions ... .
>
> Historically, the care of the mentally ill has been deplorable. During the great confinement in the early part of the 1800s, hospital officials in Europe had the authority to round up and imprison people who were mentally ill (termed then madmen and idiots), along with beggars, vagabonds, criminals, the unemployed, and other undesirables. The characterization of the mentally ill as wild beasts justified their forcible confinement and social banishment. [Emphasis deleted; p. 103.]

63 Though the early 19th century's most abhorrent treatment of those with mental illnesses has been left behind, stigmatizing attitudes persist in Canadian society to this day (H. Stuart et al., "Stigma in Canada: Results from a Rapid Response Survey" (2014), 59 *Can. J. Psychiatry* S27). As Stuart, Arboleda-Flórez, and Sartorius observe, "perceptions of violence and risk of violence are central to ... support for coercive treatments, legislative solutions, and justifications for social inequities and injustices" (p. 108). While discriminatory attitudes and impacts against those with mental illnesses regrettably persist, they must not be given the force of law (*Andrews*, at p. 172).

64 The Attorney General submits that the distinctions drawn by *Christopher's Law* are not discriminatory because they are based on statistical generalizations and "empirical fact" and impose only "modest" impacts on registrants. I cannot agree. The relevant question is whether *Christopher's Law* imposes burdens or denies benefits in a manner that reinforces, perpetuates, or exacerbates disadvantage. There is no threshold requirement of severity.

65 The distinctions drawn by *Christopher's Law* reinforce and further the stigmatizing idea that those with mental illness are inherently and permanently dangerous and, in so doing, perpetuate the disadvantage they experience. As Doherty J.A. recognized, they "reflec[t] an assumption that persons who committed criminal acts while NCRMD do not change, but rather pose the same ongoing and indeterminate risk they posed at the time of the offence" (C.A. reasons, at para. 122).

66 In addition to being stigmatized as dangerous, forced compliance with registry requirements, as the intervener the Empowerment Council notes, can also contribute to a "double stigma" for those found NCRMD, as a result of being considered both "mentally ill" and a "sexual offender" (*R. v. C.C.*, *2007 ABPC 337*, *435 A.R. 215*, at paras. 18, 43, 59 and 84; *R. v. Redhead*, *2006 ABCA 84*, *384 A.R. 206*, at para. 31).

67 The law thus imposes a burden on people found NCRMD in a manner that violates the norm of substantive equality in two respects: the law itself invokes prejudicial and stereotypical views about persons with mental illnesses, feeding harmful stigma; and the law puts those found NCRMD in a worse position than those found guilty. Both effects perpetuate the historical and enduring disadvantage experienced by persons with mental illnesses.

68 For G, being denied access to exemption and removal mechanisms based on individualized assessment means that he will be registered as a sex offender for the rest of his life; he may be subject to random police checks and will have to report at least annually for the rest of his life; and his information will never be removed from the registry, even after death, no matter what he does. His NCRMD finding, absolute discharge, spotless compliance record, consistent employment, strong family relationships -- none of that matters. By withholding exit ramps,

Christopher's Law signals that the law considers G a perpetual threat to the public. That the state will not take its eyes off G suggests that, in the opinion of the law, he will always be dangerous.

69 The Attorney General's argument that government's intention not to stereotype is relevant to the s. 15(1) analysis betrays a profound misunderstanding of equality rights -- which protect substantive equality. As this Court has repeatedly said, "a discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation" (*Eldridge*, at para. 62; *Quebec v. A*, at paras. 328-29 and 331-33). As Abella J. held in *Quebec v. A*, if the impugned measure "widens the gap between the historically disadvantaged group and the rest of society" or reinforces, perpetuates, or exacerbates historical disadvantage, then it is discriminatory (para. 332; *Quebec v. Alliance*, at para. 25). The question is not whether there is some legitimate basis upon which the distinction exists or "widens the gap" (see *Fraser*, at paras. 79-80 and 177). That is relevant only to the proportionality analysis under s. 1 of the *Charter*. The focus is on the law's real impact on the claimant and the groups to which they belong (*Withler*, at para. 2).

70 In sum, *Christopher's Law* infringes s. 15(1) of the *Charter* by requiring those found NCRMD to comply with the sex offender registry without providing them with opportunities for exemption and removal based on individualized assessment. While the opportunities for exemption and removal that exist for those found guilty involve some kind of individualized assessment, I need not determine the nature or extent of the opportunities that must be provided for those found NCRMD. That is not a determination to be made in the abstract -- subject to the requirements of the *Charter*, the legislature may choose from a range of policy options.

B. *Is Christopher's Law a Reasonable Limit on Equality Rights?*

71 The Attorney General must establish, on a balance of probabilities, that the infringement of s. 15(1) is justified under s. 1. First, there must be a pressing and substantial objective for the infringing measure. Second, the infringing measure must not disproportionately interfere with s. 15(1) rights in furtherance of that objective. The second part of the *Oakes* test has three parts. The state must demonstrate the infringement is rationally connected to the objective, the means chosen to further the objective interfere as little as reasonably possible with the s. 15(1) right, and the benefits of the infringing measure outweigh its negative effects (see *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-40; *Vriend*, at paras. 109-10; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at paras. 48, 53 and 76-78).

72 The Attorney General's burden is not to establish that the legislative scheme as a whole is a reasonable limit on s. 15(1) that can be demonstrably justified in a free and democratic society, but to justify the *infringing measure itself*. As this Court has underscored, "it is the infringing measure and nothing else which is sought to be justified" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 144; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 20). The objective of the infringing measure is thus the proper focus of the analysis; however, it may be necessary to situate the infringing measure in the context of the broader legislative scheme to understand the limitation's function (*Vriend*, at para. 111).

73 The parties agree that the purpose of *Christopher's Law* is to assist in the investigation and prevention of sexual offences. G concedes that that purpose is pressing and substantial and that the limits it places on *Charter* rights are rationally connected to that purpose. In effect, he acknowledges that requiring all persons found NCRMD to comply with *Christopher's Law* without any opportunity for exemption or removal based on individualized assessment is rationally connected to assisting in investigating and preventing sexual offences (C.A. reasons, at para. 141).

(1) Minimal Impairment

74 I agree with the Court of Appeal that *Christopher's Law* is not minimally impairing of the s. 15(1) rights of those who were found NCRMD of a sexual offence and discharged. *Christopher's Law* itself includes mechanisms by which, after some form of individualized assessment of their circumstances, offenders who were not found NCRMD can be removed from the registry (free pardon), relieved of the obligation to report (free pardon and record suspension), or exempted from reporting in the first place (discharge under s. 730 of the *Criminal Code*). The inclusion of *any* method of exempting and removing those found NCRMD from the registry based on individualized

assessment would be less impairing of their s. 15(1) rights and could actually increase the registry's effectiveness by narrowing its application to individuals who pose a greater risk to the community.

75 I would reject the Attorney General's submission that risk assessments can never be certain, and therefore the object of the legislation can only be achieved by a mandatory and permanent registry for all those found NCRMD. First, the same could be said for all those found guilty of sexual offences: the individualized assessments that occur when an absolute discharge, a free pardon, or a record suspension is granted can equally never predict risk with certainty. Second, the minimal impairment requirement requires only that the objective be *substantially* achieved (*Hutterian Brethren*, at paras. 53-55). Individual assessment does not need to perfectly predict risk -- certainty cannot be the standard. There was no evidence that providing persons found NCRMD with the opportunity to be exempted or removed from the registry based on an individualized assessment of their circumstances would significantly lessen the usefulness of the registry to law enforcement. Indeed, as Doherty J.A. noted, there is "no evidence that, while the objective of the legislation is consistent with exceptions and exemptions for persons found guilty, it is somehow undermined by comparable exceptions and exemptions for persons found NCRMD" (C.A. reasons, at para. 145).

76 I accordingly conclude that the Attorney General has not met his burden under s. 1 to demonstrate that the infringing measure is not minimally impairing of the right and therefore has not justified the s. 15(1) infringement.

C. *Does Christopher's Law Infringe the Right to Life, Liberty and Security of the Person?*

77 Given that I have concluded that *Christopher's Law* violates s. 15(1) in its application to persons found NCRMD and that G's s. 7 claim does not extend beyond those persons, it is not necessary to address whether *Christopher's Law* also violates s. 7. As I will explain, because the privacy and liberty interests of those found NCRMD are the very interests that are unequally burdened by *Christopher's Law*, they inform the remedy for the breach of s. 15(1). It is therefore not necessary to determine whether there is also a breach of s. 7 in order to inform the appropriate remedy. Further, addressing some of the s. 7 arguments would have an impact on the broader issue of the nature of the registry's effects on all registrants and whether the entire scheme complies with s. 7; such determinations are best left for another case.

78 Even so, these reasons should not be taken as agreeing with the Ontario Court of Appeal's approach to s. 7 in this case, or in *Dyck* and *Long*. Those approaches rest on the conclusion in those cases that the legislation's intrusion on liberty is "modest", a conclusion that has been challenged. I make no further comment on this point, given that a s. 7 challenge to the federal sex offender registry is currently before the courts (see *R. v. Ndhlovu*, 2020 ABCA 307, rev'g 2016 ABQB 595, 44 Alta. L.R. (6th) 382).

D. *What Is the Appropriate Remedy?*

79 The Court of Appeal issued a declaration that *Christopher's Law* is of no force or effect insofar as it applies to those found NCRMD of a sexual offence and granted an absolute discharge by a provincial review board. It suspended the effect of that declaration for a year but exempted G from the suspension, ordering that his information be immediately removed from the registry.

80 The parties submit that the effect of any declaration that *Christopher's Law* is of no force or effect should be suspended, but disagree on whether G should be immediately exempted from that suspension. The Attorney General submits that individual exemptions from suspensions should not be granted except in extreme cases where, absent an exemption, the claimant will not benefit from the declaration. The intervener, the David Asper Centre for Constitutional Rights, submits that issuing the appropriate remedy in this appeal will require clarification of this Court's remedial jurisprudence by returning to the principles that underlie the remedies it has granted in the past.

81 In recent years, academic commentators have urged that remedies for unconstitutional laws be determined in a more principled, coherent, and transparent way. In particular, our jurisprudence dealing with suspensions of declarations of invalidity, and the exemption of individuals from those suspensions, has been criticized for unduly

compromising the protection of rights by failing to grant meaningful remedies (see, e.g., R. Leckey, "The harms of remedial discretion" (2016), 14 *I CON* 584, at pp. 591-93), and for diminishing the quality of decision making by failing to transparently explain the basis for a suspension (see, e.g., G. R. Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" *(2011), 49 Alta. L. Rev. 107*, at pp. 118 and 123). I would accept the Asper Centre's invitation to articulate a principled approach to remedies for legislation that violates the *Charter*.

82 As I shall explain, this Court's leading decision on remedies for laws that violate the *Charter*, *Schachter v. Canada*, *[1992] 2 S.C.R. 679*, has provided helpful guidance on how to craft a responsive and effective remedy for unconstitutional laws for nearly three decades. But, in some respects, this Court's remedial jurisprudence has moved beyond *Schachter*. By employing and building on *Schachter*'s guidance in determining the form and breadth of declarations of invalidity, suspending the effect of those declarations, and exempting individuals from suspensions, this Court's remedial practice has come to coalesce around a group of core remedial principles. Recognizing those remedial principles and explicitly identifying approaches that strike the right balance between them will encourage greater consistency and transparency in remedial decision making.

83 As I will explain, I conclude that suspensions of declarations of invalidity should be rare, granted only when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration's effect. And when declarations are suspended, granting individual exemptions pursuant to s. 24(1) of the *Charter* will often balance the interests of the litigant, the broader public, and the legislature in a manner that is "appropriate and just".

(1) Principled Remedial Discretion

84 Section 52(1) of the *Constitution Act, 1982*, reads:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

85 Section 52(1) of the *Constitution Act, 1982*, provides in absolute terms that laws inconsistent with the Constitution are of no force or effect to the extent of the inconsistency. Although it states the legal result where there is conflict between a law and the Constitution, s. 52(1) does not explicitly provide courts with a grant of remedial jurisdiction.[2] A general declaration pursuant to courts' statutory or inherent jurisdiction is the means by which they give full effect to the broad terms of s. 52(1).

86 That a law is "of no force or effect" only "to the extent of the inconsistency" with the Constitution means that a court faced with a constitutional challenge to a law must determine to what extent it is unconstitutional and declare it to be so. Our jurisprudence teaches us that a measure of discretion is inevitable in determining how to respond to an inconsistency between legislation and the Constitution.

87 There is a theory, consonant with the Blackstonian declaratory theory of the law, that "judges never make law, but merely discover it" (*Canada (Attorney General) v. Hislop*, *2007 SCC 10*, *[2007] 1 S.C.R. 429*, at para. 79). On this view, when a law is unconstitutional, courts and other decision-makers have no remedial discretion -- s. 52(1) renders unconstitutional laws of no force or effect from the moment of their enactment (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, *2003 SCC 54*, *[2003] 2 S.C.R. 504*, at para. 28).

88 However, while s. 52(1) is the substantive basis of constitutional invalidity, the public and the state will often disagree about whether a given law is unconstitutional and, if so, to what extent. Our legal order, grounded in related principles of constitutional supremacy and the rule of law, requires that there be an institution empowered to finally determine a law's constitutionality; s. 52(1) confirms "[t]he existence of an impartial and authoritative judicial arbiter" to determine whether the law is of no force and effect (*Reference re Supreme Court Act, ss. 5 and 6*, *2014 SCC 21*, *[2014] 1 S.C.R. 433*, at para. 89). Even in the absence of a formal declaration, s. 52(1) operates to prevent the application of unconstitutional laws. For example, because of the limits of its statutory jurisdiction, a tribunal or a provincial court's determination that legislation is unconstitutional has no legal effect beyond the decision itself;

nevertheless, it must refuse to give effect to legislation it considers unconstitutional (see, e.g., *Martin*, at para. 31; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 15). Thus, the reach of a judicial determination of the unconstitutionality of a law will be limited in the absence of statutory or inherent jurisdiction to issue a general declaration of invalidity.

89 As I will explain, while s. 52(1) recognizes the primacy of the Constitution, including the fundamental rights and freedoms of individuals and groups guaranteed by the *Charter*, fashioning constitutional remedies inevitably implicates other -- at times, competing -- constitutional principles (K. Roach, "Principled Remedial Discretion Under the Charter" (2004), 25 S.C.L.R. (2d) 101, at pp. 112-13). Courts must strike an appropriate balance between these principles in determining how to give effect to s. 52(1) in a manner that best aligns with our broader constitutional order.

90 Kent Roach argues, and the intervener the Asper Centre submits, that *Charter* remedies should be granted in accordance with "principled discretion": a middle ground between "strong" or "pure" discretion, which would give judges free rein to fashion remedies as they see fit, and "rule-based" discretion, which would tightly constrain judges with hard-and-fast rules (Roach (2004), at pp. 102 and 107-13). I agree.

91 Pure discretion has the benefit of being endlessly adaptable to any factual context, but has the clear downside of permitting results based on "the wills and whims of a person or a group of people" (Roach (2004), at p. 107, quoting P. Birks, "Three Kinds of Objections to Discretionary Remedialism" (2000), 20 *Uwa. L. Rev.* 1, at p. 15). It also fails to encourage transparent reasoning -- if the decision-maker can do anything, there is less incentive to explain the basis for the decision. Rule-based discretion, by contrast, has the benefit of being applicable in different contexts in a predictable way. However, it does not encourage courts to engage with the purposes behind the rules and tends to lead to mechanical application of those rules, which can produce unfair results in individual cases (Roach (2004), at pp. 109-10 and 140).

92 A review of this Court's jurisprudence shows that it favours principled discretion, which requires judges to consider multiple, competing remedial principles and resolve conflicts between them while justifying their prioritization of certain considerations over others.

93 "Remedial principles", in this sense, are more general than rules and, unlike rules, may conflict and be weighed differently (Roach (2004), at pp. 111-13, citing R. Dworkin, *Taking Rights Seriously* (1977)). Articulating the core general principles that structure the exercise of principled remedial discretion will assist in promoting principled, transparent, and consistent approaches to s. 52(1) remedies.

94 *Schachter* provided remedial principles of this kind, identifying twin principles of respect for the purposes of the *Charter* and respect for the legislature, and thereby guiding the discretion of Canadian courts for nearly three decades. But in the process of applying that approach, this Court has sometimes articulated additional relevant or analogous principles. As I will explain, when legislation violates the *Charter*, courts have been guided by the following fundamental remedial principles, grounded in the Constitution, in determining the appropriate remedy, applying them at every stage:

A. *Charter* rights should be safeguarded through effective remedies.

B. The public has an interest in the constitutional compliance of legislation.

C. The public is entitled to the benefit of legislation.

D. Courts and legislatures play different institutional roles.

95 Safeguarding rights lies at the core of granting *Charter* remedies because the *Charter* exists to protect rights, freedoms, and inherent dignity; this purpose inheres in the *Charter* as a whole (see *Vriend*, at para. 153; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at para. 57). The Court's purposive approach to constitutional remedies ensures that the effective vindication and protection of rights is at the core of the remedies it grants for legislation that violates the *Charter* (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 104).

96 The rule of law is explicitly recognized in the preamble to the *Charter*, which says that "Canada is founded upon principles that recognize ... the rule of law". It is also implicitly recognized in the preamble to the *Constitution Act, 1867*, which says Canada has "a Constitution similar in Principle to that of the United Kingdom" (see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750). Two facets of the rule of law are foundational here: the government must act within the law and there must be positive laws to preserve order in society. This Court has recognized that adherence to the principle of the rule of law means that the impact of legislation, even unconstitutional legislation, extends beyond those whose rights are violated -- it is bad for all of society for unconstitutional legislation to "remain on the books" (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 51; see also *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 (*SWUAV*), at para. 31). But the public interest cuts both ways -- the public is also entitled to the benefit of legislation, which individuals rely upon to organize their lives and protect them from harm (*Manitoba Language Rights*, at pp. 748-49 and 757). Laws validly enacted by democratically elected legislatures "are generally passed for the common good" and there is accordingly a "public interest" in legislation that "weighs heavily in the balance" of remedial discretion (*Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 135; see also *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, at para. 9).

97 Legislation is enacted by the legislature, which is sovereign in the sense that, within its constitutional ambit, it has "*exclusive* authority to enact, amend, and repeal any law as it sees fit" (*Reference re pan-Canadian securities regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 54; *Constitution Act, 1867*, ss. 91 to 95; *Constitution Act, 1982*, ss. 44 and 45). This fact serves as an important constraint on courts' exercise of their remedial authority. Parliamentary sovereignty is an expression of democracy, because it accords exclusive legislative authority to Parliament and the provincial legislatures, each of which includes an elected chamber without whose consent no law can be made (*Constitution Act, 1867*, ss. 17, 40, 48, 55 and 91; *Charter*, ss. 3 and 4; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 62-65).

98 Even so, the courts remain "guardians of the Constitution and of individuals' rights under it" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169) -- "[d]eference ends ... where the constitutional rights that the courts are charged with protecting begin" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 36). This is because "[i]t is emphatically the province and duty of [the courts] to say what the law is" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), at p. 177).

99 These remedial principles -- fundamental aspects of our constitutional order, including democracy and the rule of law -- are reflected in the Court's remedial decisions since the *Charter* came into force.

(2) *Schachter*

100 In *Schachter*, this Court set out a general approach to granting remedies for legislation that violates the *Charter*. *Schachter* endorsed remedies tailored to the breadth of rights violations, thereby allowing constitutionally compliant aspects of unconstitutional legislation to be preserved. *Schachter* also recognized that, in rare circumstances, the effect of a declaration of invalidity could be suspended for a period of time to protect the public interest.

101 At the core of *Schachter* was its recognition that flexibility is necessary to arrive at appropriate remedies involving legislation, and its endorsement of remedies short of a full declaration of invalidity. Lamer C.J. made clear that "[d]epending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in" (p. 695).

102 Different types of remedy can be granted because the circumstances may implicate general remedial principles in different ways. *Schachter* recognized the "twin guiding principles" of "respect for the role of the legislature and the purposes of the *Charter*" (p. 715) that play a key role in determining the type of remedy that would be ordered.

103 *Schachter* held that the first step in choosing the appropriate remedy is defining the extent of the inconsistency between the legislation and the *Charter*. The second step is determining the form of the declaration. Beyond the extent of the inconsistency, *Schachter* said that the form of a remedy would be influenced by courts' respect for the role of the legislature. The general rule is that tailored remedies should only be granted when a court can fairly conclude that the legislature would have enacted the law as it would be modified by the court (pp. 697 and 700).

104 *Schachter* also endorsed the use of suspended declarations -- declarations that legislation is unconstitutional, but whose *effect* is suspended for some period of time. Lamer C.J. reasoned that a delayed order could be justified based on the effect of an immediate declaration on the public and that, by contrast, the roles of courts and legislatures should *not* enter into the question of whether to suspend a declaration (p. 717).

105 Finally, *Schachter* considered how s. 52(1) remedies could be combined with individual remedies for *Charter* violations. Lamer C.J. concluded that individual remedies under s. 24(1) of the *Charter* "will rarely be available in conjunction with" remedies involving legislation (p. 720).

106 Much of *Schachter* remains good guidance three decades later. However, as I will explain, the jurisprudence on *Charter* remedies has built upon the foundation of *Schachter* and moved beyond it in some ways. While *Schachter* wisely advised courts to consider the principled basis for their remedial decisions, those remedial principles have since been further developed. In part, the guidelines *Schachter* endorsed for determining the extent of rights violations were tied to an articulation of the *Oakes* test that has since been overtaken. Aspects of its discussion of suspended declarations have been overlooked by courts and criticized in academic commentary for their failure to rely on coherent principles and encourage transparent application. Finally, its admonition against combining s. 52(1) and individual remedies has frequently not been followed.

107 Since *Schachter*, this Court has granted at least 60 s. 52(1) remedies for *Charter* breaches. In my view, the guidelines given in *Schachter* should be clarified and updated in light of those decisions.

(3) The Form and Breadth of Section 52(1) Declarations

108 As our jurisprudence demonstrates, and the language of s. 52(1) directs, the first step in crafting an appropriate s. 52(1) remedy in a given case is determining the extent of the legislation's inconsistency with the Constitution. Courts should bear in mind both "the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1" (*Schachter*, at p. 702) in crafting tailored remedies. (While this general guideline remains useful, courts should bear in mind that the *Oakes* test has evolved since *Schachter* was decided, such that it now focuses on justifying the infringing measure rather than the law as a whole (compare *Schachter*, at pp. 703-5 and *RJR-MacDonald*, at para. 144).) The nature and extent of the underlying *Charter* violation lays the foundation for the remedial analysis because the breadth of the remedy ultimately granted will reflect at least the extent of the breach.

109 Defining the extent of the constitutional defect by reference to the substantive violation of the *Charter* safeguards the rights of all those directly affected by ensuring that the law is cured of all its constitutional defects. It also serves the broader public interest in having government act in accordance with the Constitution. These remedies reach beyond the claimant -- and can even be granted when the claimant is not directly affected by the law -- because "[n]o one should be subjected to an unconstitutional law" (*Nur*, at para. 51; see also *R. v. Big M Drug Mart Ltd.*, *[1985] 1 S.C.R. 295*, at p. 313). This step of the analysis therefore reflects the *Charter*'s rights-protecting purpose, the public's interest in constitutional compliance, and the text of s. 52(1) -- the law is of no force or effect to the *full* extent of its inconsistency with the Constitution.

110 For example, in some cases where a criminal offence's effects on particular groups of people or in certain circumstances have been found unconstitutional, *all* of those people and circumstances have been exempted from criminal liability (see, e.g., *Carter v. Canada (Attorney General)*, *2015 SCC 5*, *[2015] 1 S.C.R. 331*; *R. v. Sharpe*, *2001 SCC 2*, *[2001] 1 S.C.R. 45*, as interpreted in *R. v. Barabash*, *2015 SCC 29*, *[2015] 2 S.C.R. 522*; *R. v.*

Appulonappa, 2015 SCC 59, [2015] 3 S.C.R. 754, as interpreted in *R. v. Rajaratnam*, 2019 BCCA 209, 376 C.C.C. (3d) 181; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602). The same is true for mandatory minimum penalties, which can be invalidated even when the applicant is not directly affected (see, e.g., *Nur*; *Lloyd*).

111 On the other hand, it also follows from s. 52(1) that to the extent they are not inconsistent with the Constitution, the public is entitled to the benefit of laws passed by the legislature. Tailored remedies that address the precise constitutional flaw can permit a court to both safeguard the constitutional rights of all those affected and preserve the constitutional aspects of the law. Many of the Court's tailored remedies reflect both these principles. The criminal offences considered in *Carter*, *Sharpe*, *Smith*, and *Appulonappa*, for example, were declared of no force or effect *only* to the extent that they violated rights, preserving their constitutionally compliant effects.

112 The second step is determining the form that a declaration should take. In doing so, *Schachter* explained that remedies other than full declarations of invalidity should be granted when the nature of the violation and the intention of the legislature allows for them. Full statutory schemes or Acts are rarely struck down in their entirety -- to my knowledge, this Court has only done so on eight occasions.[3] To ensure the public has the benefit of enacted legislation, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (*Schachter*, at p. 700; *Vriend*, at paras. 149-50). Crucially, in Canada, the declaration issued cures the law's unconstitutionality. A declaration that fails to do so, like the kind suggested by my colleagues, Justice Côté and Justice Brown, at para. 248 of their reasons, is more akin to the declaration of "inconsistency" or "incompatibility" made in jurisdictions where courts do not have the authority to strike down unconstitutional legislation (see, e.g., *Attorney-General v. Taylor*, [2018] NZSC 104, [2019] 1 N.Z.L.R. 213; *Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4(4) and (6)).

113 Reading *down* is when a court limits the reach of legislation by declaring it to be of no force and effect to a precisely defined extent. Reading down is an appropriate remedy when "the offending portion of a statute can be defined in a limited manner" (*Schachter*, at p. 697). Inversely, reading *in* is when a court broadens the grasp of legislation by declaring an implied limitation on its scope to be without force or effect. Reading in is an appropriate remedy when the inconsistency with the Constitution can be defined as "what the statute wrongly excludes rather than what it wrongly includes" (*Schachter*, at p. 698, emphasis in original). *Severance* is when a court declares certain words to be of no force or effect, thereby achieving the same effects as reading down or reading in, depending on whether the severed portion serves to limit or broaden the legislation's reach. Severance is appropriate where the offending portion is set out explicitly in the words of the legislation. These forms of remedy illustrate a court's flexibility in responding to a constitutional violation.

114 However, if granted in the wrong circumstances, tailored remedies can intrude on the legislative sphere. *Schachter* cautioned that tailored remedies should only be granted where it can be fairly assumed that "the legislature would have passed the constitutionally sound part of the scheme without the unsound part" and where it is possible to precisely define the unconstitutional aspect of the law (p. 697, citing *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.), at p. 518). If it appears unlikely that the legislature would have enacted the tailored version of the statute, tailoring the remedy would not conform to its policy choice and would therefore undermine parliamentary sovereignty (*Schachter*, at pp. 705-6; *Hunter*, at p. 169). The significance of the remaining portion of the statute must be considered, and tailored remedies should not be granted when they would interfere with the legislative objective of the law as a whole (*Schachter*, at pp. 705-15). For example, in *Vriend*, Iacobucci J. read "sexual orientation" into the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, because the term was sufficiently precise and because the legislature would rather have included that protection than sacrificed the entire scheme (paras. 155-60 and 167-69). In *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, McLachlin C.J. severed part of the tertiary ground for denying bail because the rest of the provision "is capable of standing alone without doing damage to Parliament's intention" (para. 44). This Court has granted a remedy short of full invalidity of a statutory provision at least 24 times.[4] Nonetheless, a tailored remedy will frequently not be appropriate. This Court has opted to fully invalidate a provision at least 55 times.[5] These include the cases dealing with mandatory minimum penalties referenced above -- the goal of a mandatory minimum sentence is to remove judicial discretion, so tailoring the declaration to reintroduce that discretion would distort the provision so that it no longer conformed to its legislative purpose (*R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 50 and 53).

115 Lamer C.J. was also conscious of the limitation of the judicial role, explaining in *Schachter* that tailored remedies should not be granted when they do not "flo[w] with sufficient precision from the requirements of the Constitution", because although courts are capable of determining what the Constitution requires, they are not well-suited to making "*ad hoc* choices from a variety of options" (p. 707).

116 In sum, consistent with the principle of constitutional supremacy embodied in s. 52(1) and the importance of safeguarding rights, courts must identify and remedy the full extent of the unconstitutionality by looking at the precise nature and scope of the *Charter* violation. To ensure the public retains the benefit of legislation enacted in accordance with our democratic system, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (*Schachter*, at p. 700; *Vriend*, at paras. 149-50). To respect the differing roles of courts and legislatures foundational to our constitutional architecture, determining whether to strike down legislation in its entirety or to instead grant a tailored remedy of reading in, reading down, or severance, depends on whether the legislature's intention was such that a court can fairly conclude it would have enacted the law as modified by the court. This requires the court to determine whether the law's overall purpose can be achieved without violating rights. If a tailored remedy can be granted without the court intruding on the role of the legislature, such a remedy will preserve a law's constitutionally compliant effects along with the benefit that law provides to the public. The rule of law is thus served both by ensuring that legislation complies with the Constitution and by securing the public benefits of laws where possible.

(4) Suspending the Effect of Section 52(1) Declarations

117 There are times when an immediately effective declaration of invalidity would endanger an interest of such great importance that, on balance, the benefits of delaying the effect of that declaration outweigh the cost of preserving an unconstitutional law that violates *Charter* rights.

118 In total, this Court has suspended declarations of invalidity in 23 out of approximately 90 decisions in which it declared legislation to be of no force or effect for violating the *Charter*.[6] The approach to suspensions has varied over the last 35 years. Suspensions were initially recognized to be available when necessary to protect against serious threats to the rule of law. Then, in *Schachter*, this Court took an approach to granting suspensions based on determining whether cases fit into one of a list of categories -- threats to the rule of law, threats to public safety, or underinclusive benefits -- based on the public interest in the law's interim application. Since then, many cases have gone beyond the *Schachter* categories to grant suspensions for other reasons, including concerns related to the roles and capacities of courts and legislatures. The 12 declarations of invalidity for *Charter* violations after *Schachter* between 1992 and 1997 -- from *Zundel* to *Benner* -- took immediate effect. By contrast, between 2003 and 2015 -- from *Trociuk* to *Carter* -- 13 out of 17 s. 52(1) declarations were suspended. Those more recent cases have been criticized for suspending declarations too frequently and without sufficient explanation. This case gives the Court an opportunity to recalibrate the remedial principles that guide the judicial discretion to delay the effect of a declaration of invalidity.

119 Suspensions of declarations of invalidity have attracted significant concern even as they have come to be used in jurisdictions around the world, including Canada, Germany, South Africa, Hong Kong, and Indonesia (see, e.g., Leckey; S. Jhaveri, "Sunsetting suspension orders in Hong Kong", in P. J. Yap, ed., *Constitutional Remedies in Asia* (2019), 49). While most accept that there will be some circumstances when the immediate enforcement of rights must give way to other constitutional concerns, opinions vary on the appropriate underlying principles and the right balance between them. Some argue suspensions should only be granted in "extreme cases" in order to prevent "legal chaos" (B. Bird, "The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity" (2019), 42 Man. L.J. 23, at pp. 39 and 46). Others suggest that suspensions can be granted to "remand complex issues to legislative institutions" (S. Choudhry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" *(2003), 21 S.C.L.R. (2d) 205*, at p. 232), giving them the first opportunity to respond to a finding of unconstitutionality. Still others endorse an approach based on proportionality, which would import considerations from the *Oakes* test to require the government to demonstrate that a suspension is justified

(Hoole, at pp. 136-47; B. Ryder, "Suspending the Charter" *(2003), 21 S.C.L.R. (2d) 267*, at pp. 282-83). But all commentators recognize some discretion to grant suspensions in Canada.

120 While ss. 52(1) does not explicitly provide the authority to suspend a declaration,[7] in adjudicating constitutional issues, courts "may have regard to unwritten postulates which form the very foundation of the Constitution of Canada" (*Manitoba Language Rights*, at p. 752; see also *R. v. Comeau*, *2018 SCC 15*, *[2018] 1 S.C.R. 342*, at para. 52).

121 The power to suspend the effect of a declaration of invalidity should be understood to arise from accommodation of broader constitutional considerations and is included in the power to declare legislation invalid (see *Koo Sze Yiu v. Chief Executive of the HKSAR*, [2006] 3 H.K.L.R.D. 455, at para. 35). This is only one way in which giving immediate and retroactive effect to the fundamental rights and freedoms guaranteed by the *Charter* must, at times, yield to other imperatives. This reflects the "clear distinction between declaring an Act unconstitutional and determining the practical and legal effects that flow from that determination" (*Air Canada v. British Columbia*, *[1989] 1 S.C.R. 1161*, at p. 1195). As examples, even when a declaration of invalidity is made, other legal doctrines, including the *de facto* doctrine, *res judicata*, and the law of limitations, may restrict its retrospective reach (*Hislop*, at para. 101).

122 The idea that the effect of a declaration could be suspended originally aimed to protect against a potential emergency. In 1985, in *Manitoba Language Rights*, nearly all of Manitoba's legislation was declared unconstitutional for being enacted in English alone. The Court issued a temporary declaration that the laws were valid in order to give the legislature the chance to re-enact them. The Court grounded this move in the constitutional principle of the rule of law, explicitly recognized in the preambles to the *Constitution Act, 1867*, and the *Charter*, and implicit in the "very nature of a Constitution" (*Manitoba Language Rights*, at p. 750). The rule of law requires the creation and maintenance of an actual order of positive laws to govern society; a legal vacuum, along with the inevitable legal chaos, would have violated that principle (p. 753). The period of temporary validity ran from the date of judgment "to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing" (p. 767).

123 The Court suspended the effect of a declaration of invalidity for the first time in a *Charter* case in *Swain*, in which automatic detention for those acquitted on what was then called the ground of "insanity" was found unconstitutional. Lamer C.J. suspended the declaration due to a concern that if the provision was immediately struck down, judges would have to free "those who may well be a danger to the public" (p. 1021).

124 In *Schachter*, Lamer C.J. recognized three categories of cases in which suspensions could be granted: threats to the rule of law, threats to public safety, and underinclusive legislation (pp. 715-16). The first category flows directly from *Manitoba Language Rights*; the second corresponds with *Swain*; and the third category represents the circumstances of *Schachter* itself, in which immediate invalidity of the law would have deprived those entitled to financial benefits under the law without providing any remedy for those directly excluded from the benefits in question. All three categories reflect constitutionally grounded considerations, including recognizing the public's interest in legislation passed for its benefit. Suspending the effect of a declaration is one tool that allows courts to preserve the rights and entitlements that existing schemes extend to the public.

125 *Schachter*'s categorical approach has resulted in uncertainty about when suspensions will be granted. Some decisions have gone beyond the *Schachter* categories. For example, a suspension was endorsed where it promoted a co-operative solution in the Aboriginal rights context (*R. v. Powley*, *2003 SCC 43*, *[2003] 2 S.C.R. 207*, at para. 51) and granted where it was analogous to a *Schachter* category (*Trociuk*, at para. 43). In other cases, failing to fit into a *Schachter* category has been given as an explanation for declining to grant a suspension (*Boudreault*, at para. 98; *Hislop*, at para. 121). At times, the Court has provided *no* explanation for suspending the effect of its declaration (*Mounted Police Association*, at para. 158; *Saskatchewan Federation of Labour*, at para. 103). Academic commentators have noted the lack of transparent reasoning in some of this Court's decisions to grant suspensions (Roach (2004); Hoole, at pp. 118-23).

126 A principled approach makes it possible to reconcile these cases on suspended declarations, and encourage consistency and transparency. As I will explain, the government bears the onus of demonstrating that a compelling public interest, like those included in *Schachter*, supports a suspension. These compelling interests cannot be reduced to a closed list of categories, but will be related to a remedial principle grounded in the Constitution -- typically, the principle that the public is entitled to the benefit of legislation or that courts and legislatures play different institutional roles. The categorical approach in *Schachter* has been overtaken by the underlying remedial principles that animated those categories. This is not surprising, given that *Schachter* had a limited number of cases to draw from in establishing its categorical approach.

127 As well, the relevance of some of the underlying principles has evolved in our jurisprudence. Lamer C.J. specifically noted in *Schachter* that "whether to delay the application of a declaration of [invalidity] should ... turn not on considerations of the role of the courts and the legislature, but rather on considerations ... relating to the effect of an immediate declaration on the public" (p. 717, emphasis added).

128 Nonetheless, since the late 1990s, the general principle that courts and legislatures have different roles and competencies has informed how the Court exercises its jurisdiction to suspend the effect of its declarations for a period of time. No fewer than 10 decisions of this Court have relied on the differing capacities and roles of legislatures and courts when suspending declarations' effects.[8] Roach has argued that the *dicta* in *Schachter* quoted in the previous paragraph should be rejected or qualified in light of these decisions, and institutional roles should be explicitly recognized as a legitimate rationale for granting suspensions (Roach (2004), at p. 144). On the most expansive version of that view, suspensions allow the legislature to determine the remedy for its own breach of the Constitution, thereby "eliminat[ing] or dilut[ing] the counter-majoritarian objection to judicial review [of statutes]" (Choudhry and Roach, at p. 227). In my view, this presupposes an unduly narrow view of the role of courts. Respecting the legislature cannot come at the expense of the functions the Constitution assigns to the judiciary: giving effect to constitutional rights and making determinations of law.

129 Although institutional roles can be relevant to remedial discretion, the decisions that rely on them have by and large failed to transparently explain how those roles can legitimately motivate suspensions (Hoole, at pp. 118-23). The relevance of institutional roles to granting suspensions cannot be divorced from the underlying rationale for granting suspensions in the first place: avoiding the harmful and undesirable consequences of an immediate declaration. In my view, *Schachter* and the cases that have come since are best reconciled by recognizing that allowing the legislature to fulfil its law making role can be a relevant consideration in whether to grant a suspension, but only when the government demonstrates that an immediately effective declaration would *significantly impair* the ability to legislate.

130 In determining whether to exercise remedial discretion to suspend a declaration of invalidity, the Court should consider whether and to what extent the government has demonstrated that an immediately effective declaration would have a limiting effect on the legislature's ability to set policy. In the vast majority of cases, as Bruce Ryder recognizes, "[a] suspended declaration neither enlarges nor diminishes the range of constitutional choices open to a legislature" (p. 285). For example, in *M. v. H.*, in which the Court found unconstitutional the definition of "spouse" denying benefits to same-sex spouses, the effect of a declaration of invalidity was suspended because "if left up to the courts, these issues could only be resolved on a case-by-case basis at great cost to private litigants and the public purse. Thus ... the legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion" (para. 147). However, an immediately effective declaration would not have prevented the legislature from addressing the issues more comprehensively in light of the Court's decision. By contrast, there may be some cases where an immediate declaration could create legal rights that could narrow the range of constitutional policy choices available to the government or undermine the effectiveness of its policy choices. As I shall explain, this case offers an example of a situation in which the legal rights created by the declaration of invalidity could undermine the effectiveness of the legislature's policy choices. Even so, avoiding such restrictions on the ability to legislate is but a relevant consideration, and may not be sufficient to justify a suspension of invalidity.

131 The benefit achieved (or harm avoided) by the suspension must then be transparently weighed against countervailing fundamental remedial principles, namely the principles that *Charter* rights should be safeguarded through effective remedies and that the public has an interest in constitutionally compliant legislation. This includes considering factors such as the significance of the rights infringement (*Bedford*, at para. 167) -- for example, the weight given to ongoing rights infringement will be especially heavy when criminal jeopardy is at stake -- and the potential that the suspension will create harm such as legal uncertainty (Leckey, at pp. 594-95). Albeit in different constitutional contexts, the Constitutional Courts of South Africa and Germany have similarly recognized that the propriety of a constitutional remedy short of an immediate declaration of invalidity is a question of balancing the harms of failing to immediately protect rights against the harms of an immediate declaration (see, e.g., *Coetzee v. Government of the Republic of South Africa*, [1995] ZACC 7, 1995 (4) S.A. 631, at para. 76; BVerfG, 2 BvC 62/14, Decision of January 29, 2019 (Germany), at paras. 136-37).

132 However, a balancing approach does not mean that suspensions will be easier to justify. A categorical approach may have been intended to provide narrow circumstances in which an unconstitutional law may continue to apply temporarily, but it has not had that effect. A balancing approach permits courts to engage with the underlying principles and ensure that a delayed declaration is not ordered unless there are compelling reasons to do so. The appropriate balance will result in suspensions only in rare circumstances. Given the imperative language of s. 52(1), and the importance of the fundamental remedial principles of constitutional compliance and of providing an effective remedy that safeguards the rights of those directly affected, there is a strong interest in declarations with immediate effect. Indeed, leaving unconstitutional laws on the books can lead to legal uncertainty and instability, especially if those laws are criminal prohibitions, which compel multiple actors (including police, Crown prosecutors, and the public) to conduct themselves in a certain way (Leckey, at pp. 594-95). Public confidence in the Constitution, the laws, and the justice system is undermined when an unconstitutional law continues to have legal effect without a compelling basis. And, of course, the violation of constitutional rights weighs heavily in favour of an immediate declaration of invalidity. A principled approach requires these countervailing factors to be weighed and does not allow for a suspension to be granted simply because the case engages, for example, public safety. In practice, therefore, a principled approach is disciplined and would be more stringent than a categorical approach, because any suspension must be specifically justified.

133 Thus, I agree with the submissions of the Asper Centre that the government bears the onus of demonstrating that the importance of another compelling interest grounded in the Constitution outweighs the continued breach of constitutional rights. In each case, the specific interest, and the manner in which an immediate declaration would endanger that interest, must be identified and, where necessary, supported by evidence. Suspensions of declarations of invalidity will be rare. Indeed, this aligns with this Court's recent practice. This Court has not suspended the effect of a declaration of invalidity since its decision in *Carter* over five years ago, making 13 immediately effective declarations that legislation was of no force or effect for violating the *Charter* over that period.[9]

134 When deciding whether to grant a suspension, a court must also determine its length. In Hong Kong, the Court of Final Appeal has said that suspensions should not be granted for longer than "necessary" (*Koo Sze Yiu*, at para. 41). In *Corbiere*, on the other hand, suspending the effect of the declaration for a relatively long period allowed the legislature greater flexibility in putting its capacity to consult to use (paras. 119 and 121, per L'Heureux-Dubé J.). In *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 S.C.R. 13, the extension of a suspension was accompanied by a process by which any rights holder could apply for a remedy under s. 24(1) to alleviate the harmful impact of the unconstitutional provision.

135 In my view, the onus to demonstrate the appropriate length of time remains with the government and there is no "default" length of time such as 12 months. In *Manitoba Language Rights*, in the absence of submissions, this Court considered itself ill-equipped to determine the appropriate length of time for Manitoba's legislature to re-enact all of its legislation in both English and French (p. 769). It is the government's responsibility to make a case for the length of the suspension it seeks.

136 I add this. My colleagues contend that s. 33 of the *Charter* is an express and, thus, more legitimate source of

authority that allows Parliament or a provincial legislature to suspend the effect of a declaration of invalidity. Since the Constitution gives Parliament and the provincial legislatures this power, my colleagues suggest that suspension is legislative in nature and at odds with the judicial role.

137 This is an unsustainable proposition. Section 33 permits Parliament or a provincial legislature to temporarily exempt an Act from the application of rights and freedoms guaranteed by ss. 2 and 7 to 15 of our *Charter*, even for purely political reasons (*Charter*, ss. 32(1) and 33(1) and (2); *Quebec Association of Protestant School Boards*, at p. 86).When a court determines that a law violates the *Charter* in a manner that cannot be justified in a free and democratic society under s. 1, the court must grant the appropriate remedy. This includes, in some rare cases, delaying the effects of a declaration of invalidity based on a compelling public interest. Court-ordered suspension leaves Parliament and the legislatures free to respond to the declaration of invalidity, including by using s. 33 (see *Vriend*, at paras. 139 and 178). The court cannot shirk its responsibility to remedy constitutional violations simply because s. 33 permits Parliament or a legislature to exceptionally override certain *Charter* rights and freedoms.

138 The court has the authority -- and responsibility -- to determine whether a declaration of invalidity should be suspended. It is not for the courts to direct or encourage Parliament and the provincial legislatures to use their exceptional authority to override *Charter* rights and freedoms.

139 In sum, the effect of a declaration should not be suspended unless the government demonstrates that an immediately effective declaration would endanger a compelling public interest that outweighs the importance of immediate constitutional compliance and an immediately effective remedy for those whose *Charter* rights will be violated. The court must consider the impact of such a suspension on rights holders and the public, as well as whether an immediate declaration of invalidity would significantly impair the legislature's democratic authority to set policy through legislation. The period of suspension, where warranted, should be long enough to give the legislature the amount of time it has demonstrated it requires to carry out its responsibility diligently and effectively, while recognizing that every additional day of rights violations will be a strong counterweight against giving the legislature more time.

(5) Individual Remedies -- Exemptions From Suspensions

140 Where a declaration of invalidity is suspended, it often raises the issue of whether the claimant should receive an individual remedy or exemption from that suspension. The Attorney General argues that individual exemptions from suspensions should not be granted except in extreme circumstances where the claimant will not benefit from the declaration absent an exemption. He says individual exemptions create uncertainty and undermine the rule of law by applying laws to everyone except the claimants who challenged them. He says granting individual exemptions usurps the role of the legislature by imposing judicial discretion where the statute precludes it.

141 The Attorney General also relies on a "rule" endorsed in *Demers* that s. 24(1) remedies cannot be combined with s. 52(1) remedies, precluding courts from granting a s. 24(1) individual remedy during the suspension period (para. 62). However, in *Demers*, at para. 61, Iacobucci and Bastarache JJ. drew that conclusion from a passage in *Schachter* cautioning that "where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available" (p. 720, emphasis added) because such a remedy would undermine the suspension. When it came to giving an individual remedy during a period of suspension, Lamer C.J. reasoned that it would be "tantamount" to giving the declaration retroactive effect.

142 To the extent that *Demers* reads *Schachter* as setting out a hard-and-fast rule against combining s. 24(1) and s. 52(1) remedies, it misreads that case. As I will explain, s. 24(1) is too flexible to be restricted in this way. As other jurisprudence of this Court suggests, individual exemptions from suspensions will often be an "appropriate and just" remedy when an individual claimant has braved the storm of constitutional litigation and obtained a declaration whose benefit "enures to society at large" (*Demers*, at para. 99, per LeBel J.). On the other hand, where an exemption would undermine the rationale for the suspension, this will be a strong countervailing factor against granting an exemption.

143 Section 24(1) of the *Charter* provides:

> **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.

144 This Court has said that to be "appropriate and just", a s. 24(1) remedy should meaningfully vindicate the right of the claimant, conform to the separation of powers, invoke the powers and function of a court, be fair to the party against whom the remedy is ordered, and allow s. 24(1) to evolve to meet the challenges of each case (*Doucet-Boudreau*, at paras. 55-59). In particular, an effective remedy that meaningfully vindicates the rights and freedoms of the claimant will take into account the nature of the rights violation and the situation of the claimant, will be relevant to the claimant's experience and address the circumstances of the rights violation, and will not be "smothered" in procedural delays and difficulties (para. 55). The court's approach to s. 24(1) remedies must stay flexible and responsive to the needs of a given case (para. 59).

145 This Court's jurisprudence makes clear that granting individual remedies while the effects of declarations of invalidity are suspended can be appropriate and just. The Court granted a worker disability benefits for chronic pain during the suspension of a declaration that provisions were invalid for *excluding* chronic pain from the workers' compensation system (*Martin*, at paras. 121-22). The Court has acquitted individuals of criminal or quasi-criminal charges stemming from unconstitutional laws despite suspending the effects of the declarations of invalidity (*Guignard*, at para. 32; *Bain*, at pp. 105 and 165; see also *Corbiere*, at paras. 22-23).

146 A rule that individual claimants cannot be exempted from suspensions of declarations of invalidity would improperly fetter the broad discretion afforded under s. 24(1) of the *Charter* for courts to grant remedies they "conside[r] appropriate and just in the circumstances." Remedial discretion is a fundamental feature of the *Charter*. A bar on exempting individual claimants would often be unfair to the claimant, especially given that it is a court's decision to grant a suspension that makes the individual remedy necessary. While the reason the suspension was granted is no doubt an important consideration in granting a s. 24(1) remedy -- and, as I explain below, should be taken into account when the court is considering granting an exemption -- Brendan Brammall has aptly described a strict rule as prioritizing fairness to government "over all countervailing reasons, such as providing an effective remedy" ("A Comment on *Doucet-Boudreau v. Nova Scotia (Minister of Education)* and *R. v. Demers*" *(2006), 64 U.T. Fac. L. Rev. 113*, at p. 117).

147 In my view, when the effect of a declaration is suspended, an individual remedy for the claimant will often be appropriate and just. The importance of safeguarding constitutional rights weighs heavily in favour of an individual remedy. The concern for vindicating individual rights with effective remedies reaches back to Blackstone and Dicey, and continues to have force in the present day (see K. Roach, "Dialogic remedies" (2019), 17 *I CON* 860, at pp. 862-65).

148 Exempting only the claimant from a suspension may appear unfair at first glance (see, in the context of prospective remedies, Choudhry and Roach, at p. 223, fn. 65, citing *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995)). But the claimant is not in the same position as others subject to the impugned law in a key respect: the claimant who brings a successful constitutional challenge has done the public interest a service by ensuring that an unconstitutional law is taken off the books -- the claimant has pursued the "right of the citizenry to constitutional behaviour by Parliament" (*Thorson v. Attorney General of Canada*, *[1975] 1 S.C.R. 138*, at p. 163). While, as the Attorney General submits, it is in the public interest for laws to apply to everyone uniformly, immediate remedies for claimants are also in the public interest. The practical realities of bringing a constitutional challenge may reduce the incentive for rights claimants to bring cases that carry substantial societal benefits (Leckey, at pp. 594-95; Brammall, at p. 119, fn. 44, quoting *Demers*, at para. 99, per LeBel J.; see also Department of Justice, Research and Statistics Division, *"The Costs of Charter Litigation"* (2016)). Individual exemptions can temper any further disincentive caused by suspensions (Leckey, at p. 607). As a result, courts should focus not only on the case or legislation before them, but also encourage *Charter*

compliance in the long term through their s. 24(1) remedies (*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at paras. 29 and 38).

149 Like the decision of whether to suspend a declaration of invalidity despite the continued rights violation, there must be a compelling reason to deny the claimant an immediately effective remedy. Two examples seem apparent.

150 First, a court must consider whether and to what degree granting an exemption in the claimant's particular circumstances would undermine the interest motivating the suspension in the first place. Thus, the ability of the legislature to fashion policy responses to the declaration and the public interest in the interim operation of the legislation will be important considerations in determining whether an exemption can be granted. For example, when the effect of a declaration is suspended to protect public safety, an individual exemption would not be appropriate and just if it would endanger public safety. Evidence of the individual claimant's situation, which the court will likely have, will inform whether this is the case.

151 Second, courts may also have a compelling reason to refrain from granting an individual exemption where practical considerations like judicial economy make it inappropriate to do so. For instance, if a large group or class of claimants comes forward, it may not be practical -- or even possible -- to conduct the individual assessments necessary to grant them all individual exemptions.

152 Ultimately, the public is well served by encouraging litigation that furthers the public interest by uncovering unconstitutional laws. Claimants, unlike others similarly situated, invest time and resources to pursue matters in the public interest -- and those investments can pay dividends for others directly affected, especially those without the means to challenge the law themselves. Thus, if an exemption is otherwise appropriate and just, they should be exempted from suspensions in the absence of a compelling reason not to. Exemptions from suspensions will often be necessary to balance the interests of the litigant, the broader public, and the legislature.

(6) General Remedial Principles for Legislation That Violates the *Charter*

153 As I have explained, running through this Court's remedial practice -- from determining the form and breadth of remedies involving legislation, to suspending the effect of those remedies, to exempting litigants from suspensions -- are recurring touchstones. These guide the principled discretion that this Court exercises when granting remedies for legislation that violates the *Charter*.

154 Safeguarding rights lies at the core of that remedial approach. Section 52(1) calls for courts to invalidate any legislation to the extent it violates the *Charter*. The *Charter* "constrain[s] government action in conformity with certain individual rights and freedoms, the preservation of which [is] essential to the continuation of a democratic, functioning society in which the basic dignity of all is recognized" (*Richardson*, at para. 57). The fundamental principle that courts should provide meaningful remedies for the violation of constitutional rights (*Doucet-Boudreau*, at para. 25) shapes the form and breadth of the declaration, acts as a strong counterweight against suspending the effect of such a declaration, and weighs in favour of granting an individual remedy in tandem with a suspension.

155 It is a defining feature of our society, reflected in s. 52(1) and required by the rule of law, that state laws and state action must comply with the Constitution (*SWUAV*, at para. 31; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, *[1992] 1 S.C.R. 236*, at p. 250; *Secession Reference*, at para. 72). That the public has an interest in the constitutional compliance of the laws that govern it can be seen throughout this Court's remedial decisions. Courts ensure that a remedy covers the full scope of *Charter* violations; while this plays an important rights-protecting function, it also serves the public interest, ensuring that the government acts in accordance with the law -- "[c]ompliance with *Charter* standards is a foundational principle of good governance" (*Ward*, at para. 38). The importance of constitutional compliance weighs against suspension of the declaration, and in favour of an individual exemption from any suspension.

156 Another aspect of the rule of law, reflected in s. 52(1)'s caution that laws are of no force or effect only "to the extent of the inconsistency" with the Constitution, is the entitlement to a positive order of laws that organizes society

and protects it from harm. The public has an interest in preserving legislation duly enacted by its democratically elected legislatures, to the extent it is not unconstitutional. This is why courts will tailor remedies to retain constitutional aspects of an unconstitutional law where possible and will temporarily suspend the effect of a declaration when an immediate order would undermine the public interest by depriving the public of laws passed for its benefit. In contrast, concerns about legal instability may weigh against suspension.

157 Finally, running through this Court's remedial practice for unconstitutional legislation is respect for the role of the legislature coupled with an understanding of the duties of the judicial role. When determining the form and breadth of remedies, courts will preserve as much of the law as possible to respect the legislature's policy choices, following its discernible intention when doing so. But courts will not shrink from performing their duty to protect rights through s. 52(1) remedies, determining the full extent of inconsistencies with the Constitution and declaring legislation to be of no force or effect when necessary. Suspensions can be granted when the legislature's democratic role as policymaker would be so seriously undermined by an immediately effective declaration that it outweighs important countervailing principles. In such circumstances, if an exemption would undermine that role, it will weigh against an individual remedy.

158 As I have explained, these constitutional considerations, drawn from our constitutional text and the broader architecture of our constitutional order and the rule of law, have repeatedly arisen in this Court's decisions on s. 52(1) remedies for *Charter* violations and give rise to four foundational principles:

A. *Charter* rights should be safeguarded through effective remedies.

B. The public has an interest in the constitutional compliance of legislation.

C. The public is entitled to the benefit of legislation.

D. Courts and legislatures play different institutional roles.

159 In my view, these remedial principles provide the groundwork for meaningful remedies in different contexts. They provide guidance to courts and encourage them to transparently explain remedial results. They will not always lead to agreement on the correct outcome; their value is in transparency, helping those who disagree articulate their specific points of disagreement.

(7) Application to This Case

(a) *What Form and Breadth Should the Remedy Take?*

160 The first step in determining the breadth and form of a s. 52(1) remedy is determining the extent of the law's inconsistency with the *Charter*, which is defined by the nature of the substantive rights violation.

161 Here, *Christopher's Law* limits s. 15(1) of the *Charter* by requiring those found NCRMD to comply with the sex offender registry upon discharge without providing them with any opportunities for exemption and removal based on individualized assessment. It draws distinctions based on the enumerated ground of mental disability by extending opportunities for exemption and removal to those found guilty of a sexual offence but denying them to those found NCRMD. Those distinctions are discriminatory because they perpetuate the historical and enduring disadvantage experienced by persons with mental illnesses.

162 The s. 15(1) infringement was found not to be minimally impairing of the right because making any form of individualized assessment that could lead to exemption and removal available to those found NCRMD would be less impairing of the right.

163 Turning to the second step, a court must determine whether a tailored remedy would be appropriate, rather than a declaration of invalidity applying to the whole of the challenged law.

164 Given the limited and precisely defined nature of the violation in the context of the overall scheme of the sex offender registry, some form of tailored remedy was clearly appropriate to respond to the unconstitutionality. The

legislature would no doubt have enacted *Christopher's Law* to apply to those convicted of a sexual offence even if it could not include those found NCRMD and granted a discharge.

165 In this case, reading in an individualized assessment requirement would intrude on the legislative sphere -- there are many ways to provide for such an assessment and "it is the legislature's role to fill in the gaps, not the court's" (*Schachter*, at p. 705).

166 On the other hand, a declaration reading down *Christopher's Law* such that it is of no force or effect to the extent it applies to everyone unconstitutionally affected effectively vindicates rights without interfering with aspects of the statute's operation unaffected by the finding of unconstitutionality. Granting a tailored remedy here will better protect the public's interest in legislation enacted for its benefit and will better respect the role of the legislature, while also safeguarding *Charter* rights and realizing the public's interest in constitutionally compliant legislation.

167 There is one final issue respecting the proper scope of the declaration in this case. Although G's argument that *Christopher's Law* violates s. 15(1) of the *Charter*, which has been accepted by this Court and by the Court of Appeal, applies to all those found NCRMD of sexual offences who have been discharged, G framed his constitutional challenge to cover only those who have been ***absolutely*** discharged. The order of the Court of Appeal and the constitutional questions the parties stated before this Court were also limited. Should the s. 52(1) declaration be limited in this way?

168 In my view, the formal limits on the scope of G's application do not reflect the substance of the constitutional issue before the Court, as argued by the parties. G's arguments on s. 15(1) apply to all those found NCRMD of a sexual offence who do not have access to exemption and removal mechanisms based on individualized assessment: that is, all those found NCRMD who have been discharged. The Attorney General's central s. 1 argument attempting to justify the s. 15(1) violation -- that this Court should defer to the legislature's determination that all those found NCRMD in respect of a sexual offence should be registered because they are more likely to reoffend than a member of the general public is to commit a first-time offence and there is no way to predict with certainty whether they will reoffend -- also applies to all those found NCRMD. Of course, those conditionally discharged have the opportunity to obtain an absolute discharge following each annual disposition review hearing before the review board.

169 However, had G's application been framed to include all those found NCRMD of a sexual offence and discharged, the Attorney General may have brought other evidence to support his s. 1 arguments, and addressed the differential risks -- in particular the risk of reoffending posed by those found NCRMD of a sexual offence and *conditionally* discharged.

170 Because I cannot conclude that the Attorney General had the "fullest opportunity to support the validity" of *Christopher's Law* in relation to those conditionally discharged, like the Court of Appeal, I would limit the declaration to those who have been found NCRMD of a sexual offence and absolutely discharged (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at paras. 19 and 22).

(b) *Was the Effect of the Declaration Properly Suspended?*

171 As noted above, the terms of s. 52(1) and the need to safeguard *Charter* rights and ensure constitutional compliance of all legislation weigh heavily in favour of an immediately effective declaration. However, those must be balanced against protecting the public's interest in legislation passed for its benefit. To do so, the Court must consider the nature and extent of both the continued rights violations and the danger to an identified public interest that could flow from an immediate declaration of invalidity.

172 The Attorney General has identified public safety as the public interest that justifies a suspension. The importance of this interest, and its appropriate weight in the analysis, is informed by the danger posed by those found NCRMD of sexual offences and granted absolute discharges by a provincial review board.

173 The *Criminal Code* requires provincial review boards to absolutely discharge any person found NCRMD who does not pose a significant risk of committing a serious criminal offence (*Winko*, at para. 57). If a person poses that type of risk, the review board may discharge them subject to conditions it considers appropriate (*Criminal Code*, s. 672.54(b)). The review board's "paramount consideration" in making any disposition is public safety.

174 The application judge found those discharged after an NCRMD finding to be at a statistically higher risk of offending than the general population. Those who are absolutely discharged therefore may pose *some* elevated risk of committing criminal offences. Granting an immediate declaration would endanger the public interest in safety from sexual offences to some extent because some individuals who still pose a greater risk to offend would be relieved of their reporting obligations. Those individuals would also be able to apply to have their personal information removed from the database pursuant to s. 24(1) (see, e.g., *Boudreault*, at paras. 107-9).

175 The application judge found that the registry contributed to public safety by enhancing the ability of police to prevent and investigate sexual offences. Immediately relieving a group of people who may pose some risk of committing sexual offences from the obligation to report or permitting them to seek removal of their information could detract from this enhanced ability. The threat to public safety is therefore meaningful. However, given that persons found NCRMD who pose the highest demonstrable risk to reoffend are not given absolute discharges, this threat is limited.

176 The other public interest at stake is respect for the legislature's ability to enact its preferred rights-respecting scheme. Granting an immediate declaration of invalidity could risk compromising the legislature's ability to fulfil its role as policymaker because allowing everyone found NCRMD of a sexual offence and absolutely discharged to be removed from the sex offender registry could restrict the effectiveness of the new version of *Christopher's Law* eventually enacted by the Ontario legislature in response to these reasons. Identifying those individuals and requiring them to register and report again -- or to undergo individualized assessment of some kind -- would likely be impracticable because their information simply would not be retained in the interim.

177 Balanced against these considerations is the significance of the rights violation that the suspension would temporarily prolong. *Christopher's Law* treats those found NCRMD and discharged in accordance with a persistent, demeaning stereotype. The law compels them to report in person to a police station, subjects them to the spectre of random police checks at their residence, and retains their personal information without providing an opportunity to determine whether they pose sufficient risk to justify that intrusion on their liberty and privacy. Importantly, granting a suspension also runs counter to the public's interest in constitutionally compliant legislation.

178 Here, there is an ongoing threat to public safety, although it is limited as the group of individuals whose information would no longer be tracked consists entirely of persons who the Review Board has deemed do not pose a significant threat to public safety. The legislature's ability to address that gap in public safety would, however, be appreciably restricted by an immediate declaration. This is a close call. But on balance, the combination of these two legitimate interests (public safety and preserving the legislature's latitude to respond to the finding of unconstitutionality) justifies temporarily depriving those affected of the immediate benefit of this judgment and allowing the violation to persist.

179 The parties agree with the 12-month suspension ordered by the Court of Appeal. I see no basis to interfere with that determination. However, in future, courts will expect more detailed submissions on the length of time required.

(c) *Should G Have Been Exempted From the Suspension?*

180 The final question is whether it was appropriate and just to exempt G from the suspension. The Attorney General submits that, because of a lack of "expert forensic risk assessment", it was not.

181 Although judges may not have the expertise to conduct such forensic assessments themselves, they are well-

suited to deciding and frequently charged with making determinations relating to public safety and risk in other contexts, including those that lead to exemption and removal from the sex offender registry. When judges decide whether to absolutely or conditionally discharge someone found guilty of an offence, they consider the best interests of the accused and the public interest (*Criminal Code*, s. 730). Further, a judge deciding whether to make a termination or exemption order in respect of a person subject to the federal sex offender registry must determine whether the impact of compliance on the applicant "would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature" (*Criminal Code*, ss. 490.016(1) and 490.023(2); Bill C-16, *Sex Offender Information Registration Act*, 3rd Sess., 37th Parl., 2004, s. 20).[10] These are not decisions that require expert forensic evidence. And the *adjudicative* task of assessing risk in a particular case, in order to grant a remedy that is appropriate and just in the claimant's circumstances, is distinct from the *legislative* task of creating a regime designed to assess risk.

182 The Court of Appeal granted G an individual exemption from *Christopher's Law*. Doherty J.A. concluded that an exemption did not undermine the suspension; it was difficult to envision a constitutionally compliant legislative scheme that would not exempt G from the registry. The exercise of the court's discretion deserves deference. The ORB, an expert tribunal, determined that G was not at significant risk of committing a serious criminal offence 17 years ago. His record since his release has been spotless and there is no indication that he poses a risk to public safety. An exemption would ensure he receives an effective remedy -- nearly six years have passed since he filed his notice of application and his case has been argued in three levels of court. He should not be denied the benefit of his success on the constitutional merits.

183 The individual exemption to the suspension by definition lasts only as long as the suspension by itself. Whether G will be caught by new legislation, while highly unlikely, will depend on whether he comes within its terms. Courts cannot grant an exemption to legislation that has not yet been enacted, because they cannot predict the outcome of the legislative process.

VII. Conclusion

184 For these reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

M. ROWE J.

185 I agree with Justices Côté and Brown regarding s. 15(1) of the *Canadian Charter of Rights and Freedoms* (at paras. 221-24), and regarding the general approach to ordering an individual exemption under s. 24(1) from the suspended effect of a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982* (interspersed among paras. 273-93).

186 On the proper approach to suspending a declaration of invalidity under s. 52(1), however, I would reaffirm *Schachter v. Canada*, *[1992] 2 S.C.R. 679*. As the Court stated in that case, a declaration of invalidity should be suspended only in certain circumstances, where: (1) an immediate declaration of invalidity would pose a potential danger to the public; (2) it would otherwise threaten the rule of law; or (3) the law is underinclusive and the court cannot determine properly whether to cancel or extend its benefits, but rather should provide an opportunity for the legislature to decide that. I would not treat these categories as closed. Nor would I abandon them in favour of some loosely defined exercise of discretion. Rather, they should be extended only where an immediate declaration would infringe some constitutional principle.

187 The Court should depart from a precedent such as *Schachter* only in "compelling circumstances" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, *2019 SCC 65*, at para. 18). For example, a precedent can be revisited if it is "unsound in principle", "unworkable and unnecessarily complex to apply", or if it has "attracted significant and valid judicial, academic, and other criticism" (*Vavilov*, at para. 20).

188 In recent years, the Court has departed from the approach set out in *Schachter* without sufficient reflection. It

has suspended declarations beyond *Schachter*'s categories and without regard to the reasoning underlying those categories. Some suspensions have been ordered without reference to *Schachter*. This gap between theory and practice -- between precedent and its application -- is noted by Justice Karakatsanis (at paras. 106 and 125) and by Justices Côté and Brown (paras. 233-35).

189 Such a gap invites reflection. But, that does not mean the precedent should be abandoned, as my colleagues favour. Upon reflection, I would affirm the approach in *Schachter*, as I shall explain.

I. *Schachter* Is Sound in Principle

190 *Schachter* is grounded in a view that suspended declarations of invalidity need be reserved for exceptional circumstances, as s. 52(1) does not imbue courts with a remedial discretion. The starting point for reflecting on *Schachter* is whether that interpretation of s. 52(1) is sound.

191 In line with the purposive approach to constitutional interpretation, the language of s. 52(1) needs to be understood in the context of the character and larger objects of the *Constitution Act, 1982* (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at paras. 178-85, per Rowe J.; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 39).

192 Aside from the circumstance of unlawfully obtained evidence (s. 24(2)), the *Constitution Act, 1982*, provides two remedies for unlawful state action. The contrast between these is instructive:

> a)Where rights or freedoms have been infringed, s. 24(1) states that a court may provide "such remedy as the court considers appropriate and just in the circumstances". It is "difficult to imagine language which could give the court a wider and less fettered discretion" (*Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965).
>
> b)An individual who complains not of a particular infringement but of an unconstitutional law can seek a remedy under s. 52(1). Unlike s. 24(1), s. 52(1) refers neither to judicial process, nor to discretion. Rather, a law that is inconsistent with the Constitution "is, to the extent of the inconsistency, of no force or effect".

193 Thus, while under s. 24(1) the courts have wide discretion to craft remedies for specific infringements, no such discretion is conferred under s. 52(1) with respect to unconstitutional laws. The rationale for this dichotomy can be seen in the language of s. 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The power to limit constitutional rights has been entrusted to the legislatures rather than to the courts.

194 On a purposive interpretation, the absence of remedial discretion in s. 52(1) is no oversight. The *Constitution Act, 1982*, does not give courts a choice as to whether to give effect to Canadians' right to be free from unconstitutional laws. The Constitution is not an equitable remedy or a writ of grace that lies in the favour of the courts. It confers rights of which Canadians are entitled to immediate protection. But the *Constitution Act, 1982*, is not the whole Constitution.

195 The *Constitution Act, 1982*'s first decade revealed situations in which this immediate approach to s. 52(1), unqualified, would cause conflict with other constitutional principles. An immediate declaration of invalidity in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, would have threatened the rule of law. An immediate declaration of invalidity in *R. v. Swain*, [1991] 1 S.C.R. 933, would have posed a potential danger to the public, thereby depriving Canadians of the protection of the law, which is an aspect of the rule of law. In these cases, resolution of the conflict between competing constitutional principles called for a suspended declaration.

196 As well, *Schachter* addressed an ambiguity latent within s. 52(1). When a law offers an underinclusive benefit, there may be no unique "extent of the inconsistency" to strike down. It might be possible to render the scheme constitutional by severing words (*R. v. Morales*, [1992] 3 S.C.R. 711), reading in words (*Vriend v. Alberta*, [1998] 1

S.C.R. 493), reading down the scheme (*Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401), or striking down the scheme altogether.

197 Because the appropriate remedy cannot always be discerned by a court in situations of underinclusive benefits, the supremacy of the legislature as a constitutional principle legitimately comes to bear; a declaration of suspended invalidity provides an opportunity for this to be given effect. For example, *Schachter* concerned a *financial* benefit that was available to adoptive parents, but not to natural parents. Reading in natural parents would have massively expanded and transformed the benefit, causing the Court (as Chief Justice Lamer noted) to act beyond its proper institutional role. Conversely, striking the benefit down altogether would have harmed many adoptive parents without benefiting the plaintiffs. A suspension of the declaration of invalidity ensured that the legislation would be made constitutional, but left the means of so doing to Parliament.

198 The remark in *Schachter* that the decision to suspend a s. 52(1) remedy turns on "the effect of an immediate declaration on the public" rather than "considerations of the role of the courts and the legislature" (p. 717) must be understood in this context. Institutional considerations by themselves do not provide a constitutional basis for a suspension. Rather, it is only in a situation of underinclusiveness where the proper s. 52(1) remedy is unclear that such institutional considerations may have an effect on whether to order a suspension, as indeed was the case in *Schachter* (pp. 721-24).

199 In this view, the *Schachter* categories exemplify circumstances in which countervailing constitutional principles constitute a valid basis to suspend an immediate declaration of invalidity that would otherwise follow by virtue of s. 52(1). While in my view the three categories are not exhaustive, a court should suspend a declaration of invalidity only if there is a constitutional basis for doing so. By necessary implication, the inherent jurisdiction of a court is not a sound or sufficient legal basis to depart from the immediate effect of s. 52(1).

II. *Schachter* Can Be Workable

200 While the Court has departed from *Schachter*, this does not indicate that there are conceptual flaws with the approach in *Schachter*. I say this mindful of cases such as *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, in which this Court struck down offences relating to sex work. Chief Justice McLachlin indicated that "[w]hether immediate invalidity would pose a danger to the public or imperil the rule of law ... may be subject to debate", but suspended the declaration because "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" (para. 167). Was a suspension legally justified in *Bedford*? I am not confident that the concerns noted by the Chief Justice constitute a valid legal basis for continuing to subject Canadians to laws rendered unconstitutional by virtue of s. 52(1).

201 Nor have the *Schachter* categories proved unworkable or difficult to apply in practice. Academics have had little difficulty identifying cases in which the Court has departed from *Schachter*: B. Ryder, "Suspending the Charter" (2003), 21 S.C.L.R. (2d) 267; C. Mouland, "Remedying the Remedy: *Bedford*'s Suspended Declaration of Invalidity" (2018), 41 Man. L.J. 281, at pp. 289-90; L. Weinrib, *Suspended invalidity orders out of sync with Constitution*, August 21, 2006 (online); R. Leckey, "The harms of remedial discretion" (2016), 14 *I CON* 584; S. Burningham, "A Comment on the Court's Decision to Suspend the Declaration of Invalidity in *Carter v. Canada*" (2015), 78 Sask. L. Rev. 201; G. R. Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" (2011), 49 Alta. L. Rev. 107.

202 In the six years after *Schachter*, its categories were applied without difficulty. According to Ryder's count, only two out of sixteen s. 52(1) remedies were suspended (Ryder, pp. 294-97). *Schachter* did not prove unworkable in practice; the problem was that it was too often honoured in the breach. It had been tested, it had worked well, and it can continue to do so.

III. Alternative Approaches Are Not Preferable

203 Justice Karakatsanis suggests that the *Schachter* categories be replaced by what she calls a "principled discretion". This is distinguished from what she refers to as "complete discretion" by four principles:

> A. *Charter* rights should be safeguarded through effective remedies.
>
> B. The public has an interest in the constitutional compliance of legislation.
>
> C. The public is entitled to the benefit of legislation.
>
> D. Courts and legislatures play different institutional roles. [para. 94]

204 I take no issue with these four statements. But, they lack analytic structure. Rather, they are so indeterminate and truistic as to provide no meaningful guidance. While they are compatible with the Court's uneven jurisprudence, they are equally compatible with very different choices. They present less a constraint on judicial discretion than a vocabulary for justifying *ad hoc* decisions.

205 My colleague says that a "principled" approach is better as it requires justification. This is not persuasive. All decisions require justification. Whether the framework is expressed using principles or categories, what is at issue is whether it constrains discretion as the *Schachter* framework does or whether in reality it throws open the door to judicial fiat. I am concerned that the discretionary approach Justice Karakatsanis advocates will lead to a continuation of current trends, in which declarations of invalidity are suspended in a way that varies with the length of the Chancellor's foot.

206 More fundamentally, I see no legitimate basis to read remedial discretion into s. 52(1). The provision admits of no such discretion. Rather, it is only by virtue of competing constitutional principles or ambiguity within s. 52(1) itself that one can justify suspending a declaration of invalidity. Statutes that are inconsistent with the Constitution are of no effect. Nothing can revive them. The only basis on which they can be ordered to be enforced notwithstanding their illegality is that to declare them to be immediately illegal would offend some other constitutional principle. Courts have no inherent authority to make legal that which is not. In this I differ fundamentally with my colleague.

207 My colleague writes at paras. 120-21:

> While s. 52(1) does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts "may have regard to unwritten postulates which form the very foundation of the Constitution of Canada" (*Manitoba Language Rights*, at p. 752; see also *R. v. Comeau*, *2018 SCC 15*, *[2018] 1 S.C.R. 342* at para. 52). [Footnote omitted]
>
> The power to suspend the effect of a declaration of invalidity should be understood to arise from accommodation of broader constitutional considerations and is included in the power to declare legislation invalid... .

She also writes, at para. 85, that "[a] general declaration pursuant to courts' statutory or inherent jurisdiction is the means by which they give full effect to the broad terms of s. 52(1)".

208 Respectfully, I disagree. This suggests that Superior Courts possess a form of inherent authority sufficient to override express provisions of the Constitution. On occasion courts have been called on to answer questions concerning the relationship of institutions of the state for which no answer is provided in the written Constitution, e.g. in *Reference re Secession of Quebec*, *[1998] 2 S.C.R. 217*. On such rare and exceptional occasions courts "may have regard to unwritten postulates which form the very foundation of the Constitution of Canada", which might be called structural analysis. But, in such instances, courts provide an answer as to the authority of the legislature or the executive where the written Constitution is silent. Where the Constitution is explicit, as s. 52(1) is, more is required. The power to suspend a declaration of invalidity is not "included" in s. 52(1); rather, it contradicts s. 52(1). Thus, in order to justify a suspension, one must rely on a countervailing constitutional principle.

209 As for Justices Côté and Brown's approach, the rule of law is not the only constitutional principle that can

justify suspending a declaration of invalidity. Notably, on a purposive interpretation, underinclusive benefits call for a court to order a suspension so as to give proper place to the legislature in framing a remedy.

IV. Applying *Schachter*

210 In this case, the declaration of invalidity was suspended on the basis of public safety concerns.

211 The analysis above suggests that courts cannot suspend a declaration of invalidity simply because an immediate declaration might create some risk to public safety. Rather, the risk to public safety must be sufficient to infringe the constitutional principle of the rule of law, so that the court is forced to reconcile two conflicting constitutional principles.

212 The threshold for suspending a declaration of invalidity can be illustrated by the cases in which the Court has invoked the public safety rationale. In *Swain*, the Court struck down the power to detain accused who were acquitted "by reason of insanity", as it was phrased at the time. In *R. v. Demers*, *2004 SCC 46*, *[2004] 2 S.C.R. 489*, the Court struck down the scheme for detaining those found unfit to stand trial. In *Charkaoui v. Canada (Citizenship and Immigration)*, *2007 SCC 9*, *[2007] 1 S.C.R. 350*, the Court struck down a scheme for detaining foreign nationals or permanent residents on grounds of security.

213 In all three cases, an immediate declaration would have released individuals who were held in custody because they posed a danger to public safety. The risk to public safety was high, as would be expected to justify reading into the Constitution a discretion to suspend a declaration of invalidity.

214 In this case, neither party focused their submissions on the suspension. In addition, this Court refused to stay the 12-month suspension (*Ontario (Attorney General) v. G*, *2019 SCC 36*), which thus expired on April 4, 2020, rendering the issue moot. In the circumstances, there is no cause to decide whether the declaration was properly suspended.

215 The issue of the exemption order is also moot. The respondent does not need to be exempted from legislation that is already of no force or effect. As a result, although I am in substantial agreement with the approach to individual exemptions set out by Justices Côté and Brown, there is no cause to decide whether the individual exemption was rightly ordered.

V. Conclusion

216 Rather than departing from *Schachter* and replacing it with another approach, I would affirm it, with the explanations that I have set out above.

217 In the result, I would dismiss the appeal.

The following are the reasons delivered by

S. COTÉ AND R. BROWN JJ. (dissenting in part)

I. Overview

218 While we agree with our colleague Karakatsanis J.'s conclusion that *Christopher's Law* infringes Mr. G's *Charter* right to equal treatment under the law, we write separately to constitutionally ground the usage of suspended declarations of invalidity in a way our colleague does not. In our view, suspended declarations of invalidity -- which allow for the ongoing infringement of *Charter* rights -- ought to be granted as a measure of last resort, and only to protect the rule of law. Relatedly, we respectfully disagree with our colleague that this Court's remedial jurisprudence since *Schachter v. Canada*, *[1992] 2 S.C.R. 679*, "has come to coalesce around a group of core remedial principles" (Karakatsanis J.'s reasons, at para. 82). To the contrary, our reading of this Court's

jurisprudence reveals none of the principles our colleague identifies. Instead, unmoored from the rule of law, it has produced inconsistent and unprincipled results. A return to first principles is necessary.

219 Our colleague would also grant Mr. G an individual exemption from the suspended declaration. With respect, doing so here would exceed the institutional competence of this Court and intrude into legislative domain.

220 For the reasons that follow, we would uphold the 12-month suspension of the declaration of invalidity. We would not, however, grant the respondent an individual exemption.

II. Section 15(1) of the *Canadian Charter of Rights and Freedoms*

221 Before we embark on our discussion of remedy, we offer these observations on our colleague's treatment of s. 15(1) of the *Charter*.

222 In our view, the s. 15(1) issue is easily disposed of. *Christopher's Law (Sex Offender Registry), 2000*, S.O. 2000, c. 1 ("*Christopher's Law*"), draws a distinction between persons found not criminally responsible on account of mental disorder ("NCRMD") and persons found guilty. And that distinction exacerbates pre-existing disadvantage by perpetuating the stereotype that persons with mental illness are inherently dangerous (*Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20). Persons found guilty have several "exit ramps" leading away from the obligation to comply with *Christopher's Law*'s sex-offender registry: a conditional or absolute discharge under s. 730 of the *Criminal Code*, R.S.C. 1985, c. C-46, a pardon, or a record suspension (*Christopher's Law*, ss. 1(1) "offender" and "pardon", 7(4) and 9.1). Persons found NCRMD, by contrast, do not, even where the Ontario Review Board determines that they no longer pose a significant threat to public safety and grants them an absolute discharge. As a result, those persons found NCRMD in respect of more than one sex offence, or in respect of a sex offence with a maximum sentence of more than 10 years, must -- categorically and without exception -- comply with *Christopher's Law* for the rest of their lives (s. 7(1)(b-c)). This constitutes differential treatment on the basis of an enumerated ground: mental disability. The proper remedy is to require the legislature to provide persons found NCRMD who have been absolutely discharged with an *opportunity* for exemption and removal from the *Christopher's Law* registry.

223 This disposes fully of the merits of the s. 15(1) issue. Our colleague, however, goes further, and in extensive *obiter dicta* discusses adverse-effects discrimination and "substantive equality" (paras. 41-69). Her doctrinal statements are not remotely relevant to the issues raised by this appeal, especially considering this is not an adverse-effects case. The distinction in this case is facially apparent: *Christopher's Law* explicitly states that persons found NCRMD -- persons with a mental disability -- and those who are "convicted" must comply with its registry (ss. 1(1) "offender", 2 and 8(1)(c)). It then explicitly exempts from compliance with the registry those who have received a pardon, those who have received a record suspension, and those who have received a conditional or absolute discharge under s. 730 of the *Code*. However, a person found NCRMD is ineligible to receive a pardon, a record suspension, or a discharge under s. 730 because they are deemed under the *Code* to have committed no crime (ss. 16(1), 672.1(1), 672.34 and 672.35). A discriminatory result such as this one, that arises from reading two or more statutes together, is not adverse-effects discrimination. In cases of adverse-effects discrimination, the discriminatory law appears facially neutral, and causation is the central issue: whether, in spite of its apparent neutrality, the impugned law augments pre-existing disadvantage in its effect (*Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 75-76). Consequently, in those cases, the claimant has "more work to do" (*Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 64). Here, there is simply no work to be done nor any causal connection wanting: the statutes, read together, draw a facial distinction on the basis of mental disability.

224 Thus, our silence on paragraphs 41-69 of our colleague's reasons should not be taken as tacit approval of their content. We simply do not see them as offering *actual reasons* for her judgment, but "commentary ... or exposition" instead (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 57).

III. Suspended Declarations of Invalidity

225 As we see it, there are three principal reasons why only a threat to the rule of law should warrant a suspended

declaration of invalidity. First, this was what the Court envisioned in assuming for the first time the power to issue a suspended declaration in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 ("*Manitoba Reference*"). Secondly, the Constitution commands such a result: the text contemplates immediate declarations as the norm, subject only to a rule of law concern. Thirdly, lessons learned in the wake of *Schachter* about the practical implications of suspended declarations reveal why a discretionary approach focused on "remedial principles" is undesirable, and why a constitutional tether to the rule of law is so essential. We will address each point in turn.

A. *The Genesis and Evolution of Suspended Declarations*

226 To understand the necessarily exceptional quality of suspended declarations, it is helpful to recount the unprecedented circumstances of *Manitoba Reference*. Because Manitoba had failed to enact its legislation in English and French, virtually all of its laws passed over more than nine decades were poised to become invalid. Declaring those laws immediately invalid, however, would have created a "legal vacuum ... with consequent legal chaos" of intolerable proportions (p. 747). All of Manitoba's governing bodies created by law including courts, tribunals, public offices, and school boards would have been stripped of legal authority. The composition of the Manitoba Legislature would have been called into question. The legal order that regulated the affairs of Manitobans "since 1890 [would have been] destroyed and [their] rights, obligations and other effects arising under [the unilingual] laws [would have become] invalid and unenforceable" (p. 749; see also pp. 747-48). An unprecedented "state of emergency" was imminent (p. 766).

227 In response, the Court created the suspended declaration, modelled after the doctrine of state necessity. The doctrine of state necessity, reserved for exceptional circumstances like an insurrection or forging a new constitution, allows a government temporary reprieve from complying with its constitution in order to address a public emergency and preserve the rule of law (*Manitoba Reference*, at p. 761). By accepting for itself the authority to take similar emergency action, the Court was taking a momentous step, since the precedents on state necessity cited by the Court involved emergency action being taken by the executive or legislative branches, not by courts (pp. 763 and 765-66). Further, for obvious reasons the doctrine of state necessity is potentially dangerous, and must be "severely circumscribe[d]" and "narrowly and carefully applied" in order to constitute an affirmation of, rather than an affront to, the rule of law (M. M. Stavsky, "The Doctrine of State Necessity in Pakistan" (1983), 16 *Cornell Int'l L.J.* 341, at pp. 344 and 342; see also p. 354; *Manitoba Reference*, at pp. 758-59). The line between using the doctrine as a veil for usurpation of authority and using it to safeguard the constitutional order from harm is fine. For this reason, at the core of the doctrine lies the premise that "courts should be reluctant to permit deviations from constitutional norms" (Stavsky, at p. 344).

228 Recognizing the magnitude of this step and its potential threat to the division of powers and the rule of law, the Court in *Manitoba Reference* tightly constrained the use of suspended declarations. It concluded that a suspended declaration should only be used "in order to preserve the rule of law ... under conditions of emergency, when it is impossible to comply with" constitutional rights (p. 763 (emphasis added)). The operative focus must be whether a "failure to [suspend the declaration] would lead to legal chaos" (p. 766) or, in other words, whether a suspended declaration is necessary "to preserve the rule of law the Constitution was meant to constitute" (B. Ryder, "Suspending the *Charter*" (2003), 21 S.C.L.R. (2d) 267, at p. 268). In short, the Court in *Manitoba Reference* "clearly viewed a temporary suspension of constitutional requirements as extraordinary" (Ryder, at p. 268). It was contingent on the exigency: "to avoid a state of emergency" (*Manitoba Reference*, at p. 763).

229 Since *Manitoba Reference*, however, this Court has lost its way. The Court now suspends declarations of invalidity almost as a matter of course, often with no justification or attention to the rule of law.[11] In our view, most of the cases in which suspended declarations have issued since *Manitoba Reference* do not come close to reaching the high threshold it decreed. Rather, suspended declarations have become this Court's "remedial instrument of choice", applied "casually" and as a matter of "routine" or "preference" while affording only "lip service ... to the dangers of allowing continued violations of *Charter* rights and freedoms" (G. R. Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" (2011), 49 Alta. L. Rev. 107, at pp. 110-11; Ryder, at pp. 271-72 and 280; S. Choudhry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 S.C.L.R. (2d) 205, at p. 228;

S. Burningham, "A Comment on the Court's Decision to Suspend the Declaration of Invalidity in *Carter v. Canada*" (2015), 78 Sask. L. Rev. 201, at p. 202; R. Leckey, "Remedial Practice Beyond Constitutional Text" (2016), 64 *Am. J. Comp. L.* 1 ("Leckey, 'Remedial'"), at p. 23).

230 In other words, this Court has been issuing suspended declarations, and even *extending* those suspensions, with little constitutional or jurisprudential grounding. For instance, in both *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, and *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, the Court offered meagre reasons for suspending a declaration of invalidity. In *Bedford*, the Court suspended the declaration of invalidity on the enigmatic notion that leaving prostitution unregulated "would be a matter of great concern to many Canadians", despite finding that it was "subject to debate" whether an immediate declaration would endanger the public or otherwise imperil the rule of law (para. 167). Even more remarkably, in *Carter*, the Court gave *no* reasons for suspending its declaration of invalidity (para. 128).

231 The result is that the Court's use of suspended declarations has become wholly detached from the principled foundations stated in *Manitoba Reference* that animated the existence of what was supposed to be considered a measure of last resort. Today, that remedy has become the norm, rather than the exception. We do not take our colleague as disagreeing with this proposition. But her solution presupposes that there were *some other* principles quietly at work in the cases. With respect, we are not remotely convinced that this is so.

232 Nor do we agree with our colleague that *Schachter* is the vaccine. Indeed, it is the germ. Prior to *Schachter* (but after *Manitoba Reference*), this Court assumed "that laws inconsistent with the new Charter should be declared invalid immediately [and, in the process,] affirmed the primacy and inviolability of the rights and freedoms entrenched in the Charter" (Ryder, at p. 268). After *Schachter*, however, this Court's posture changed. Statistics bear this out: by our count, out of the 44 times this Court has declared a law invalid for unconstitutionality since *Schachter*, it has suspended that declaration 23 times (that is, 52 per cent of the time).[12] And those numbers have been trending upwards: between 2003 and 2015, that number rose to 74 per cent of declarations (see also Ryder, at p. 272; Hoole, at p. 114; J. B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (2005), at p. 175). The smallest inconvenience associated with an immediate declaration, and circumstances that pale in comparison to the grave situation the Court faced in *Manitoba Reference*, will now lead the Court to temporarily suspend the operation of the *Charter*.

233 This slippage is due to a move away from the principle stated in *Manitoba Reference*. *Schachter* shifted the considerations that can justify a suspended declaration away from the rule of law to "the effect of an immediate declaration on the public" (p. 715; see also pp. 716-17). Further, *Schachter* expressly recognized two additional circumstances in which a suspended declaration of invalidity could issue: threats to public safety and under-inclusive legislation (p. 715). It also made clear (as our colleague does with her reasons) that these categories are not exhaustive (p. 719). Additionally, *Schachter* explicitly *required* courts to consider whether a suspended declaration should issue in each case (pp. 715 and 717).

234 Unsurprisingly, after *Schachter* courts began to find other reasons for issuing suspended declarations, one of which became this Court's primary justification for suspending a declaration: affording the legislature the time it needs to craft a response and choose between *Charter*-compliant regimes (e.g. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 96; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 66; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 79; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472, at para. 32). But this justification strikes us as irrelevant. The judiciary's choice between an immediate and suspended declaration has no impact on the range of constitutional options open to a legislature in the aftermath of a successful *Charter* challenge. As Professor Ryder explains:

> A key flaw [in the Court's] line of reasoning is that suspended declarations do not in fact offer anything to the legislature that it does not already have. By emphasizing the role of suspended declarations in fostering legislative choice, and dialogue with affected groups, the Court seems to be suggesting that suspensions have the effect of enlarging a legislature's range of choices and consultative possibilities. But this is not necessarily the case. Whether the operation of a declaration of invalidity is immediate or delayed, a legislature faces the exact same range of constitutional possibilities. It is free to disagree

> with the legal regime that follows upon a Court's choice of an immediate declaration of invalidity and substitute some other constitutional option. It is also free to consult as widely as it wishes in the design of a new Charter-compliant legal regime. [p. 281]
>
> (See also p. 285.)

235 Respectfully, the proper response to this rampant misuse of suspended declarations is not, as our colleague proposes, to expand the *Schachter* categories in reliance on newly divined "remedial principles" and "recurring touchstones" (paras. 82 and 153). In practice, this will result in a measure of broad discretion that is anomalous in a legal regime committed to the rule of law and the protection of rights. *Schachter*'s discretion bred inconsistent and unprincipled results, and we see no reason to believe our colleague's appeal to a "broader [constitutional] architecture" (para. 158) will be any different. Rather, the more appropriate response is to return our focus to the Constitution, and particularly its founding principle of the rule of law, in order to ensure the proper vindication of *Charter* rights and carefully circumscribe the situations in which a suspended declaration can issue.

B. *The Constitution*

(1) Section 52(1) of the *Constitution Act, 1982*, and Section 33(1) of the *Canadian Charter of Rights and Freedoms*

236 Section 52(1) of the *Constitution Act, 1982*, provides the following:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

237 The text could not be clearer: its use of the present tense "*is*" contemplates, by definition, only *immediate* declarations of invalidity. Indeed, on "a plain reading of this provision, the invalidation of any law found to be ultra vires the Constitution should be immediate" (B. Bird, "The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity" (2019), 42 Man. L.J. 23, at p. 32, citing Hoole, at p. 110; see also pp. 34-36). In other words, suspended declarations are, by their nature, "in tension with the clear words of s. 52(1) that contemplate that unconstitutional legislation is of no force and effect" (K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at s.14.1540).

238 To be sure, once it is found that a statute is inconsistent with the Constitution, "consequences for that legislation flow directly from the Constitution's status as supreme law" (Leckey, "Remedial", at p. 30): courts have "not only the power, but the duty, to regard the inconsistent statute ... as being no longer 'of force or effect'" (*R. v. Big M Drug Mart Ltd.*, *[1985] 1 S.C.R. 295*, at p. 353 (emphasis added)). While we commonly refer to a court "striking down" a law, in reality, "the law has failed by operation of s. 52 of the *Constitution Act, 1982*", because s. 52(1) "confers no discretion on judges" (*R. v. Ferguson*, *2008 SCC 6*, *[2008] 1 S.C.R. 96*, at para. 35). It is a "provision that suggests that declarations of invalidity can only be given immediate effect" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, *[1997] 3 S.C.R. 3*, at para. 99 (emphasis added)).

239 Unlike the constitutions of other countries, such as the *Constitution of the Republic of South Africa*, at s. 172(1)(b),[13] nothing in the text of our Constitution expressly empowers Canadian courts to issue suspended declarations. (And even in South Africa, suspended declarations are rare, as the "general assumption" is that the Constitutional Court of South Africa will issue an immediate declaration (Leckey, "Remedial", at p. 20)). The framers of our Constitution could easily have suggested such a power by including the words "will be ... of no force or effect" (and indeed, this is how this Court has been reading s. 52(1) in the wake of *Schachter*). Instead, the Constitution limits the role of courts to declaring a law "is of no force or effect". Therefore, when exercising such a *judicially created* power to suspend a declaration of invalidity, this Court must be judicious, measured and principled. We stress "judicially created" for a reason, which also goes to the need for restraint: while our Constitution does not expressly permit *courts* to suspend a declaration of invalidity, it *does* provide a means for *Parliament and legislatures* to do so in certain cases under s. 33(1). In other words, by keeping on life support a law that has been struck down for unconstitutionality, a court is effectively stepping into a role assigned by the Constitution *to the legislative branch* and, indeed, *is legislating*. As Bird persuasively explains:

> [W]here the Constitution assigns a specific power to a branch of government, th[e] principle of exclusivity applies. It is intuitive to say that a function expressly assigned to one branch of government by the Constitution must not be performed by another branch... .
>
> This, I submit, is the case with suspended declarations of invalidity ... . In the Canadian Constitution, the only branch of government that is expressly permitted to give life to an unconstitutional law is the legislature by way of the "notwithstanding clause". [pp. 43-44]

240 Indeed, s. 33(1) suggests that, in cases to which it applies, *legislatures*, and *not courts*, are best positioned to know when a suspended declaration is desirable and if so, for how long (see D. Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in G. Sigalet, G. Webber and R. Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (2019), 209, at pp. 230-31). This, in fact, is a primary purpose of s. 33(1): to allow a legislature to consider the impact of a court's decision on considerations "in respect of which only the legislature has institutional capacity" (Newman, at p. 218 (see also p. 224); see also Hon. A. E. Blakeney, "The Notwithstanding Clause, the *Charter*, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010), 19 *Constitutional Forum* 1, at p. 5; J. D. Whyte, "Sometimes Constitutions are Made in the Streets: The Future of the *Charter*'s Notwithstanding Clause" (2007), 16 *Constitutional Forum* 79, at p. 83; P. H. Russell, "Standing Up for Notwithstanding" *(1991), 29 Alta. L. Rev. 293*, at pp. 308-9; P. C. Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984), 18 *U. Mich. J. L. Reform* 51, at p. 86).

241 At bottom, s. 33(1) is a "factor that should serve to constrain the use of the suspended declaration" (E. Macfarlane, "Dialogue, Remedies, and Positive Rights: *Carter v. Canada* as a Microcosm for Past and Future Issues Under the *Charter of Rights and Freedoms*" *(2017), 49 Ottawa L. Rev. 107*, at p. 120). Our colleague says in response that a "court cannot shirk its responsibility to remedy constitutional violations simply because [of] s. 33" (para. 137). With respect, this misses our point. We agree that a court must remedy constitutional violations. Our point is that s. 33(1) militates against *her* position that courts have broad discretion to *delay* remedying such violations. Instead, "[c]ourts should respect the entire constitutional structure, including the possibility of using the override when exercising remedial discretion" (Roach, *Constitutional Remedies*, at s.14.1450 (emphasis added)). All this fortifies our view that, so as not to engorge or strain the judicial function, court-ordered suspended declarations ought to be confined to addressing threats to the rule of law.

(2) Rule of Law

242 Given that s. 52(1) does not expressly allow for suspended declarations, a court's authority to suspend must be found elsewhere in the Constitution. In particular, suspended declarations should be grounded not in appeals to abstruse "broader constitutional considerations" or to a heretofore undiscovered ancillary power to a court's "inherent jurisdiction" to declare legislation invalid (Karakatsanis J.'s reasons, at paras. 121 and 85), but in the constitutional principle of the rule of law. The rule of law has long been considered "a fundamental postulate of our constitutional structure" (per Rand J., *Roncarelli v. Duplessis*, *[1959] S.C.R. 121*, at p. 142). This is evidenced by its invocation in the single-sentence preamble to the *Charter*: "Canada is *founded upon* principles that recognize ... the rule of law". The rule of law is proclaimed by our written constitution to be the "very foundation" on which our country, and its *Charter*, rest (*B.C.G.E.U. v. British Columbia (Attorney General)*, *[1988] 2 S.C.R. 214*, at p. 229). It occupies hallowed ground as the "root of our system of government" and a "vital ... assumptio[n]" on which our Constitution is based (*Reference re Secession of Quebec*, *[1998] 2 S.C.R. 217* ("*Secession Reference*"), at paras. 70 and 49).

243 The centrality of the rule of law to our constitutional order is what led to the creation of suspended declarations in *Manitoba Reference* in the first place. Rights under the *Charter* may be temporarily judicially displaced only where necessary "to preserve the rule of law" (p. 763) and to ensure its "continuity" (p. 753). By relying on the protection of the rule of law as the justification for suspended declarations, courts are able to "recognize [both] the unconstitutionality of [the impugned] laws and the Legislature's duty to comply with the 'supreme law' of this country" while upholding the Constitution (*Manitoba Reference*, at p. 753; *Hunter v. Southam Inc.*, *[1984] 2 S.C.R. 145*, at p. 169). Indeed, just as much as it is the Court's role to safeguard the rights guaranteed in the *Charter* (*Hunter v. Southam*, at p. 169), it is also the Court's responsibility to ensure that the rule of law is not

"transgress[ed]" (*Manitoba Reference*, at p. 753). Where an immediate declaration would transgress the rule of law, the Court would be "abdicat[ing]" its role as "protector and preserver of the Constitution" (p. 753) to allow such a state of affairs to arise. In such instances, then, the Court is not fulfilling an impermissible legislative role as it otherwise would be by granting a suspended declaration, but an assuredly *judicial* role. This is not a novel interpretation, but simply the circumspect guidance that the Court in *Manitoba Reference* offered when recognizing this extraordinary judicial remedy.

244 There is no basis in our Constitution for this Court to have departed from this guidance. Our colleague can point to no other part of our written Constitution that could ground a court-ordered temporary suspension of *Charter* rights, and fails to identify a single case that shows why limiting suspended declarations to threats to the rule of law is unworkable, relative to the medley of "underlying", "competing", "general", "countervailing" constitutional or remedial "principles" and "touchstones" to which she points (paras. 89, 92, 102, 126, 131-132 and 153). In this regard, we find the extra-judicial commentary of Justice Scalia apt:

> [W]e should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat -- an acknowledgment that we have passed the point where "law," properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.
>
> I stand with Aristotle, then -- which is a pretty good place to stand -- in the view that "personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement." [Emphasis added; footnote omitted.]
>
> (A. Scalia, "The Rule of Law as a Law of Rules" (1989), 56 *U. Chicago L. Rev.* 1175, at p. 1182)

Our Constitution makes an exact pronouncement on the matter of suspended declarations: they are exceptional. Immediate declarations must be the norm, absent a rule of law concern. There is no need to go further.

245 It is worthwhile to describe a few instances where an impending threat to the rule of law warrants a suspended declaration. The prototypical instance of a threat to the rule of law is an existential one, as in *Manitoba Reference*. There, as noted above, the Court was concerned with "a legal vacuum" and that the "constitutional guarantee of rule of law [could] not tolerate such chaos and anarchy" (pp. 747, 753 and 758).

246 There is, however, a second form of threat to the rule of law that may give rise to a suspended declaration of invalidity: a threat to public safety. As explained in *Manitoba Reference*, a tenet of the rule of law is that a state's people should not "be allowed to perish for the sake of the constitution; on the contrary, a constitution should exist for the preservation of the State and the welfare of the people" (p. 766, citing *Attorney General of the Republic v. Mustafa Ibrahim*, [1964] Cyprus Law Reports 195, at p. 237 (emphasis deleted)). In other words, the rule of law requires that this Court ensure an "order of positive laws which preserves and embodies the more general principle of normative order" (p. 749). Normative order is lost where public safety is put at risk. Indeed, "[l]aw and order are indispensable elements of civilized life" (p. 749) and the rule of law has long implied "the existence of public order" (W. I. Jennings, *The Law and the Constitution* (5th ed. 1959), at p. 43, cited in *Manitoba Reference*, at p. 749). The rule of law "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society" (*Secession Reference*, at para. 70). Maintaining public safety, in this sense at least, is therefore an instance of preserving the rule of law.

247 Our colleague, following *Schachter*, lists "underinclusive" benefits or legislation as one of her *non-exhaustive* categories qualifying for suspension (paras. 118 and 124). She pronounces, without citing any authority in support, that the categories "reflect constitutionally grounded considerations", which are said (again, without citing to any authority) to include "recognizing the public's interest in legislation passed for its benefit" (para. 124). There is, in

our respectful view, no legal rule, and certainly no constitutional principle or the even more amorphous "constitutionally grounded considerations", to support under-inclusiveness as a category qualifying for suspension.

248 With great respect, the creation of this category in *Schachter* was ill-conceived, inconsistent as it is with the strictures of *Manitoba Reference*. Further, even on its own terms, it cannot stand. According to *Schachter*, the impetus for recognizing under-inclusive benefits as a category that justifies suspending a declaration is the concern that "striking down the law immediately would deprive deserving persons of benefits" (p. 715; see also pp. 716 and 721). However, to the extent that a law is under-inclusive, the appropriate response is not to strike down the benefits for all because, in these rare situations, the "extent of the inconsistency" under s. 52(1) refers to the legislation's *omission*, or failure to provide benefits to a certain group. The other aspects of the legislation will not have been declared unconstitutional and, as our colleague quite rightly observes, "[t]he public has an interest in preserving legislation duly enacted ... to the extent it is not unconstitutional" (para. 156). Explained in another way, striking down benefits is only warranted where the benefits are *prohibited*, not where they are *under-inclusive*. *Schachter*'s apprehension of depriving benefits from deserving persons (which grounded the justification for suspension) then withers away. The more appropriate response in such cases is not suspension, but resort to the other tools in a court's remedial toolbox, such as severance or reading in. Critically, a court can simply issue a declaration stating that the legislation is unconstitutional to the extent it does not extend benefits to a particular group and requiring that -- after the government determines the best method for extending those benefits -- the benefits be provided retroactively (e.g. *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, *[1991] 2 S.C.R. 22*, at pp. 46-47). Clearly then, under-inclusive benefits can be remedied without "depriv[ing] deserving persons of benefits", and there is therefore no corresponding need to suspend a declaration to avoid this state of affairs.

249 But our colleague goes further, identifying *yet another* category, beyond those listed in *Schachter*, that could justify a suspended declaration. A suspension should also be granted, we are told, when "an immediately effective declaration would have a limiting effect on the legislature's ability to set policy" (Karakatsanis J.'s reasons, at para. 130 (emphasis added)). This category requires refinement. A mere "limiting effect" on policy-making, whatever that means, is surely insufficient to warrant the continued infringement of *Charter* rights. We say a suspended declaration is warranted only where it can be demonstrated that the immediate vesting of rights -- and the concomitant gathering of reliance and expectation interests around the new legal regime, or the development of substantial administrative structures (Ryder, at pp. 281 and 285) -- would preclude the government from creating or maintaining "an actual order of positive laws" to govern society (*Manitoba Reference*, at p. 749; see also *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), at pp. 88-89). These cases will be extremely rare because, as we will explain below, the legislature is well equipped to respond promptly to immediate declarations of invalidity and to avoid the accrual of vested interests (for example, by invoking s. 33(1) where applicable or by enacting new or amended legislation).

250 Without a tether to the rule of law, our colleague's novel category, paired with her call to "respect ... the role of the legislature" (para. 157), will, over time, allow the flawed rationale of deference to the convenience of the legislature -- one of the central causes, if not *the* cause, of the unprincipled expansion of suspended declarations -- to resurface. Indeed, her new category is practically indistinguishable from that rationale. If the history of suspended declarations that we have recounted is any indicator of future trends, governments and courts will frequently dodge the constitutional mandate of s. 52(1) by claiming that an immediate declaration has an ostensible "limiting effect" on (para. 130), or would "significantly impair" (paras. 129 and 139) or "undermine" (para. 157), the legislature's ability to enact its "preferred" (para. 176) scheme (e.g. *Guignard*, at paras. 23 and 29-31, and Ryder, at pp. 271, 272, 286 and 288).

251 While we appreciate our colleague's efforts to strive to bring greater consistency and transparency to remedial decision making, we see her enunciation of various "core" or "fundamental" "touchstones" and "principles" as promoting uncertainty and unpredictability instead. Worse, their dubious status only exacerbates the obscurity. It is unclear whether these principles are constitutional, non-constitutional, or constitutive of a new hybrid category. Overall, it is difficult to know how to reconcile our colleague's statement that "suspensions of declarations of invalidity should be rare" (para. 83) with the imprecision of her expanded principles and categories that justify their

usage. There is, quite simply, no need to broaden the "narrow circumstances" in which a suspended declaration can issue (*contra* Karakatsanis J.'s reasons, at para. 132). Indeed, and as we explain below, there is good reason for *not* doing so, since it only risks unduly compromising the enforcement of rights.

252 In sum, as we see the matter, a suspended declaration of invalidity may be constitutionally issued by a court only to counter a threat to the constitutional principle of the rule of law, which includes threats to public safety. And indeed, a suspended declaration *must* issue in such circumstances, because "[f]or the Court to allow such a situation to arise and fail to resolve it would be an abdication of its responsibility as protector and preserver of the Constitution" (*Manitoba Reference*, at p. 753).

C. *Lessons Learned Post-Schachter*

253 Before applying the foregoing to the facts of this case, we add the following considerations that warrant a return to first principles -- that is, that warrant reinstating the rule of law as the sole justification for suspended declarations of invalidity. These considerations are, in effect, lessons that follow from *Schachter*'s jurisprudential progeny that show why it is essential to confine judicial discretion.

254 First, restraint is imperative because suspending a declaration will often pull a court beyond its institutional competence and capacity. On several occasions where this Court has suspended a declaration of invalidity, the legislature has chosen *not* to enact new legislation (Choudhry and Roach, Table B, at pp. 257-66). Or, as in *Corbiere v. Canada (Attorney General)*, 2015 SCC 15, [2015] 1 S.C.R. 331, "the new electoral regime instantiated by the government was virtually identical to what would have resulted from the immediate invalidation of the impugned law" (Hoole, at p. 125; see also pp. 124 and 126). Such a deeply regrettable state of affairs should lead us to reflect, even if only briefly, on its significance: this Court, mistakenly believing it had the institutional competence to properly assess whether a suspended declaration was necessary, allowed injury to the *Charter* rights of Canadians to persist unnecessarily. The dangers of judicial activism -- indeed, of judicial legislation -- are on full display.

255 Conversely, when an immediate declaration of invalidity is issued, "one may not speak of judicial activism ... . Rather, even though the declaration is channeled through the court, it is in truth issued by [s. 52(1) of] the original constitution" (G. C. N. Webber, "Originalism's Constitution", in G. Huscroft and B. W. Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation* (2011), 147, at pp. 166-67; see also *Ferguson*, at para. 35, and *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 28). The responsibility for responding to the declaration of invalidity then, as our Constitution intended, falls to the legislature -- the branch with the competence and toolbox necessary to craft an appropriate response. Not only do legislatures have the ability in certain cases to respond to an immediate declaration of invalidity by using s. 33(1) (as discussed above), but they may also enact amended legislation before or upon release of the Court's decision (Hoole, at pp. 120-21 and 134; e.g. *Schachter*, at pp. 690 and 724-25; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 92). As Stavsky explains:

> A legislature is a functioning entity, fully capable of responding to any set of circumstances. The contention that legislatures act too slowly in emergency situations is erroneous... .There are no inherent barriers in the legislative system that prevent expedient action when it is necessary. [p. 345]

In the end, it must not be forgotten that before *Schachter*, immediate declarations of invalidity were the established practice, and some of the Court's most striking decisions were rendered in this fashion without any adverse consequences (e.g. *Big M Drug Mart*; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *R. v. Oakes*, [1986] 1 S.C.R. 103). We are unaware of any reports that Parliament or the legislature had difficulty responding to immediate declarations of invalidity then, and it would be pure conjecture on this Court's part to wonder if they will now.

256 Secondly, a return to a norm of immediate declarations would have the effect of avoiding this Court's particularly arbitrary and uninformed exercise of determining the length of a suspension. In *Manitoba Reference*, the Court recognized its limits in this regard: "As presently equipped, the Court is incapable of determining the period of

time during which" a suspended declaration should govern (p. 769). Nothing we have seen in the intervening 35 years persuades us that this has fundamentally changed.

257 A court's institutional incapacity to estimate the amount of time required is only heightened "if there is no majority in government, if party discipline is weakened or if the unelected upper house of Canada's federal Parliament exercises its powers" (K. Roach, "The Separation and Interconnection of Powers in Canada: The Role of Courts, the Executive and the Legislature in Crafting Constitutional Remedies" (2018), 5 *J. Int'l Comp. L.* 315, at p. 335). It is no surprise then that, as in the case at bar (see Karakatsanis J.'s reasons, at para. 179), this Court often "appears unwilling to articulate why [its] long period[s] of suspension [are] appropriate," (A. van Kralingen, "The Dialogic Saga of Same-Sex Marriage: *EGALE*, *Halpern*, and the Relationship Between Suspended Declarations and Productive Political Discourse About Rights" *(2004), 62 U.T. Fac. L. Rev. 149*, at p. 176; e.g. *Corbiere*, at para. 27) and simply resorts to its standard durations of six months, a year, or 18 months with little guidance or consistency (Hoole, at p. 122).

258 There is, consequently, a strong chance courts will overshoot the mark and allot the legislature more time than it requires. That was the case in *Corbiere*, where the 18-month suspension acted "as a sedative, not a stimulant", excusing the legislature from acting forthwith (C. Mouland, "Remedying the Remedy: *Bedford*' s Suspended Declaration of Invalidity" (2018), 41 Man. L.J. 281, at p. 331; see also Macfarlane, at p. 118). In the end, the legislature waited until the *seventh* month before even *beginning* to respond (Mouland, at p. 331). To allow for an unconstitutional state of affairs, and the maintenance of its "harmful ... effects [including] exacerbating existing disadvantage and marginalization" (R. Leckey, *Bills of Rights in the Common Law* (2015) ("Leckey, *Bills*"), at pp. 173-74) to persist for a day longer than necessary is offensive to our constitutional order. Thus, we strongly reject any notion that affording the legislature "time" is on its own a sufficient justification for extending the harms associated with the law in the first place. This brings us to our third point.

259 It also behooves us to consider the harms inflicted on *Charter* claimants and other affected rights holders by this Court's liberal and unprincipled use of suspended declarations. In allowing an unconstitutional law to remain in force, a court not only withholds the immediate relief to a successful claimant to which he or she is expressly entitled under s. 52(1) of our Constitution, but also sustains the law's capacity to produce harm. In the process, the significance of the right at issue is diluted. For this reason, the improper use of suspended declarations pose "a threat to the very idea of constitutional supremacy" (Choudhry and Roach, at p. 230) precisely because they "impose substantial costs on litigants" (Leckey, *Bills*, at p. 170) who must bear the brunt of the unenforced norm (see R. Leckey, *Suspended Declarations of Invalidity and the Rule of Law*, March 12, 2014 (online); Burningham, at p. 206; and Macfarlane, at p. 120).

260 Similarly, suspended declarations can exacerbate pre-existing disadvantage. Dean Leckey highlights how "the delayed declaration risk[s] leveraging factual differences among members [of a litigant's class] into arbitrary and unjust legal effects" (R. Leckey, "The harms of remedial discretion" (2016), 14 *I CON* 584, at p. 592). Mouland echoes this when she writes of "horizontal inequity" (p. 338) as a harm incurred by suspended declarations. For instance, in the context of an unconstitutional criminal law, "individuals arrested and charged under the unconstitutional provisions late in the [suspended declaration period] would be much less likely to receive a conviction before that period elapsed than those arrested and charged earlier" (Leckey, at p. 592). The arbitrariness of this result is not only temporally based however, as an individual's access to resources and socioeconomic position are also determinative: "Individuals with decent legal advice ... know not to plead guilty under the law, but to keep their file open until the suspension lapse[s]," whereas those without such advice, typically the marginalized and vulnerable, may not (p. 592). Further, prosecutorial discretion in charging may be informed by whether the Crown in a particular jurisdiction has knowledge of the government's intention (or lack thereof) to replace the legislation (and if so, with what), resulting in further arbitrary distinctions among those in the claimant's class (p. 595). Ultimately, "incarcerating individuals convicted under an interdiction known to violate rights" engenders marginalization and "intensifies concerns for the rule of law and for justice generally" (p. 593; see also p. 595).

261 In addition to its potential to extend harm, the routine use of suspended declarations risks discouraging rights holders from bringing *Charter* claims forward in the first place. Commentators have suggested that suspended

declarations "contribute to a chilling effect on constitutional litigation in Canada... . [T]here is a legitimate risk that suspended declarations add to the already steep disincentives against individuals initiating constitutional challenges" (Hoole, at p. 131; see also Ryder, at p. 287). We see a case in point in our colleague's "balancing the harms" (para. 131) approach, which adds one more step at which claimants must assert their rights against other factors. It cannot be anything but discouraging for potential *Charter* claimants to know that, under our colleague's test, even where the government fails to justify the infringement of their *Charter* rights under s. 1, they must be ready to parry any "identifiable public interest" (para. 83; see also paras. 117, 139 and 171) that the government can muster to justify allowing that infringement to persist.

262 In contemplating a test for suspended declarations then, we must recognize that the balancing at the s. 1 stage has already been resolved in *favour* of the protection of the *Charter* right. For a court to then alter this balance *against* the protection of that right strikes us as a monumental and unfortunate step. This is especially so where a court has already concluded that there is no rational connection between a law's *Charter* infringement and its objective (*contra Figueroa*, at paras. 86 and 92-93): if an impugned law is not rationally serving the interests it purports to in the first place, we fail to see why the law should remain temporarily in effect. Again, we would return to first principles. Courts should legitimize a deviation from the initial balance struck only where the weighty interest in originally protecting the right is outweighed by a threat to the rule of law.

263 A final point of concern. Suspended declarations, if used improperly (as we see this Court having used them), can actually undermine the rule of law they were designed to preserve in at least two ways. First, suspended declarations can lead to uncertainty in the law. For example, this Court's suspended declaration in *Bedford* caused such significant uncertainty that "police and prosecution units across the country took different approaches to laying charges under the provisions maintained temporarily in effect, generating [extensive] litigation" and concern about unjust imprisonment (Leckey, *Bills*, at p. 176; see also Hoole, at pp. 125-26). Secondly, suspended declarations can "lessen the consequences for lawmakers of enacting laws that violate the [*Charter*, which] in turn, reduces the incentives for complying with rights when making [the] law" (Leckey, *Bills*, at p. 177; see also *Schachter*, at p. 728, per La Forest J.: "It is the duty of the courts to see that ... laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset."). Professor Ryder explains:

> One result of routinely suspending declarations of invalidity when legislation unjustifiably infringes Charter rights and freedoms is that the costs to lawmakers of risking Charter violations may no longer be apparent... . Lawmakers might be getting the message that they take no significant risks if they pass laws without serious regard for Charter rights and freedoms... . The consequences of drafting laws that may violate the Charter, from a government's point of view, may be nothing worse than litigation and a second chance at drafting Charter-compliant legislation a few years down the road. [p. 288]

In other words, suspended declarations have actually become an invitation for governments to be bolder with their legislation, because the potentially negative consequences of doing so have been so largely contained, or are uncertain to occur. A remedy initially designed to *serve* the rule of law, in the absence of being grounded in the Constitution, now risks *causing*, even *promoting*, its violation (Ryder, at p. 288). We would therefore return to the familiar rule of law path that was set in *Manitoba Reference*, and that is entirely within the province of the judiciary. And we would leave the concerns for policy-making constraints to those orders of the state (legislative and executive) that know of such matters.

D. *Conclusion*

264 This Court's use of suspended declarations as an instrument of remedial delegation to the legislature is not only "at odds with the precepts of Canada's constitutional model ... [but] has [also] produced a problem of analytic incoherency, exacerbated flawed institutional assumptions that impose undue costs on *Charter* claimants, and caused unnecessary injury to *Charter* rights" (Hoole, at p. 147). Beyond upholding the constitutional principle of the rule of law, we see no defensible justification -- at least no judicially cognizable justification -- for a court to suspend the enforcement of constitutional rights. If the Court's concern with using immediate declarations is deferential

restraint, we say that *true* deference lies in conforming to the Constitution, and not in "engag[ing] in a discretionary exercise each time" (Leckey, *Bills*, at p. 178; see also p. 177).

265 It is tempting, and indeed it is venerable judicial methodology to scrutinize decided cases to discern principles that allow us to reconcile those cases with each other, and to identify a path forward in deciding a present case. But it must be borne in mind what is at stake. Fundamentally, "[i]t is the duty of the courts to uphold the Constitution, not to seal its suspension" (*Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at pp. 463-64). Unless, therefore, an immediate declaration of invalidity would transgress the rule of law -- the very "foundation of [our] [C]onstitution" (*Manitoba Reference*, at p. 766) -- the *Charter* must not be abrogated. We return again to Professor Ryder, who makes the point compellingly:

> ... suspended declarations ... appea[r] to conflict with [s. 52(1)] and section 1 of the Charter. These sections place on governments the responsibility for demonstrating that limits on rights and freedoms are justified, and they place on the judiciary the responsibility for declaring invalid laws that have not been so justified... . Judges partially abdicate their constitutional obligations if they grant to legislatures the responsibility for initially bringing invalid legislation into compliance with constitutional norms whenever a range of Charter-compliant options exists. Remedial dialogue should follow *after* the judiciary has exercised its section 52 responsibilities; it should not provide a reason for temporarily abdicating those responsibilities in the first place. [Emphasis in original; p. 282.]

266 With great respect to our colleague who strives to find meaningful principles in what is a haphazard body of case law, it is time to restore discipline and restraint to this Court's approach to suspended declarations, and re-impose narrow conditions that give practical effect to its statements that the suspended declaration is a "high standard" to meet and an "extraordinary step" (*R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98; *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 S.C.R. 13, at para. 2). As we see it, this can only be done by turning back the clock to *Manitoba Reference* and reverting to its sound guidance that suspended declarations ought to be unusual and exigent, reserved exclusively for those cases where the rule of law is imperilled. The solution is *not* to rely on "principles" in decided cases that simply are not there to be seen. As was said by Lord Shaw of Dunfermline more than a century ago, "[t]o remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand" (*Scott v. Scott*, [1913] A.C. 417 (H.L.), at p. 477). When it comes to protecting *Charter* rights from undue suspension, it must be the law, our Constitution -- not pure discretion (which our colleague only nominally rejects) -- that is in command. Accordingly, this Court should not shy away from using immediate declarations of invalidity in the future. In most cases, immediate declarations are necessary to enforce protected rights, uphold constitutionalism, and vindicate the rule of law. We now turn to applying this approach to the case at bar.

E. *Application*

267 In our view, granting an immediate declaration of invalidity in this case would threaten public safety and, therefore, the rule of law. We find the concerns in this case to be of the nature and magnitude of those that warranted suspended declarations in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1021 (holding that the detention of *all* persons found not guilty by reason of (what was then called) "insanity" was arbitrary because some will not be dangerous at the time of sentencing) and *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at paras. 56-57 (holding that absolute discharges must be *available* to permanently unfit accused who do not pose a significant threat to public safety). In *Swain*, the Court considered that an immediate declaration would mean that "judges will be compelled to release into the community all insanity acquittees, including those who may well be a danger to the public" (p. 1021). Because of potentially "serious consequences" (p. 1021) to public safety, the Court issued a six-month suspended declaration of invalidity (p. 1022). Likewise, in *Demers*, the Court found that "striking down the legislation could create a danger to public safety" (para. 57) as it would, by necessary implication of its holding, have given absolute discharges to some unfit accused who *did* pose a threat to society.

268 Similarly, in this case, an immediate declaration would mean that the *Christopher's Law* registry would not apply to all persons found NCRMD who have been granted absolute discharges by the Ontario Review Board. While we are confident *Christopher's Law* captures persons who do not pose a significant risk of reoffending, we

are equally confident that it also captures many who do. The application judge accepted Dr. Hanson's evidence that, in general, persons found NCRMD pose an elevated risk of committing another sexual offence as compared to the general population, and further, that those who receive an absolute discharge have an increased probability of offending (*2017 ONSC 6713*, *401 C.R.R. (2d) 297*, at paras. 102, 103, 112 and 165). An absolute discharge cannot be equated with an absence of a risk of recidivism (*Ferguson v. Regional Mental Health Care St. Thomas*, *2010 ONCA 810*, *271 O.A.C. 104*, at paras. 1, 3 and 41-45; *Kassa (Re)*, *2019 ONCA 313*, at paras. 33-35 (CanLII)). Indeed, in some cases, the review board might not have granted an absolute discharge had they known the person found NCRMD was not going to be subject to *Christopher's Law*.

269 Most importantly, it must be remembered that the "recidivism risk" we are referring to in this case is the risk of committing sexual offences, "violent crimes that ... cause profound harm" to our most vulnerable (*R. v. Friesen*, *2020 SCC 9*, at para. 5). Removing all absolutely discharged persons found NCRMD from the *Christopher's Law* registry would significantly hamper the prevention and investigation of these offences. Given that an immediate declaration of invalidity would remove persons found NCRMD who *are* potentially dangerous from the registry, it would, like in *Swain* and *Demers*, create a lacuna in the regime that would undoubtedly pose a danger to the public and thus threaten the rule of law.

270 In addition to public safety, our colleague adds what she considers an additional justification to suspend the declaration of invalidity: she would suspend the declaration on the basis of "preserving the legislature's latitude to respond to the finding of unconstitutionality" (para. 178). With respect, there is no reason to suppose that difficulty in getting persons found NCRMD back on the registry (see para. 176) would reduce the number of ways in which the legislature could provide an opportunity for exemption, or otherwise undermine the effectiveness of that policy choice (para. 130). The legislature could simply enact amended legislation that, like the current version of *Christopher's Law*, requires everyone who falls under its jurisdiction to report forthwith, subject to penalty (ss. 3(1) and 11(1)).

271 In any event, and for the reasons we have already given, the practical difficulties that a government may face in rolling out constitutionally compliant legislation cannot justify suspending *Charter* rights. Indeed, to us this indicates how dangerously close our colleague's new category comes to the impermissible rationale of legislative deference from which this Court should disassociate itself. Rather than depending on vague notions of "the public's interest in legislation enacted for its benefit" and "the role of the legislature" (para. 166), we would instead ground a suspended declaration of invalidity here solely on the threat to the rule of law that would otherwise manifest in the form of a threat to public safety.

272 Nor do we see any need for our colleague to invoke "the significance of the rights violation that the suspension would temporarily prolong" in this case (para. 177). Were our colleague's new approach to suspended declarations grounded in the constitutional principle of the rule of law, such commentary would not be necessary. Indeed, it appears to be necessitated only by what we see as our colleague's unsound "balancing" approach, since showing that it works in practice requires her to identify some concern to place on the respondent's side of the scale to weigh against suspending the declaration (para. 177).

IV. Individual Exemptions

273 If a suspended declaration of invalidity should be rare, then an individual exemption from that suspension must be exceedingly so. Indeed, this Court's jurisprudence dictates that, in order to respect the role of the legislature, the limits of a court's institutional capacity, and the potential for horizontal unfairness, an individual exemption is only appropriate in *highly* "unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy" (*Ferguson*, at para. 63 (emphasis added); see also *Schachter*, at p. 720; *Demers*, at paras. 62-63). We see no reason to depart from this.

274 A helpful consideration in determining whether an individual exemption is necessary to provide an "effective" remedy is to ask the question the interveners, the David Asper Centre for Constitutional Rights, and the Attorney General of Canada, posit: whether an exemption is necessary to prevent "irreparable harm" to the interests the

Charter was designed to protect during the suspension (Asper Centre factum, at para. 2; A.G.C. factum, at para. 55; Roach, *Constitutional Remedies*, at ss.14.60, 14.910, 14.930 and 14.1790). The case for irreparable harm must be so significant that it overcomes the weighty need to leave the manner of addressing a constitutional infringement to the legislature. For example, an exemption may be warranted where the litigant needs urgent medical treatment or to ensure the claimant is released from custody. In our view, the test from *Ferguson* gives flexible interpretation to the words "appropriate and just" in s. 24(1) and allows courts to adhere to their role as defender of fundamental rights by minimizing any injustice caused by the suspension while also -- by limiting exemptions to exceptional cases -- allowing the legislature to discharge its singular role in formulating complex and multi-faceted legislation.

275 Considered here, this is not one of those rare cases where an individual exemption is warranted. There is, to speak plainly, nothing highly unusual about this case: a delayed remedy will not deprive Mr. G of an effective one, nor preclude him from accessing the government's new opportunity for exemption in whatever form that may take. Further, a suspended declaration of 12 months means that Mr. G will, at most, have to report to the police station one more time (for approximately 30-60 minutes (Sup. Ct. reasons, at para. 58)) as part of his obligation to report annually (see *Christopher's Law*, at ss. 3(1)(f)-(g)). This is a far cry from "irreparable harm". We are, therefore, in respectful disagreement with our colleague's decision to grant Mr. G an individual exemption.

276 What is particularly troubling, however, is that our colleague's reasons appear to establish a *presumption in favour* of individual exemptions in all cases ("if an exemption is otherwise appropriate and just, they should be exempted from suspensions in the absence of a compelling reason not to" (para. 152)). We therefore proceed to offer two important reasons why an individual exemption is inappropriate in this case, and in turn, why setting such a presumption and departing from the collective wisdom of *Schachter*, *Demers*, and *Ferguson*, is imprudent.

277 First, in this case, as in most, crafting an individual exemption will exceed the competence of a court and encroach on what is at bottom an issue for resolution by the legislature. This Court has long made clear that filling gaps in unconstitutional legislation is a task for the legislature, not the judiciary: *Hunter v. Southam*, at p. 169; see also *Schachter*, at pp. 705 and 707.

278 In the case at bar, the legislature is in a far better position than this Court -- indeed it is its role -- to determine, through research and study, what the appropriate mechanism is to provide persons found NCRMD with the opportunity for exemption, who has the necessary expertise to grant those exemptions, and which factors ought to inform that inquiry. Indeed, there are a plethora of options for the legislature to choose from. Our colleague even acknowledges as much:

> ... reading in an individualized assessment requirement would intrude on the legislative sphere -- there are many ways to provide for such an assessment and "it is the legislature's role to fill in the gaps, not the court's" (*Schachter*, at p. 705). [Emphasis added; para. 165.]
>
> (See also para. 183.)

279 The Court of Appeal similarly notes that, because the *Sex Offender Information Registration Act*, *S.C. 2004, c. 10* ("*SOIRA*"), has been invalidated in Ontario, the Ontario legislature and Parliament will have to consult one another as to the best way to provide exemptions for those unconstitutionally affected:

> There are several ways in which Parliament and the Ontario legislature could make the sex offender registry legislation compliant with s. 15(1) of the *Charter*. Those choices engage various policy considerations. There is also a need for a co-ordinated response by the two legislative bodies. The evaluation of those policy considerations and the mechanics of implementing a co-ordinated response are best left to Parliament and the legislature.
>
> (*2019 ONCA 264*, *145 O.R. (3d) 161*, at para. 150)

280 However, while acknowledging "reading in an individualized assessment requirement would intrude on the legislative sphere" (para. 165), our colleague effectively does just that by granting an individual exemption to Mr. G. Our reading-in jurisprudence teaches us that "if it is not clear that Parliament would have passed the scheme with the modifications being considered by the court" (in this case, allowing *courts* to determine who should and should

not be on the *Christopher's Law* registry), "then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere" (*Ferguson*, at para. 51 (see also para. 50); see also *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at paras. 74-75). Put differently, in attempting to provide an effective remedy, courts must not "leap into the kind of decisions and functions for which [their] design and expertise are manifestly unsuited" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 57). This concern, and the related need to avoid dictating the content of new legislation, should govern our decisions on whether to issue an individual exemption (Roach, *Constitutional Remedies*, at s.14.901).

281 The legislature may, for example, conclude that only the Ontario Review Board has the requisite expertise to determine whether a person who has been absolutely discharged should be subject to *Christopher's Law*, and that courts are institutionally ill-suited to make any legitimate assessment of persons found NCRMD. Indeed, as J. Barrett and R. Shandler observe, "courts simply lack the medical expertise and institutional knowledge necessary" to assess the dangerousness of a person found NCRMD (*Mental Disorder in Canadian Criminal Law* (loose-leaf), at s.11.1(a)(i)(B), citing *R. v. Peckham* (1994), 93 C.C.C. (3d) 443 (Ont. C.A.), at para. 39; see also *Ferguson* (ONCA), at para. 11). This is particularly true in the case of sexual offences, given that, according to the evidence of the appellant's expert, Dr. Hanson, it often takes considerable time for sexual recidivism to manifest. Dr. Hanson, whose evidence was accepted by the application judge, testified that while most non-sexual recidivists will be identified within five years, new sexual recidivists are identified even after long periods, with studies showing that recidivism rates increase significantly after 10 years of being offence-free. This aligns with our collective knowledge that sexual offences, for various reasons, "can all too often be invisible to society" and remain undiscovered for years (*Friesen*, at para. 67).

282 In light of these considerations, it seems to us profoundly ill-advised for this Court to short-circuit the legislative process and gift unto itself the ability to grant exemptions from the registry, even for Mr. G and even temporarily.

283 To be clear, we do not say that Mr. G is likely to reoffend. Our point is simply that what Mr. G has shown is that persons found NCRMD who have been granted absolute discharges are entitled to "opportunities for exemption and removal" (Karakatsanis J.'s reasons, at para. 161), and that this Court cannot assume for itself the mantle of deciding what form these opportunities should take. In other words, the "benefit of [Mr. G's] success" (*ibid.*, at para. 182) is that, like those who are found guilty of a sexual offence, he is entitled to the *opportunity* for exemption and removal from the registry, not that he must *necessarily* be removed.

284 We are, further, in respectful disagreement with our colleague's rationale that judges "are well-suited to deciding and frequently charged with making determinations" such as the one she has made for Mr. G (para. 181). Our colleague points specifically to termination and exemption orders in respect of a person subject to *SOIRA* under ss. 490.016(1) and 490.023(2) of the *Code* (para. 181). Without deciding the issue, we note that appellate courts have concluded that the "very high" standard (*R. v. Redhead*, 2006 ABCA 84, 384 A.R. 206, at para. 43) to be met by an applicant seeking a termination or exemption order pursuant to these sections *does not* focus on risk. Instead, it focuses on those rare cases where the applicant's unique circumstances make the impact of registration on their liberty and privacy interests particularly severe and something more than "the normal inconvenience [someone] would incur in complying with the requirements of registration" (*R. v. R.L.*, 2007 ONCA 347, at para. 7 (CanLII); see also paras. 2-6 and 8; see also *R. v. Debidin* (2008), 94 O.R. (3d) 421, at paras. 32, 68, 70 and 80; *Redhead*, at paras. 3, 21, 31 and 37-43). The Court of Appeal for Ontario, for example, has concluded that "[i]t is error to enhance the impact on an offender or to dilute the public interest in registration on the basis of a diminished risk of recidivism. Indeed, it may be open to question whether accurate forecasts of the unlikelihood of recidivism can even be made [by courts]" (*Debidin*, at para. 70). Moreover, we find our colleague's reference to judicial discretion under *SOIRA* particularly curious, given that Parliament has amended s. 490.012(4) of the *Code*, thereby eliminating the possibility for a sentencing judge to refuse to issue an order to comply with the registry (see *Protecting Victims from Sex Offenders Act*, S.C. 2010, c. 17, at s. 5).

285 The other two examples our colleague offers, discharges under s. 730 and record suspensions *issued by the Parole Board of Canada* (not courts) under s. 4.1(1) of the *Criminal Records Act*, R.S.C. 1985, c. C-47, do not -- as

she amply recognizes throughout her reasons -- apply to or address the unique circumstances of persons found NCRMD. In any event, these are all modes of assessment that Parliament, not courts, has deemed appropriate.

286 In conclusion, and with respect, there are unresolved contradictions in our colleague's reasoning. She accepts that this Court does not have the institutional competence to craft a new regime that would determine who should be on the registry and who should not, evidenced by her decision to issue a declaration of invalidity and not some other remedy. Yet, this decision is ultimately "at cross-purposes" (*Hislop*, at para. 92) with her conclusion that this Court, and thereby other courts, has the institutional competence to assess for itself the level of risk posed by persons found NCRMD and to issue corresponding exemptions.

287 We add a second reason for not granting an individual exemption here, and generally against establishing a presumption in favour of doing so. Granting an individual exemption in this case, as in most cases, raises concerns of horizontal unfairness -- that is, of treating the litigant better than others who are similarly situated. It is, in our respectful view, inappropriate to reward (even temporarily) only the litigant who was able to fund extensive constitutional litigation. There are undoubtedly other persons found NCRMD -- perhaps those who are more vulnerable, or have committed less egregious offences than Mr. G -- who are just as, if not more, in need of relief.

288 Our colleague responds that "the claimant is not in the same position as others subject to the impugned law in a key respect: [he] has done the public interest a service by ensuring that an unconstitutional law is taken off the books" (para. 148). Respectfully, we are unconvinced that there exists any principled reason why an individual constitutional remedy ought to become a device to reward a successful litigant for "brav[ing] the storm of constitutional litigation" (para. 142). The fact that a litigant has prevailed will entitle them to judgment in their favour, and may also entitle them to an order for costs to indemnify them for expenses sustained (see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 21). But in a constitutional case involving the validity of a statute of *general* applicability, a litigant should not be entitled to a better or more immediate constitutional remedy than all other persons similarly situated merely because they brought the case. As this Court recognized in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524, many members of our society, particularly the marginalized, are simply "unable to participate in a court challenge" for various reasons beyond cost, such as "risk of public exposure [and loss of privacy], fear for [their] personal safety, and the potential loss of social services, income assistance ... and [future education or] employment opportunities" (paras. 6 and 71). Several of these factors, in addition to the "stigmatizing, prejudicial notions [that have] led to profound disadvantage for individuals living with mental illnesses" (Karakatsanis J.'s reasons, at para. 62), have no doubt encumbered persons found NCRMD from challenging *Christopher's Law*. Considered in this light, our colleague's justification for individual exemptions falls away.

289 Further, it is worth considering what is to happen if a legislature ultimately decides to deem court-ordered exemptions inappropriate in its future regime. Here the risk of horizontal unfairness, which is associated with the rule of law, and of "creating further inequities" in the process (*Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 179) looms large, since this leaves all other persons found NCRMD in an inferior position relative to Mr. G, who received a special court-ordered exemption from which they are precluded (see K. Roach, "Dialogic Judicial Review and its Critics" (2004), 23 S.C.L.R. (2d) 49, at p. 84).

290 In our colleague's view, a claimant should only be denied an individual exemption for a "compelling reason" (para. 149). She offers two examples. First, an individual exemption should be denied only where it "would undermine the interest motivating the suspension in the first place" (para. 150). She says that, where a declaration is suspended to protect public safety, an individual exemption would be inappropriate if it would endanger public safety. But again, judges are not well-suited to conduct an individualized assessment as to whether an exemption would endanger public safety in cases such as this one, whether evidence of the individual claimant's situation is available or not.

291 Secondly, our colleague says that an individual exemption should be denied where practical considerations such as "judicial economy" (para. 151) make it inappropriate to grant one. She offers the example of a large group

of claimants, where it might be impractical or impossible to conduct the individualized assessments necessary to grant individual exemptions to each claimant. We agree that in cases involving a large number of claimants, a court might be disinclined to conduct multiple individual assessments. Indeed, such reticence might well be apt in cases involving a *single* claimant, where -- as here -- the Court lacks the competence to conduct even a single assessment. This suggests a converse danger, which is that a court confronted with multiple claimants could -- as our colleague does in this case -- simply skate over the assessments and grant exemptions all around. All that said, we observe that our colleague gives no guidance as to how the practical considerations she raises might, in a difficult case, be weighed against the supposed constitutional imperatives she identifies.

292 Respectfully, we view our colleague's reasons on the matter of an individual exemption, considered in their totality, as internally inconsistent. First, they acknowledge that "tailored remedies should only be granted when a court can fairly conclude that the legislature would have enacted the law as it would be modified by the court" (para. 103), and that "although courts are capable of determining what the Constitution requires, they are not well-suited to making '*ad hoc* choices from a variety of options'" (para. 115 (citation omitted)). Then, without *any* evidence of the legislature's intention and without *any* expert assessment of Mr. G,[14] they grant him an individual exemption. Our colleague's statements that "the legislature may choose from a range of policy options" (para. 70) or "any form of individualized assessment" (para. 162) are undermined by her later conjecture that it will be "highly unlikely" that Mr. G will be caught by the new legislation (para. 183). In this way, our colleague has usurped the legislative function and is legislating not just in effect, but in fact. In reality, amended legislation may capture Mr. G, or it may not -- it is not the role of the judiciary to postulate on whether or how the legislature will respond.

293 In the end, the proliferation of individual exemptions is simply the unfortunate upshot of failing to properly confine the use of suspended declarations (see Karakatsanis J.'s reasons, at para. 146: "it is a court's decision to grant a suspension that makes the individual remedy necessary"). We would reject our colleague's *post-hoc* solution that "[i]ndividual exemptions can temper any further disincentive caused by suspensions" (para. 148). Rather, the more appropriate response is to closely circumscribe the use of suspended declarations, as mandated by the Constitution. Once suspended declarations are properly limited to the exceptional situations where the rule of law is imperilled, the concern for providing an immediate remedy to the claimant fades.

V. Conclusion

294 For all these reasons, we are unable to join our colleague's reasons, which to us represent an unbridled expansion of judicial discretion, with regard to issuing both suspended declarations and individual exemptions. We agree with our colleague that *Christopher's Law* infringes Mr. G's *Charter* right to equal treatment under the law, and that the declaration of invalidity was properly suspended. However, the suspension should be constitutionally grounded in the principle of the rule of law and the threat to public safety that would manifest otherwise. Consistent with *Manitoba Reference*, at p. 769, we would have invited submissions from the Attorney General of Ontario as to the minimum period necessary for *Christopher's Law* to be made constitutionally compliant. In the absence of that evidence, we would simply uphold the 12-month suspension of the declaration of invalidity. Consistent with the limited role of the judiciary vis-à-vis the legislature, we would not grant the respondent an individual exemption from that suspension. We would therefore allow the appeal in part.

Appeal dismissed with costs, COTÉ *and* BROWN JJ. *dissenting in part.*

Solicitors:

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Swadron Associates Barristers & Solicitors, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Presser Barristers, Toronto.

Solicitors for the intervener the Empowerment Council: Anita Szigeti Advocates, Toronto; Morphew Symes Menchynski Barristers, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Embry Dann, Toronto; Weisberg Law, Toronto.

Solicitor for the intervener David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Solicitors for the intervener the Canadian Mental Health Association, Ontario: McCarthy Tétrault, Toronto.

---

1 Though Part XX.1 also empowers courts to make such orders in certain circumstances, review boards are responsible for making the large majority of these orders (Department of Justice, Research and Statistics Division, *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study* (2006), at p. 2). That is why I refer to review boards throughout these reasons.

2 Unlike, e.g., the Constitution of South Africa, s. 172(1)(*a*), which specifically mandates courts to "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

3 See *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 246, at para. 97; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 40; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 118; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 88; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 176-77; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, at p. 1108; *R. v. Généreux*, [1992] 1 S.C.R. 259, at pp. 309-10; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 355-56.

4 See *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 83; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 96; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at paras. 83-85; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602, at paras. 30-31; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 67-115; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 126-27, 132 and 147; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 164; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 164; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 142; *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at paras. 22, 44 and 45; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 70; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at paras. 1, 55 and 101; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 128-29; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at paras. 105 and 159; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 23-24 and 114-18; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 148-79; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 276 and 294; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at paras. 103-5; *Miron v. Trudel*, [1995] 2 S.C.R. 418, at paras. 176-81; *R. v. Laba*, [1994] 3 S.C.R. 965, at pp. 1011-16; *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 243-45; *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 741-43; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at pp. 101-6; *R. v. Hess*, [1990] 2 S.C.R. 906, at pp. 933-34; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88.

5 Note that some of the cases listed here are also listed at footnote 4, *supra*, since they contain both full invalidations of certain legislative provisions, as well as only partial invalidations of other provisions. See *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 73; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 83; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at paras. 5, 23 and 58; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 103; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336, at para. 4; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 74; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 56; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 119; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 67 and 115; *Mounted Police*

Association of Ontario v. Canada (Attorney General), 2015 SCC 1, [2015] 1 S.C.R. 3, at paras. 154 and 158; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at paras. 81-89; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 164; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at paras. 100-103; *Quebec (Education Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 46; *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at paras. 89-91; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 168; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 142; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at paras. 56 and 58; *Nova Scotia (Worker's Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 118; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 93; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, at paras. 43 and 46; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 64; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 47-48; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472, at paras. 32 and 34; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 70; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at paras. 79-80; *M. v. H.*, [1999] 2 S.C.R. 3, at paras. 136-45; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 131; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 86; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 292; *R. v. Heywood*, [1994] 3 S.C.R. 761, at pp. 803-4; *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438, at pp. 439-40; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at pp. 89-90 and 117; *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 778; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 725; *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 104 and 164-65; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 207-8 and 255; *R. v. Sit*, [1991] 3 S.C.R. 124, at p. 130; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 630; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at pp. 38-47; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1021; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at pp. 164-66, 226-27 and 251; *R. v. Arkell*, [1990] 2 S.C.R. 695, at p. 702; *R. v. Martineau*, [1990] 2 S.C.R. 633; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 251-53; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at pp. 394-96; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1351 and 1368; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, at pp. 633-34; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 745; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 812; *Corporation professionnelle des médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033, at pp. 1045-46; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 80 and 184; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, at p. 1081; *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 142; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 521; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169.

6 *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *Nova Scotia (Worker's Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *U.F.C.W., Local 1518 v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *M. v. H.*, [1999] 2 S.C.R. 3; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Schachter v. Canada*, [1992] 2 S.C.R. 679, ; *R. v. Bain*, [1992] 1 S.C.R. 91; and *R. v. Swain*, [1991] 1 S.C.R. 933.

7 Unlike, e.g., the Constitution of South Africa, s. 172(1)(*b*)(ii), which grants a court the power to "make any order that is just and equitable, including . . . an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect".

8 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 118-19; *M. v. H.*, [1999] 2 S.C.R. 3, at para. 147; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 79; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 140; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 168; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 46; *R. v. Tse*, 2012 SCC

16, [2012] 1 S.C.R. 531, at para. 102; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 41; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 93; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 66.

9 *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602, at para. 32; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401.

10 Under the previous version of s. 490.012(4) of the *Criminal Code*, in effect until 2011, courts considered a number of relevant factors when deciding whether to refuse to make an initial order requiring compliance with *SOIRA*, such as the nature of the offence, the offender's risk to reoffend, the offender's criminal record, the impact on the offender's privacy and liberty interests, stigmatizing effects registration may have, and other matters relating to the offender's present and future personal circumstances (see *R. v. Debidin*, 2008 ONCA 868, 94 O.R. (3d) 421, at paras. 65-70; *R. v. Redhead*, 2006 ABCA 84, 384 A.R. 206, at paras. 30-31). Though the discretion not to make a compliance order under s. 490.012(4) has been removed, the wording in that provision is very similar to that of ss. 490.016(1) and 490.023(2) (*Martin's Annual Criminal Code*, by M. Henein, M. Rosenberg and E. L. Greenspan (2019), at pp. 1018-19). The only difference since 2011 is that the current provisions refer to effectively *preventing* crimes of a sexual nature in addition to effectively investigating them.

11 e.g. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 158; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 103; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 79-80; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 168; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472, at paras. 32 and 34; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, at paras. 43 and 46; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 93; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 24; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 128.

12 The total number of 44 is current to the beginning of this year. It excludes cases involving mandatory minimums (which, by their nature, must be struck down immediately: Karakatsanis J.'s reasons, at para. 114) and those cases where the Court rectified the constitutional flaw through a tailored remedy, such as severance or reading in. The cases included in this number are as follows (cases with suspended declarations are in bold): *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 73; ***Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at paras. 3 and 5**; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 103; ***Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 103**; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602, at paras. 30-32; ***Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at paras. 154 and 158**; ***Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 128**; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at paras. 88-89; ***Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 166-69**; ***Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 41**; ***R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at paras. 100-103**; ***Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 46**; *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at paras. 89-91; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 95; ***Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 168**; ***Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 140**; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 121; ***Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791**; ***R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at paras. 56-60**; ***Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 93**; ***Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 119**; ***Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, at paras. 43 and 46**;***Mackin v.***

***New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 77; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472, at paras. 32 and 34**; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 64; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 47-48; ***Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 66**; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at paras. 1, 55 and 101; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at paras. 105 and 159; ***U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 79**; ***Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 24 and 118**; ***M. v. H.*, [1999] 2 S.C.R. 3, at paras. 136-45**; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 131; ***Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 96**; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 86; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at paras. 103-5; ***Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 292**; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 176-77; *R. v. Heywood*, [1994] 3 S.C.R. 761, at pp. 803-4; *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438, at pp. 439-40; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, at p. 1108; *Baron v. Canada*, [1993] 1 S.C.R. 416, at pp. 453-55; *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 778.

13 See also: *Scotland Act, 1998* (U.K.), 1998, c. 46, at ss. 102(2)-102(3).

14 We highlight that no forensic risk assessment was ever made as to Mr. G. The respondent's expert Dr. Brink, did not examine the respondent, nor did the appellant's expert Dr. Hanson. The only witness who assessed the respondent was his treating physician, who had no expertise in forensic assessment and who was found by both courts below to be unreliable (A.G.O. factum, at para. 96; Sup. Ct. reasons, at paras. 64-68; C.A. reasons, at paras. 48-49).

End of Document

Mounted Police Association of Ontario v. Canada (Attorney General)

Supreme Court Reports

Supreme Court of Canada

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

Heard: February 18, 2014;

Judgment: January 16, 2015.

File No.: 34948.

[2015] 1 S.C.R. 3 | *[2015] 1 R.C.S. 3* | *[2015] S.C.J. No. 1* | *[2015] A.C.S. no 1* | *2015 SCC 1*

Mounted Police Association of Ontario and British Columbia Mounted Police Professional Association, on their own behalf and on behalf of all members and employees of the Royal Canadian Mounted Police, Appellants; v. Attorney General of Canada, Respondent, and Attorney General of Ontario, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Association des membres de la Police Montée du Québec Inc., Mounted Police Members' Legal Fund, Confédération des syndicats nationaux, Canadian Police Association, Canadian Labour Congress, Canadian Civil Liberties Association, Public Service Alliance of Canada and British Columbia Civil Liberties Association, Interveners.

(270 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Freedom of association — Right to collective bargaining — Scope of constitutional protection — Private associations of RCMP members challenging constitutionality of legislation excluding RCMP members from public service labour relations regime and imposing non-unionized regime — Legislatively imposed regime not independent from management and not providing for employee choice [page4] of association or input into selection of collective goals — Whether impugned legislation substantially interferes with right to meaningful process of collective bargaining and thereby infringes constitutional guarantee of freedom of association — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(d) — Royal Canadian Mounted Police Regulations, 1988, SOR/88-361, s. 96 — Public Service Labour Relations Act, *S.C. 2003, c. 22, s. 2*(1) "employee" (d).

Summary:

RCMP members are not permitted to unionize or engage in collective bargaining. They have been excluded from the labour relations regime governing the federal public service since collective bargaining was first introduced in the federal public service, first, under the *Public Service Staff Relations Act* ("*PSSRA*") and now under the *Public Service Labour Relations Act* ("*PSLRA*"). Instead, members of the RCMP are subject to a non-unionized labour relations scheme. At the time of the hearing of this appeal, that scheme was imposed upon them by s. 96 of the *Royal Canadian Mounted Police Regulations, 1988* ("*RCMP Regulations*"), since repealed and replaced by the substantially similar s. 56 of the *Royal Canadian Mounted Police Regulations, 2014*, *SOR/2014-281*.

The core component of the current RCMP labour relations regime is the Staff Relations Representative Program

("SRRP"). The SRRP is the primary mechanism through which RCMP members can raise labour relations issues (excluding wages), and the only form of employee representation recognized by management. The SRRP is governed by a National Executive Committee and is staffed by member representatives from various RCMP divisions and regions elected for a two-year term by both regular and civilian members of the RCMP. Two of its representatives act as the formal point of contact with the national management of the RCMP. The aim of the program is that, at each level of the hierarchy, members' representatives and management consult on human resources initiatives and policies, with the understanding that the final word always rests with management.

A little over 15 years ago, the Court held that the exclusion of RCMP members from collective bargaining under the *PSLRA*'s predecessor legislation did not infringe s. 2(*d*) of the *Charter*: *Delisle v. Canada (Deputy [page5] Attorney General)*, *[1999] 2 S.C.R. 989*. That case did not involve a direct challenge to the sufficiency of the entire RCMP labour relations scheme. Since that decision was rendered, the RCMP labour relations regime has undergone a number of changes that have increased the independence afforded to the SRRP, but none of those changes has substantially altered its purpose, place or function within the RCMP chain of command.

In May 2006, a constitutional challenge was initiated by two private associations of RCMP members whose goal is to represent RCMP members in Ontario and British Columbia on work-related issues, but who have never been recognized for the purpose of collective bargaining or consultation on workplace issues by RCMP management or the federal government. They sought a declaration that the combined effect of the exclusion of RCMP members from the application of the *PSLRA* and the imposition of the SRRP as a labour relations regime unjustifiably infringes members' freedom of association. A judge of the Ontario Superior Court of Justice concluded that s. 96 of the *RCMP Regulations*, which imposed the SRRP as a labour relations regime, substantially interfered with freedom of association and could not be justified under s. 1 of the *Charter*. However, the judge also held that the exclusion of RCMP members from the federal public service labour relations regime did not infringe s. 2(*d*) of the *Charter*. The Court of Appeal allowed the Attorney General of Canada's appeal and held that the current RCMP labour relations scheme does not breach s. 2(*d*) of the *Charter*.

Held (Rothstein J. dissenting): The appeal should be allowed. Section 96 of the *RCMP Regulations*, which was in effect at the time of the hearing of this appeal, infringed s. 2(*d*) of the *Charter*. Similarly, para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes s. 2(*d*). Neither infringement is justified under s. 1 of the *Charter*. Had s. 96 of the *RCMP Regulations* not been repealed, it would have been declared to be of no force or effect. The offending provision of the *PSLRA* is of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*. This declaration of invalidity is suspended for a period of 12 months.

[page6]

Per McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.: The s. 2(*d*) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. However, the current labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence.

Section 2(*d*) protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities. Viewed purposively, s. 2(*d*) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals. This guarantee includes a right to collective bargaining. Collective bargaining is a necessary precondition to the meaningful exercise of the constitutional guarantee of freedom of association. It is not a derivative right protected only if state action makes it effectively impossible to associate for workplace matters. That said, however, the right to collective bargaining is one that guarantees a process rather than an outcome or a particular model of labour relations.

The government cannot enact laws or impose a labour relations process that substantially interferes with the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. Just as a ban on

employee association impairs freedom of association, so does a labour relations process that substantially interferes with the possibility of having meaningful collective negotiations on workplace matters. Similarly, a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(*d*) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.

[page7]

A meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them. But choice and independence are not absolute: they are limited by the context of collective bargaining.

The degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. Moreover, accountability to the members of the association plays an important role in assessing whether employee choice is present to a sufficient degree in any given labour relations scheme. A scheme that holds representatives accountable to the employees who chose them ensures that the association works towards the purposes for which the employees joined together.

In the same vein, the degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members. Although the function of collective bargaining is not served by a process which is dominated by or under the influence of management, like choice, independence in the collective bargaining context is not absolute. The degree of independence required is one that permits the activities of the association to be aligned with the interests of its members.

What is required to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s. 2(*d*) inquiries, the required analysis is contextual. Choice and independence do not require adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. However, whatever the labour relations model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining.

This is not a case of a complete denial of the constitutional right to associate. Rather, it is a case of substantial interference with the right to associate for the purpose of addressing workplace goals through a meaningful process of collective bargaining, free from employer control. [page8] The flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2(*d*) of the *Charter*. That process fails to respect RCMP members' freedom of association in both its purpose and its effects.

Section 96 of the *RCMP Regulations* imposed the SRRP on RCMP members for the purpose of preventing collective bargaining through an independent association. Not only are members represented by an organization they did not choose and do not control, they must work within a structure that is part of the management organization of the RCMP and thus lacks independence from management. The SRRP process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.

The SRRP also infringes s. 2(*d*) in its effects. The relevant inquiry is directed at whether RCMP members can genuinely advance their own interests through the SRRP, without interference by RCMP management. On the record here, they cannot. Simply put, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed on RCMP members by management. The element of employee choice is almost entirely missing and the structure has no independence from management.

The second issue raised by the present constitutional challenge concerns the exclusion of RCMP members from the application of the *PSLRA* by para. (*d*) of the definition of "employee" in s. 2(1). This Court, in *Delisle*, held that the exclusion of the RCMP from the *PSSRA*, the *PSLRA*'s predecessor legislation, did not violate s. 2(*d*) of the *Charter*. Overturning precedents of this Court is not a step to be lightly taken. However, *Delisle* was decided before this Court's shift to a purposive and generous approach to labour relations and *Delisle* considered a different question and narrower aspects of the labour relations regime than those at issue here. It follows that the result in *Delisle* must be revisited.

The purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA*, viewed in its historical context, violates s. 2(*d*) of the *Charter*. The *PSSRA* and, [page9] later, the *PSLRA* established the general framework for labour relations and collective bargaining in the federal public sector. A class of employees, the members of the RCMP, has, since the initial enactment of this regime, been excluded from its application in order to prevent them from exercising their associational rights under s. 2(*d*). The purpose of excluding a specific class of employees from the labour relations regime in order to deny them the exercise of their freedom of association impermissibly breaches the constitutional rights of the affected employees.

Section 2(*d*) gives Parliament much leeway in devising a scheme of collective bargaining that satisfies the special demands of the RCMP. Beyond this, s. 1 of the *Charter* provides additional room to tailor a labour relations regime to achieve pressing and substantial objectives, provided it can show that these are justified. In the present case, the infringement of the guarantee of freedom of association cannot be justified under s. 1 of the *Charter*.

Although the government's objective of maintaining an independent and objective police force constitutes a pressing and substantial objective, the infringing measures are not rationally connected to their objective. First, it is not apparent how the exclusion of RCMP members from a statutorily protected collective bargaining process ensures the neutrality, stability or even reliability of the Force. Second, it is not established that permitting meaningful collective bargaining for RCMP members would disrupt the stability of the police force or affect the public's perception of its neutrality.

While this conclusion is sufficient to dispose of the s. 1 analysis, denying RCMP members any meaningful process of collective bargaining is also more restrictive than necessary to maintain the Force's neutrality, stability and reliability. The RCMP is the only police force in Canada without a collective agreement to regulate the working conditions of its officers. It has not been shown how or why the RCMP is materially different from the police forces that have the benefit of collective bargaining regimes that provide basic bargaining protections. A material difference between the forces having not been shown, it is clear that total exclusion of RCMP members from meaningful collective bargaining cannot be minimally impairing.

[page10]

Having found that s. 96 of the *RCMP Regulations* and para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringe the freedom guaranteed to RCMP members under s. 2(*d*) of the *Charter*, and that these provisions cannot be saved under s. 1, the appropriate remedy is to strike down the offending provision of the *PSLRA* under s. 52 of the *Constitution Act, 1982*. This declaration of invalidity is suspended for a period of 12 months. We would similarly strike down s. 96 of the *RCMP Regulations* were it not repealed. This conclusion does not mean that Parliament must include the RCMP in the *PSLRA* scheme. Section 2(*d*) of the *Charter* does not mandate a particular model of labour relations. Should it see fit to do so, Parliament remains free to enact any labour relations model it considers appropriate to address the specific context in which members of the RCMP discharge their duties, within the constitutional limits imposed by the guarantee enshrined in s. 2(*d*) and s. 1 of the *Charter*.

Per Rothstein J. (dissenting): The language used by the majority creates greater rights, and imposes greater restrictions on the government, than either a plain or generous reading of s. 2(*d*) of the *Charter* can logically provide. The interpretation of a *Charter* right must be principled and must not be so divorced from the text of the provision as to depart from the foundation of the right. When, in *Health Services and Support -- Facilities Subsector*

Bargaining Assn. v. British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391, and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, this Court recognized a derivative right to collective bargaining stemming from the purpose of s. 2(*d*) of the *Charter*, it extended constitutional rights beyond what had previously been accepted.

Now, less than four years after *Fraser* was decided, the majority further expands freedom of association and retreats from the effective impossibility test stated in that case. It also enshrines an adversarial model of labour relations as a *Charter* right, reversing this Court's findings in *Health Services* and in *Fraser* that s. 2(*d*) does not guarantee a particular model of collective bargaining or a particular outcome.

[page11]

Section 2(*d*) of the *Charter* protects the right to associate to make collective representations and to have employers consider those representations in good faith. The majority in *Fraser* unambiguously held that the test to find an infringement of s. 2(*d*) in the labour relations context is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals. The language in *Fraser* does not support the majority's revised -- and lowered -- s. 2(*d*) standard. There is no doubt that the majority in *Fraser* firmly established a high threshold for infringement of the derivative right to collective bargaining. Fairness and certainty require that where settled law exists, courts must apply it to determine the result in a particular case. They may not identify a desired result and then search for a novel legal interpretation to bring that result about.

The essential feature of a labour relations regime that allows employees to exercise their constitutional right to make meaningful collective representations on their workplace goals is representativeness. Representativeness is the constitutional imperative required in order to ensure that s. 2(*d*) rights are protected in the collective bargaining context and it is only where legislation impairs the right of employees to have their interests advanced honestly and fairly that legislation will be constitutionally deficient.

Neither the choice of the organization representing employees for bargaining purposes nor the independence of that association are necessary to ensure that meaningful collective bargaining can occur. Choice and independence are central to Wagner-style labour relations and, by selecting choice and independence as constitutional requirements for meaningful collective bargaining, the majority mandates an adversarial model of labour relations and precludes others which may be just as or more effective in contributing to meaningful collective bargaining.

A statutorily designated bargaining model can ensure that employees' interests will be effectively represented to management even where the employees do not choose their individual representatives or the system in which this representation takes place. Section 2(*d*) requires that [page12] the voice with which employees communicate with their employer as a collective be representative of their interests. Provided that the spokespersons through whom employees make representations to their employer have a duty to represent the interests of all employees and that there is a means to hold those representatives to account, the workers' constitutional right to make collective representations and to have their collective representations considered in good faith is met. Representativeness is what *Fraser* mandates and there is no justification to embark upon the imposition of unnecessary constitutional constraints.

As with choice, the notion of independence is not an inherent aspect of collective bargaining. Where concerns are raised with respect to the independence of a legislatively prescribed employee association, the relevant question is not whether the association or process is independent in the sense that it segregates employees from management, but whether the process prevents employees, such as RCMP members, from associating to advance their collective workplace goals. To reiterate, the touchstone is representativeness. So long as employees have recourse to ensure that their views are put forward to management and that their representatives are working in their interests, the labour relations process will not be dominated by management and employees will have the means to work towards their collective workplace goals. Any representative who limits representation based on what management permits or who places their own employment interests above the interests of all employees will be held accountable for his or her own actions.

In the case at bar, the context of a national police force led to the adoption of a statutory collaborative labour relations model, the SRRP. The correct standard against which the SRRP should be evaluated is whether the process renders meaningful collective bargaining effectively impossible. Whether the *Fraser*-mandated effective impossibility test or the majority's new substantial interference test is applied, it is clear that the SRRP does not infringe s. 2(*d*) of the *Charter*.

That Parliament chose a collaborative model like the SRRP as a means of facilitating employer-employee engagement for the national police force does not mean that that model has rendered it effectively impossible for RCMP members to achieve collective workplace goals. [page13] Although RCMP members did not choose their associational framework for bargaining purposes, they are able to democratically elect their representatives and those representatives have a statutory duty to represent employee interests. They can be replaced if they fail to uphold that duty. Management also has a constitutional obligation to consider in good faith the representations made on behalf of RCMP members. In short, the evidence before this Court is that Staff Relations Representatives fairly advance employee interests to RCMP management and thus the SRRP meets the constitutional requirement of representativeness mandated under this Court's interpretation of s. 2(*d*).

The purpose of excluding RCMP members from the *PSLRA* is not to interfere with collective bargaining, but is driven by a legitimate concern that the model imposed under that legislation is ill suited to the national police force. The evolution in the legal understanding of s. 2(*d*) since *Delisle* bears no relation to the majority's finding in that case as to the purpose of the exclusion of RCMP members from the *PSLRA*'s predecessor legislation, and thus cannot be used to support revisiting the issues settled in *Delisle*. Although *Delisle* was decided before *Health Services* and *Fraser* ushered in a more expansive approach to labour relations, the jurisprudential developments since do not allow this Court to conclude that the purpose of the exclusion is to deny RCMP members' associational rights. In fact, changes to the SRRP since *Delisle* have reinforced the understanding that the program's goal is to enhance representation of the interests of RCMP members without the imposition of an adversarial model.

Even if *Delisle* had been incorrectly decided and the purpose of the exclusion contained in the *PSSRA* in 1967 was to deny RCMP members meaningful collective bargaining, it does not follow that this continues to be the purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* today. By 2003, when the *PSSRA* was replaced by the *PSLRA*, the RCMP labour relations scheme was considerably changed from that which existed in 1967. The decision to continue the exclusion was made with the knowledge that doing so did not deny members collective bargaining rights. These individuals were subject to a parallel labour relations regime -- the [page14] SRRP. To ignore the significantly different context in which the exclusion of RCMP members was re-enacted in the *PSLRA* disregards the current legislative reality.

Had para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* been found to breach s. 2(*d*) of the *Charter*, it would nonetheless constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society and would therefore be justified under s. 1 of the *Charter*. Parliament is entitled to address concerns that an adversarial RCMP members' association might order its members to refuse to intervene in certain circumstances involving the labour disputes of others or that belonging to such associations could inhibit members from responding to such situations impartially. The RCMP is materially different from other Canadian police forces. The government must be permitted to organize the Force's labour relations in view of its distinctive and essential role as our national police force.

Cases Cited

By McLachlin C.J. and LeBel J.

Overruled: *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; **applied:** *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; **explained:** *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; **referred to:** *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125; *Ontario (Public Safety and Security) v. Criminal Lawyers'*

Association, 2010 SCC 23, [2010] 1 S.C.R. 815; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209; *Bernard v. Canada (Attorney General)*, 2014 SCC 13, [2014] 1 S.C.R. 227; *Dunmore v. Ontario (Attorney General)*, [page15] 2001 SCC 94, [2001] 3 S.C.R. 1016; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

By Rothstein J. (dissenting)

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209; *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509; *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *Dunmore v. Ontario [page16] (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

Statutes and Regulations Cited

Act respecting the Syndical Plan of the Sûreté du Québec, CQLR, c. R-14.

Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16.

Canada Labour Code, R.S.C. 1985, c. L-2, Part I, s. 6.

Canadian Charter of Rights and Freedoms, ss. 1, 2, 33.

Commissioner's Standing Orders (Division Staff Relations Representative Program) [made pursuant to s. 21(2) of the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9; rep. SOR/2003-325].

Commissioner's Standing Orders (Representation), 1997, SOR/97-399, s. 3(*b*).

Constitution Act, 1982, s. 52.

Expenditure Restraint Act, S.C. 2009, c. 2, s. 393.

Industrial Relations and Disputes Investigation Act, S.C. 1948, c. 54.

Interpretation Act, R.S.C. 1985, c. I-21, s. 44(f).

Labour Code, CQLR, c. C-27, s. 4.

National Labor Relations Act, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. ss. 151-169).

Ontario Provincial Police Collective Bargaining Act, 2006, S.O. 2006, c. 35, Sch. B.

Police Act, 1990, S.S. 1990-91, c. P-15.01, ss. 83 to 86.

Public Service Labour Relations Act, S.C. 2003, c. 22 [as en. by *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2], s. 2(1) "employee" (*d*), Part 3.

Public Service Staff Relations Act, S.C. 1966-67, c. 72 [1970, c. P-35; 1985, c. P-35; rep. 2003, c. 22, s. 285], s. 2 "employee" (*e*), (*g*), (*j*).

Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10.

Royal Canadian Mounted Police Regulations, 1988, SOR/88-361 [rep. 2014-281, s. 58], s. 96 [ad. 89-581].

Royal Canadian Mounted Police Regulations, 2014, SOR/2014-281, ss. 56, 58.

Royal Newfoundland Constabulary Act, 1992, S.N.L. 1992, c. R-17.

[page17]

School Boards Collective Bargaining Act, 2014, S.O. 2014, c. 5.

War Measures Act, R.S.C. 1927, c. 206.

Wartime Labour Relations Regulations, P.C. 1003 (1944).

Treaties and Other International Instruments

Convention (No. 87) concerning freedom of association and protection of the right to organize, 68 U.N.T.S. 17, art. 9.

International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 22.

International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, art. 8.

Authors Cited

Adams, George W. *Canadian Labour Law*, 2nd ed. Toronto: Canada Law Book, 1993 (loose-leaf updated June 2014, release 50).

Adams, Roy J. "A Pernicious Euphoria: 50 Years of Wagnerism in Canada" (1995), 3 *C.L.E.L.J.* 321.

Adams, Roy J. "Public Employment Relations: Canadian Developments in Perspective", in Gene Swimmer, ed., *Public-Sector Labour Relations in an Era of Restraint and Restructuring.* Don Mills, Ont.: Oxford University Press, 2001, 212.

Anderson, John C., and Thomas A. Kochan. "Collective Bargaining in the Public Service of Canada" (1977), 32 *Relat. ind.* 234.

Bogg, Alan, and Keith Ewing. "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2012), 33 *Comp. Lab. L. & Pol'y J.* 379.

Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 5e éd. Cowansville, Qué.: Yvon Blais, 2008.

Burkett, Brian W. "The Future of the *Wagner Act*: A Canadian-American Comparison" *(2013), 38 Queen's L.J. 363*.

Canada. Advisory Committee on Labour Management Relations in the Federal Public Service. *Working Together in the Public Interest.* Ottawa: Treasury Board of Canada, 2001 (online: http: //www.tbs-sct.gc.ca/report/fryer/wtpi-teip-eng.pdf).

Canada. Office of the Independent Investigator into RCMP Pension and Insurance Matters. *A Matter of Trust: Report of the Independent Investigator into Matters Relating to RCMP Pension and Insurance Plans.* Ottawa: The Office, 2007.

[page18]

Canada. Preparatory Committee on Collective Bargaining in the Public Service. *Report of the Preparatory Committee on Collective Bargaining in the Public Service.* Ottawa: Queen's Printer, 1965.

Canada. Task Force on Governance and Cultural Change in the RCMP. *Rebuilding the Trust: Report of the Task Force on Governance and Cultural Change in the RCMP.* Ottawa: The Task Force, 2007.

Canada. Task Force on Labour Relations. *Canadian Industrial Relations: The Report of the Task Force on Labour Relations.* Ottawa: Privy Council Office, 1969.

Caron, Renée. *Employment in the Federal Public Service.* Aurora, Ont.: Canada Law Book, 2001 (loose-leaf updated by Emond Harnden LLP, August 2009, release 5).

Carpenter, Dale. "Expressive Association and Anti-Discrimination Law After *Dale*: A Tripartite Approach" (2001), 85 *Minn. L. Rev.* 1515.

Carter, Donald D., et al. *Labour Law in Canada*, 5th ed. The Hague: Kluwer Law International, 2002.

Coutu, Michel, et autres. *Droit des rapports collectifs du travail au Québec*, vol. 1, *Le régime général*, 2e éd. Cowansville, Qué.: Yvon Blais, 2013.

Doorey, David J. "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" *(2013), 38 Queen's L.J. 511*.

Dorsey, James E. "Individuals and Internal Union Affairs: The Right to Participate", in Kenneth P. Swan and Katherine E. Swinton, eds., *Studies in Labour Law.* Toronto: Butterworths, 1983, 193.

Forcese, Dennis. "Police Unionism: Employee-Management Relations in Canadian Police Forces" (1980), 4 *Canadian Police College Journal* 79.

Fudge, Judy. "Freedom of Association", in Errol Mendes and Stéphane Beaulac, eds., *Canadian Charter of Rights and Freedoms*, 5th ed. Markham, Ont.: LexisNexis, 2013, 527.

Fudge, Judy. "Introduction: Farm Workers, Collective Bargaining Rights, and the Meaning of Constitutional Protection", in Fay Faraday, Judy Fudge and Eric Tucker, eds., *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*. Toronto: Irwin Law, 2012, 1.

Hardy, J. Fred, and Allen Ponak. "Staff Relations in the Royal Canadian Mounted Police" (1983), 12 *J. Collective Negotiations* 87.

Inazu, John D. *Liberty's Refuge: The Forgotten Freedom of Assembly*. New Haven, Conn.: Yale University Press, 2012.

Kahn-Freund's Labour and the Law, 3rd ed. by Paul Davies and Mark Freedland. London: Stevens & Sons, 1983.

Kaufman, Bruce E. "Accomplishments and Shortcomings of Nonunion Employee Representation in the Pre-Wagner Act Years: A Reassessment", in Bruce E. [page19] Kaufman and Daphne Gottlieb Taras, eds., *Nonunion Employee Representation: History, Contemporary Practice, and Policy*. Armonk, N.Y.: M. E. Sharpe, 2000, 21.

MacDowell, Laurel Sefton. "Company Unionism in Canada, 1915-1948", in Bruce E. Kaufman and Daphne Gottlieb Taras, eds., *Nonunion Employee Representation: History, Contemporary Practice, and Policy*. Armonk, N.Y.: M. E. Sharpe, 2000, 96.

MacKay, Robin. "The Royal Canadian Mounted Police and Unionization". Library of Parliament, Parliamentary Research Branch, Law and Government Division, September 3, 2003.

Middleton, J. P. *A Study Report on Police Associations*. Ottawa: RCMP, 1974.

Moon, Richard. "Freedom of Conscience and Religion", in Errol Mendes and Stéphane Beaulac, eds., *Canadian Charter of Rights and Freedoms*, 5th ed. Markham, Ont.: LexisNexis, 2013, 339.

Murray, Gregor, et Pierre Verge. *La représentation syndicale: visage juridique actuel et futur*. Saint-Nicolas, Qué.: Presses de l'Université Laval, 1999.

Rootham, Christopher. *Labour and Employment Law in the Federal Public Service*. Toronto: Irwin Law, 2007.

Royal Canadian Mounted Police. Staff Relations Representatives. *SRR Challenge 2000 Review: Final Report*, January 2003.

Schabas, Paul B. "The Ups and Downs of Freedom of Expression -- Section 2(b)", in Ryder Gilliland, ed., *The Charter at Thirty*. Toronto: Canada Law Book, 2012, 1.

Taras, Daphne. "Reconciling Differences Differently: Employee Voice in Public Policymaking and Workplace Governance" (2007), 28 *Comp. Lab. L. & Pol'y J.* 167.

Taras, Daphne Gottlieb. "Why Nonunion Representation Is Legal in Canada" (1997), 52 *Relat. ind.* 763.

United States. National Labor Relations Board. *Legislative History of the National Labor Relations Act 1935*, vol. 1. Washington, D.C.: The Board, 1949.

Verge, Pierre, Gilles Trudeau et Guylaine Vallée. *Le droit du travail par ses sources*. Montréal: Thémis, 2006.

Walzer, Michael. "The Concept of Civil Society", in Michael Walzer, ed., *Toward a Global Civil Society*. Providence, R.I.: Berghahn Books, 1995, 7.

Wellington, Harry H. *Labor and the Legal Process*. New Haven, Conn.: Yale University Press, 1968.

[page20]

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rosenberg and Juriansz JJ.A.), *2012 ONCA 363*, *111 O.R. (3d) 268*, *292 O.A.C. 202*, *350 D.L.R. (4th) 261*, *260 C.R.R. (2d) 242*, *220 L.A.C. (4th) 107*, *[2012] O.J. No. 2420* (QL), 2012 CarswellOnt 6781 (WL Can.), setting aside a decision of MacDonnell J., *96 O.R. (3d) 20*, *188 C.R.R. (2d) 225*, *2009 CLLC para220-027*, *2009 CanLII 15149*, *[2009] O.J. No. 1352* (QL), 2009 CarswellOnt 1780 (WL Can.). Appeal allowed, Rothstein J. dissenting.

Counsel

Laura C. Young and *Patric Senson*, for the appellants.

Peter Southey, *Donnaree Nygard* and *Kathryn Hucal*, for the respondent.

Robin K. Basu and *Michael Dunn*, for the intervener the Attorney General of Ontario.

Jonathan Penner, *Keith Evans* and *Karen Horsman*, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, *Q.C.*, for the intervener the Attorney General for Saskatchewan.

Roderick S. Wiltshire, for the intervener the Attorney General of Alberta.

James R. K. Duggan and *Alexander H. Duggan*, for the intervener Association des membres de la Police Montée du Québec Inc.

John D. R. Craig and *Christopher D. Pigott*, for the intervener the Mounted Police Members' Legal Fund.

Benoit Laurin and *Éric Lévesque*, for the intervener Confédération des syndicats nationaux.

Ian J. Roland and *Michael Fenrick*, for the intervener the Canadian Police Association.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

[page21]

Ranjan K. Agarwal and *Ashley L. Paterson*, for the intervener the Canadian Civil Liberties Association.

Andrew Raven, *Andrew Astritis* and *Morgan Rowe*, for the intervener the Public Service Alliance of Canada.

Lindsay M. Lyster, for the intervener the British Columbia Civil Liberties Association.

The judgment of McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. was delivered by

McLACHLIN C.J. and LeBEL J.

I. Introduction

1 In this appeal, we must decide whether excluding members of the Royal Canadian Mounted Police ("RCMP") from collective bargaining under the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 ("*PSLRA*"), and imposing a non-unionized labour relations regime violates the guarantee of freedom of association in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*. This requires us to review the nature and interpretation of the right guaranteed by s. 2(*d*) of the *Charter*, and to clarify the scope of the constitutional protection of collective bargaining recognized in *Health Services and Support- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3.

2 RCMP members are not permitted to unionize or engage in collective bargaining. They have been excluded from the *PSLRA* and its predecessor statute since collective bargaining was first introduced in the federal public service in the late 1960s. Instead, there exists a non-unionized labour relations regime with three core components. First, members [page22] can advance their workplace concerns through the Staff Relations Representative Program ("SRRP"). Second, members' concerns regarding pay and benefits are communicated to management through the RCMP Pay Council process. Third, RCMP members have created the Mounted Police Members' Legal Fund ("Legal Fund"), a not-for-profit corporation funded through membership dues, which provides legal assistance to RCMP members for employment-related issues.

3 A little over 15 years ago, this Court held that exclusion of RCMP members from collective bargaining under the *PSLRA*'s predecessor legislation did not infringe s. 2(*d*): *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989. On this appeal we are asked to reconsider that decision as it relates to the *PSLRA*. Unlike this appeal, however, *Delisle* did not involve a direct challenge to the sufficiency of the SRRP: *Delisle*, at para. 34.

4 This case was heard together with a related appeal, brought by two Staff Relations Representatives ("SRRs") on behalf of all members of the RCMP, challenging the constitutionality of federal wage restraint legislation: *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125. While the factual background of both appeals overlap, they raise different legal issues. *Meredith* addresses the question of whether a piece of legislation and its implementation unconstitutionally interfered with the existing RCMP labour relations scheme, but does not challenge that scheme as a whole as constitutionally deficient under s. 2(*d*). The present appeal is directed at the constitutionality of the scheme comprising both the *PSLRA* exclusion and the SRRP process.

[page23]

5 We conclude that the s. 2(*d*) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. The current RCMP labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence. Accordingly, we allow the appeal and find that s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 ("*RCMP Regulations*"),[1] which was in effect at the time of the hearing of this appeal, is inconsistent with s. 2(*d*) of the *Charter*. We also find that the exclusion of RCMP members from collective bargaining under para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes s. 2(*d*) of the *Charter*. Neither infringement is justified under s. 1 of the *Charter*.

II. The Parties

6 The appellants are voluntary, private associations of RCMP members organized at the initiative of members. The Mounted Police Association of Ontario ("MPAO") is a non-profit corporation registered in Ontario, formed in 1998 from an amalgamation of two predecessor groups. It represents RCMP members in the National Division (the

National Capital Region), Headquarters (RCMP national office in Ottawa) and "O" Division (Ontario, outside the National Capital Region). The British Columbia Mounted Police Professional Association ("BCMPPA") is a non-profit society incorporated in British Columbia in 1994. Its members are principally drawn from "E" Division (British Columbia). A similar organization, the Association des membres de la Police Montée du Québec Inc., intervenes in [page24] this appeal. It represents the majority of members of "C" Division (Quebec) as well as French-speaking members across Canada.

7 The goal of all three associations is to represent RCMP members on work-related issues. The associations engage in political lobbying, educational efforts, and social activities. They provide advice and assistance to their members in discipline and grievance matters. Their operations are funded through membership dues, and the associations have no full-time staff. None of the associations has ever been recognized for the purpose of collective bargaining or consultation on workplace issues by RCMP management or the federal government.

8 The respondent, the Attorney General of Canada, joined by a number of provincial Attorneys General, opposes the appellants' contention that the current labour relations scheme violates the guarantee of freedom of association under s. 2(*d*) of the *Charter*.

III. The Current Process

9 The labour relations system currently in place at the RCMP is composed of three bodies: the SRRP, the Pay Council and the Legal Fund. The core component of the scheme is the SRRP.

10 The SRRP is the primary mechanism through which RCMP members can raise labour relations issues (excluding wages), and the only form of employee representation recognized by management. The program is the result of consultations that took place as early as 1974. It was formalized in s. 96 of the *RCMP Regulations*:

> **96.** (1) The Force shall have a Division Staff Relations Representative Program to provide for representation of [page25] the interests of all members with respect to staff relations matters.
>
> (2) The Division Staff Relations Representative Program shall be carried out by the division staff relations representatives of the members of the divisions and zones who elect them.

11 The SRRP process is amplified by the RCMP Staff Relations Representative Program Constitution ("SRRP Constitution"), unilaterally adopted by the SRRP, and by an agreement between the National Executive Committee of the SRRP and the RCMP Commissioner addressing matters such as the composition of the program (the "Agreement"). The SRRP Constitution states the purpose of the program is to "promote mutually beneficial relations between Force management and the wider membership" (s. 2). To this end, the SRRP seeks to provide RCMP members "with fair and equitable representation in staff relations matters and to facilitate their participation in the development and implementation of Force policies and programs" (*ibid.*).

12 The SRRP was designed to resolve issues at the lowest possible level within the RCMP hierarchy. The aim is that at each level (divisional, regional and national), members' representatives and management consult on human resources initiatives and policies, with the understanding that the final word always rests with management.

13 Both the current and former RCMP regulations (s. 96, *RCMP Regulations*; s. 56, *RCMP Regulations, 2014*) provide for SRRP staffing by elected representatives known as the Staff Relations Representatives or SRRs. Thirty-four SRRs are elected by both regular and civilian members of the RCMP for a two-year term and serve in this capacity full-time. Additionally, 150 part-time sub-representatives are elected but continue to perform their regular duties while acting as representatives.

[page26]

14 The SRRP is organized regionally and divisionally (generally corresponding to a province or territory) to align with the RCMP's nation-wide structure. The National Caucus is the collective body of elected SRRs. Regional Caucuses comprise all SRRs in a region, while Divisional Caucuses comprise all SRRs and sub-representatives in

a province or territory. Regional and Divisional Caucuses provide the formal point of contact between membership and regional and divisional management.

15 The National Executive Committee ("NEC") is the governing body of the SRRP, as well as the presiding body of the National Caucus. The National Caucus elects two SRRs to fulfill a three-year term as full-time members of the NEC. In addition, one SRR is elected to the NEC by each of the five Regional Caucuses for a one-year term. The two full-time members of the NEC are the formal point of contact for the National Caucus with the national management of the RCMP (Commissioner, senior management, and the Minister of Public Safety and Emergency Preparedness). As such, they attend meetings of the RCMP's Senior Executive Committee, where strategic decisions are made.

16 To fully understand the SRRP's role and function, it is necessary, as the application judge and the Court of Appeal did, to take a step back and review the history of labour relations at the RCMP and the origins of the SRRP. As we shall see, the SRRP has undergone a number of changes since its inception. None of them, however, has substantially altered its purpose, place or function within the RCMP chain of command.

A. *Origins of the Staff Relations Representative Program*

17 RCMP members were forbidden from unionizing for much of the last century. From 1918 to 1974, *all* associational activities were prohibited on pain of instant dismissal, by virtue of Orders in Council P.C. 1918-2213 and later P.C. 174/1981 (1945). This policy was believed to be necessary to [page27] preserve the loyalty of RCMP members and their obedience to superior orders, which could have been disturbed by allegiance to fellow workers: *Delisle*, at paras. 92-96, per Cory and Iacobucci JJ., dissenting.

18 Collective bargaining in the federal public service in Canada was implemented in 1967, with the adoption of the *Public Service Staff Relations Act*, S.C. 1966-67, c. 72 ("*PSSRA*"). Members of the RCMP were excluded from bargaining under that Act, as they continue to be excluded under the *PSLRA*. Prior to the enactment of the *PSSRA* in 1967, a committee struck by the government to examine whether and how to implement collective bargaining in the federal public service had expressed concerns related to loyalty and obedience within the Force. The concerns were of the same nature as the ones which had led to Orders in Council prohibiting all associational activities by RCMP members. In what is known as the Heeney Report, the committee recommended excluding RCMP members from the labour relations regime proposed by it: *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (1965), at p. 27; *Delisle*, at paras. 97-98, per Cory and Iacobucci JJ., dissenting. The Woods Report of 1968, however, recommended that federal law enforcement officials have the right to organize and engage in collective bargaining, subject to certain limitations (*Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (1969), at para. 440).

19 Later, in the early 1970s, dissatisfaction within the RCMP led members to take steps towards the formation of a members' association to advance their interests (J. F. Hardy and A. Ponak, "Staff Relations in the Royal Canadian Mounted Police" (1983), 12 *J. Collective Negotiations* 87, at pp. 89-90). An exploratory committee was established in 1972 in the hopes of establishing an association, and, by early 1974, well-attended meetings to consider forming an association were being held in Montréal, Toronto, Ottawa, Vancouver, and smaller [page28] centres (*SRR Challenge 2000 Review: Final Report* (January 2003), at pp. 10-11). In or around the same time, RCMP management began to show greater openness to members' concerns. The then-Commissioner began a series of annual meetings with members' representatives from each division. It is worth noting that those "representatives" were in some cases elected by the members, but in most cases, were simply appointed by their commanding officers and mandated to attend meetings in addition to their other full-time duties. Consultation occurred, but no agreement was reached on the issues that were raised.

20 In May 1974, newly appointed RCMP Commissioner Maurice Jean Nadon met with representatives of RCMP members and proposed a plan to formalize labour relations within the RCMP. A referendum was held on the plan, and it was approved by members in all divisions except "C" Division (Quebec), where it was rejected. The Division Staff Relations Representative Program ("DSRRP") was, accordingly, implemented by Commissioner's Standing

Order, which formed the program's legal basis from 1974 to 2003 (*Commissioner's Standing Orders (Division Staff Relations Representative Program)* (repealed by *Commissioner's Standing Orders Repealing the Commissioner's Standing Orders (Division Staff Relations Representatives Program)*, SOR/2003-325)). It featured full-time, elected representatives and it was to be funded by Divisional Commanding Officers from within divisional budgets. The DSRRP was led by a program director appointed by the RCMP Commissioner.

21 The program was progressively implemented within the RCMP. In 1987, a joint committee composed of management representatives and Division Staff Relations Representatives ("DSRRs") was formed to review the program. It concluded that many features of the labour relations plan proposed by the Commissioner in 1974 had never been [page29] formally implemented, and were in fact unknown to many RCMP members. At the recommendation of the committee, a chapter dedicated to the DSRRP was then inserted in the RCMP administration manual as a first step towards the program's formal recognition.

B. *The SRR Challenge 2000 Review*

22 In 1999, a review of the inadequacies and shortcomings of the DSRRP was undertaken, partly in response to the constitutional challenge in *Delisle*. The SRR Challenge 2000 Review was the first review of the program to be undertaken at the initiative of the DSRRs. The Caucus of the DSRRP approached the Commissioner to discuss three key principles: independence and accountability; consultation and efficiency; and exclusive agency and caucus discipline (*SRR Challenge 2000 Review: Final Report*, at pp. 29-32).

23 The SRR Challenge 2000 Review triggered two changes to the functioning of the program (whose name was changed to the SRRP and whose members are known as SRRs). The first change was the adoption by the SRRs of the SRRP Constitution as a governance scheme to replace Commissioner's Standing Orders that had until that time governed the program. The Constitution formalized matters such as the purpose of the program, its composition and its organization. The second change was the execution of the Agreement by the RCMP Commissioner and the NEC of the SRRP. Both changes were implemented in 2002.

24 As a result of these changes, the Government of Canada repealed the redundant *Commissioner's Standing Orders (Division Staff Relations Representative Program)*. However, some Commissioner's Standing Orders and provisions of the RCMP administrative manual remained in place, to cover matters not addressed by the SRRP Constitution. For instance, s. 3(*b*) of the *Commissioner's Standing Orders (Representation), 1997*, SOR/97-399, still limits the member representatives' rights to represent members in grievances, proceedings, preparations [page30] or appeals under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, where that representation "could impair the efficiency, administration or good government of the Force".

25 Undoubtedly, the SRR Challenge 2000 Review increased the independence afforded to the SRRP. Pursuant to the Agreement, the NEC now names the SRR Program Director. It also administers its annual budget. However, the reform left the SRRP largely unchanged with respect to its role within the RCMP chain of command.

IV. The Present Constitutional Challenge

26 The current challenge to the SRRP and *PSLRA* was commenced in May 2006. The appellants' application was heard in the Ontario Superior Court of Justice by MacDonnell J., who rendered his decision before this Court's judgment in *Fraser*: (2009), 96 O.R. (3d) 20. Applying the then-existing framework, he concluded that s. 96 of the *RCMP Regulations* substantially interfered with freedom of association because (i) the SRRP is not an independent association formed or chosen by members of the RCMP, and (ii) the interaction between the SRRP and management could not reasonably be described as a process of collective bargaining.

27 The Court of Appeal for Ontario (Doherty, Rosenberg and Juriansz JJ.A.), in a decision rendered after this Court's decision in *Fraser*, reversed MacDonnell J.'s decision: 2012 ONCA 363, 111 O.R. (3d) 268. The court, per Juriansz J.A., focused on *Fraser*'s description of collective bargaining as a "derivative right" (para. 109, citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815) and

concluded that "a positive obligation to engage in good faith collective bargaining will only be imposed on an employer when it is effectively impossible for the workers to act collectively to achieve workplace goals" (para. 111).

[page31]

28 The Court of Appeal held that it is not "effectively impossible" for RCMP members to meaningfully exercise their s. 2(*d*) right (para. 121) because of (1) the existence of voluntary associations such as the appellants; (2) the members' Legal Fund, which assists members; and (3) the SRRP. The Court of Appeal recognized that the SRRP was "created by regulation", was "not institutionally independent", and did not allow members of the RCMP to choose "a bargaining agent in a Wagner labour regime" (para. 128). It nevertheless concluded that RCMP members could act collectively through the SRRP to pursue workplace issues in a meaningful way. Accordingly, it held that the current labour relations scheme does not breach s. 2(*d*) of the *Charter*.

V. Issues

29 On February 20, 2013, the Chief Justice stated the following constitutional questions:

1. Does s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Does para. (*d*) of the definition of "employee" at s. 2(1) of *Public Service Labour Relations Act*, S.C. 2003, c. 22, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?
4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

[page32]

VI. Analysis

A. *Evolution of Section 2(d) Jurisprudence Toward a Purposive and Contextual Approach*

30 The jurisprudence on freedom of association under s. 2(*d*) of the *Charter*- which developed mainly with respect to labour relations (J. Fudge, "Freedom of Association", in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), 527, at pp. 527-28) - falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.

31 In what has come to be known as the Labour Trilogy, a majority of this Court held that s. 2(*d*) does not protect the right to bargain collectively or the right to strike: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the "*Alberta Reference*"); *PSAC v. Canada*, [1987] 1 S.C.R. 424; and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

32 The reasoning is set out most fully in the three opinions issued in the *Alberta Reference*. There Le Dain J., in brief reasons supported by Beetz and La Forest JJ., endorsed an interpretation of s. 2(*d*) that would protect "the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal" (p. 391). However, he described collective bargaining and the right to strike as "modern rights" created by statute, and hence not protected by s. 2(*d*) (*ibid.*).

33 McIntyre J. reached the same conclusion, but for somewhat different reasons. In his view, freedom of association rested on the following proposition: "... the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others" (p. 395). Accordingly, McIntyre J. held that freedom [page33] of association protected a right to engage collectively in those activities which are constitutionally protected for each individual:

> The only basis on which it is contended that the *Charter* enshrines a right to strike is that of freedom of association. Collective bargaining is a group concern, a group activity, but the group can exercise only the constitutional rights of its individual members on behalf of those members. If the right asserted is not found in the *Charter* for the individual, it cannot be implied for the group merely by the fact of association. It follows as well that the rights of the individual members of the group cannot be enlarged merely by the fact of association. [pp. 398-99]

34 After reviewing six possible approaches to the scope of s. 2(*d*), McIntyre J. concluded that freedom of association encompassed the right to form and join associations, the right to exercise other constitutional freedoms collectively, and the right to do in concert with others what an individual may lawfully do alone (p. 409). On the particular question before the Court, he found that an individual could not lawfully refuse to work, and that there was no individual equivalent of a strike conducted in accordance with labour legislation (p. 410). Accordingly, he concluded that the right to strike was not protected (p. 412).

35 Dickson C.J., dissenting (Wilson J. concurring), would have allowed the appeal. He identified three possible approaches to s. 2(*d*). The first, which he termed the "constitutive" approach, protects the freedom to belong to or form an association (p. 362). The second, the "derivative" approach, goes beyond the constitutive approach to protect associational activity that relates specifically to other constitutional freedoms enumerated in s. 2 (p. 364). Dickson C.J. rejected these alternatives as too restrictive and opted for a third approach. In his view, a purposive approach to freedom of association was needed. He identified the purpose and scope of s. 2(*d*) as follows, at pp. 365-66:

[page34]

> The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends... .
>
> ...
>
> As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live... .
>
> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict... .
>
> ...
>
> What freedom of association seeks to protect is not association activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage.

36 Dickson C.J. recognized as a starting point that s. 2(*d*) protected the right to do collectively what one may do as an individual. But he would also have held that the *Charter* protected some collective activities that have no true individual equivalents, including the right to strike.

37 The approach to freedom of association endorsed by the majority in the Labour Trilogy was affirmed three years later in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ("*PIPSC*"). In that case, the *Public Service Act*, R.S.N.W.T. 1974, [page35] c. P-13, subjected the employees' choice of bargaining agent to approval by the legislature of the Northwest Territories. Like the present

appeal, *PIPSC* involved a challenge to a labour relations scheme that imposed a framework for collective bargaining on a group of public service employees, limiting their ability to represent themselves through a freely chosen association. But the association itself remained entirely independent from management (p. 408).

38 The seven judges who heard the case wrote five separate opinions. The majority agreed with Sopinka J. who concluded that s. 2(*d*) protected only the ability to form and join unions, but did not protect the right to collective bargaining. Famously, he outlined four principles concerning the scope of s. 2(*d*) drawn from the *Alberta Reference*, at p. 402:

> ... first, that s. 2(*d*) protects the freedom to establish, belong to and maintain an association; second, that s. 2(*d*) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(*d*) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(*d*) protects the exercise in association of the lawful rights of individuals.

39 Sopinka J.'s disposition of the case was supported by Dickson C.J., La Forest J. and L'Heureux-Dubé J., but only L'Heureux-Dubé J. endorsed the third and fourth propositions as limiting principles under s. 2(*d*). Dickson C.J. and La Forest J. each found that the appeal could be resolved by application of the Labour Trilogy's conclusion that s. 2(*d*) did not protect collective bargaining, without deciding the broader question of its scope.

40 Cory J. (Wilson and Gonthier JJ. concurring), dissented on the scope of freedom of association. In his view, freedom of association permits individuals [page36] to work together for the purpose of achieving common goals. This freedom is fundamental to a free and democratic society and extends into the workplace. He succinctly stated one aspect of freedom of association in the workplace:

> Whenever people labour to earn their daily bread, the right to associate will be of tremendous significance. Wages and working conditions will always be of vital importance to an employee. It follows that for an employee the right to choose the group or association that will negotiate on his or her behalf with regard to those wages and working conditions is of fundamental importance. The association will play a very significant role in almost every aspect of the employee's life at work, acting as advisor, as spokesperson in negotiations, and as a shield against wrongful acts of the employer. If collective bargaining is to function properly, employees must have confidence in their representative. That confidence will be lost if the individual employee is unable to choose the association. [Emphasis added; p. 380.]

41 To recap, and notwithstanding noteworthy dissents, the majority of this Court in this early period maintained a narrow view of freedom of association, which protected only the bare formation of the association and the collective exercise of individual freedoms. This view prevailed for some time. Outside the labour relations context, the same approach was applied in *Canadian Egg Marketing Agency v. Richardson*, *[1998] 3 S.C.R. 157*. And in the labour relations context, this approach resulted in the majority of this Court holding that the exclusion of RCMP members from the *PSSRA* did not violate s. 2(*d*) in the 1999 case of *Delisle*.

42 Parallel to these cases, the Court considered the "negative" aspect of freedom of association - the freedom not to associate: *Lavigne v. Ontario Public Service Employees Union*, *[1991] 2 S.C.R. 211*; *R. v. Advance Cutting & Coring Ltd.*, *2001 SCC 70*, *[2001] 3 S.C.R. 209*; affirmed in *Bernard [page37] v. Canada (Attorney General)*, *2014 SCC 13*, *[2014] 1 S.C.R. 227*. But, *Lavigne* and *Advance Cutting* are significant because they applied a purposive approach to s. 2(*d*). In *Lavigne*, at p. 318, La Forest J. suggested that, in keeping with democratic ideals, the guarantee of freedom of association should be interpreted as protecting "the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it". (See also *Lavigne*, at p. 344, per McLachlin J.; and *Advance Cutting*, at paras. 15-17, per Bastarache J., and at paras. 170-71, per LeBel J.) Both judgments emphasized the importance of a purposive interpretation of s. 2(*d*).

43 These cases marked the beginning of a more generous, purposive approach to s. 2(*d*) - an approach that was resoundingly affirmed in *Dunmore v. Ontario (Attorney General)*, *2001 SCC 94*, *[2001] 3 S.C.R. 1016*. In that case, agricultural workers challenged their exclusion from the collective bargaining regime created by the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A. Bastarache J., for the majority, began his analysis with a review of the

existing case law, concluding that Sopinka J.'s four principles could not capture all of the potential scope of s. 2(*d*). Justice Bastarache wrote, at para. 16:

> In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(*d*). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in *PIPSC*, *supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals.

44 This renewed focus on the collective aspect of freedom of association and on its purposive [page38] interpretation led to the express recognition of a s. 2(*d*) right to collective bargaining in *Health Services.* All seven judges who heard that appeal agreed that a purposive interpretation of s. 2(*d*) required constitutional protection for the right of employees to engage in a process of collective bargaining:

> Based on the principles developed in *Dunmore* and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment.

(Para. 89, per McLachlin C.J. and LeBel J.; see also para. 174, per Deschamps J.)

45 Finally, in *Fraser*, this Court reaffirmed that s. 2(*d*) confers the right to a process of collective bargaining, understood as meaningful association in pursuit of workplace goals. This process includes the employees' rights to join together, to make collective representations to the employer, and to have those representations considered in good faith:

> What s. 2(*d*) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process... . Without such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. [para. 42]

46 In summary, after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, [page39] the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(*d*): *R. v. Big M Drug Mart Ltd.*, *[1985] 1 S.C.R. 295*, at p. 344.

B. *Defining the Scope of the Section 2(d) Guarantee*

(1) A Purposive, Generous and Contextual Approach

47 As is the case with other *Charter* rights, the jurisprudence establishes that s. 2(*d*) must be interpreted in a purposive and generous fashion, having regard to "the larger objects of the *Charter* ..., to the language chosen to articulate the ... freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*": *Big M Drug Mart*, at p. 344. In a phrase, in order to determine whether a restriction on the right to associate violates s. 2(*d*) by offending its purpose, we must look at the associational activity in question in its full context and history. Neither the text of s. 2(*d*) nor general principles of *Charter* interpretation support a narrow reading of freedom of association.

48 This interpretative approach to freedom of association is consistent with the approach to other basic rights connected with human activities and needs. The scope of freedom of religion, for example, is derived from its history and the range of activities to which it applies - holding, proclaiming and transmitting beliefs in the bosom of a

secular state (R. Moon, "Freedom of Conscience and Religion", in Mendes and Beaulac, 339). Similarly, the scope of freedom of expression is defined by the different forms it takes and the different interests it protects - including, notably, "the quest for truth, self-fulfillment, and an embracing marketplace of ideas": *Saskatchewan (Human Rights Commission) [page40] v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 171, per Rothstein J. for the Court; see also *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 766; P. B. Schabas, "The Ups and Downs of Freedom of Expression - Section 2(b)", in R. Gilliland, ed., *The Charter at Thirty* (2012), 1; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at p. 1060. An activity-based contextual approach is equally essential for freedom of association. Freedom of association, like the other s. 2 freedoms - freedom of expression, conscience and religion, and peaceful assembly - protects rights fundamental to Canada's liberal democratic society.

49 Freedom of association is not derivative of these other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.

50 The purposes underlying *Charter* rights and freedoms may be framed at varying levels of abstraction. At the broadest level, a purposive interpretation must be consistent with the "larger objects of the *Charter*", including "basic beliefs about human worth and dignity" and the maintenance of "a free and democratic political system": *Big M Drug Mart*, at pp. 344 and 346; see also *Health Services*, at para. 81. At the same time, however, while *Charter* rights and freedoms should be given a broad and liberal interpretation, a purposive analysis also requires courts to consider the most concrete purpose or set of purposes that underlies the right or freedom in question, based on its history and full context. That is the task to which we now turn with respect to s. 2(*d*).

[page41]

(2) The Content of Section 2(*d*) Protection

51 In his dissenting reasons in the *Alberta Reference*, Dickson C.J. identified three possible approaches to the interpretation of s. 2(*d*) - constitutive, derivative and purposive. We conclude that s. 2(*d*) protects each of the aspects of freedom of association with which these approaches are concerned.

52 The narrowest approach, the "constitutive", would protect only the bare right to belong to or form an association. The state would thus be prohibited from interfering with individuals meeting or forming associations, but would be permitted to interfere with the *activities* pursued by the associations people form. This protection, while narrow, is not trivial; history is replete with examples of states that have banned associations or prevented people from associating, either absolutely or in terms of restrictions on the number of people who can associate for a particular purpose.

53 The "derivative" approach would protect not only the right to associate, but also the right to associational *activity* that specifically relates to other constitutional freedoms. This approach prevails in the United States, where freedom of association is recognized insofar as it supports other constitutional rights, like freedom of religion and the political rights. Beyond this, however, associational activities would not be constitutionally protected.

54 The purposive approach, adopted by Dickson C.J. in the *Alberta Reference*, defines the content of s. 2(*d*) by reference to the purpose of the guarantee of freedom of association: "... to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends" (*Alberta Reference*, at p. 365). The object of Dickson C.J.'s words is a concrete one, not an abstract expression of a desire for a better life. Elaborating on this interpretive approach, Dickson C.J. states that the purpose [page42] of the freedom of association encompasses the protection of (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict": *Alberta Reference*, at p. 366.

55 The purposive approach thus recognizes that freedom of association is empowering, and that we value the guarantee enshrined in s. 2(*d*) because it empowers groups whose members' individual voices may be all too easily drowned out. This conclusion is rooted in "the historical origins of the concepts enshrined" in s. 2(*d*) (*Big M Drug Mart*, at p. 344).

56 The historical emergence of association as a fundamental freedom - one which permits the growth of a sphere of civil society largely free from state interference - has its roots in the protection of religious minority groups: M. Walzer, "The Concept of Civil Society", in M. Walzer, ed., *Toward a Global Civil Society* (1995), 7, at p. 20. More recent history also illustrates how the freedom to associate has contributed to the women's suffrage and gay rights movements: J. D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (2012), at p. 45; and D. Carpenter, "Expressive Association and Anti-Discrimination Law After *Dale*: A Tripartite Approach" (2001), 85 *Minn. L. Rev.* 1515.

57 Historically, those most easily ignored and disempowered as individuals have staked so much on freedom of association precisely because association was the means by which they could gain a voice in society. As Dickson C.J. put it in the *Alberta Reference*:

[page43]

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. [Emphasis added; pp. 365-66.]

58 This then is a fundamental purpose of s. 2(*d*) - to protect the individual from "state-enforced isolation in the pursuit of his or her ends": *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.

59 The flip side of the purposive approach to freedom of association under s. 2(*d*) is that the guarantee will not necessarily protect all associational activity. Section 2(*d*) of the *Charter* is aimed at reducing social imbalances, not enhancing them. For this reason, some collective activity lies outside the *Charter*'s protection. For example, associational activity that constitutes violence is not protected by s. 2(*d*): *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 107.

60 Whether there are other categories of activity in addition to violence that are by their very nature entirely excluded from s. 2(*d*) protection need not be canvassed here. It suffices to note that a purposive interpretation of s. 2(*d*) confers *prima facie* protection on a broad range of associational activity, subject to limits justified pursuant to s. 1 of the *Charter*.

[page44]

61 The nature of a given associational activity and its relation to the underlying purpose of s. 2(*d*) may also be relevant to the s. 1 analysis, in the same way that the nature of particular expression is relevant in s. 2(*b*) cases. For instance, as Rothstein J. explains in *Whatcott*, at paras. 112 and 114:

> Violent expression and expression that threatens violence does not fall within the protected sphere of s. 2(*b*) of the *Charter*: *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 70. However, apart from that, not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from

> the core values behind the freedom, depending on the nature of the expression. This will, in turn, affect its value relative to other *Charter* rights, the exercise or protection of which may infringe freedom of expression.
>
> ...
>
> Hate speech is at some distance from the spirit of s. 2(*b*) because it does little to promote, and can in fact impede, the values underlying freedom of expression. As noted by Dickson C.J. in *Keegstra*, expression can be used to the detriment of the search for truth (p. 763). As earlier discussed, hate speech can also distort or limit the robust and free exchange of ideas by its tendency to silence the voice of its target group. It can achieve the self-fulfillment of the publisher, but often at the expense of that of the victim. These are important considerations in balancing hate speech with competing *Charter* rights ... . [Emphasis added.]

62 Section 2(*d*), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2(*d*) are not [page45] merely a bundle of individual rights, but collective rights that inhere in associations. L'Heureux-Dubé J. put it well in *Advance Cutting*:

> In society, there is an element of synergy when individuals interact. The mere addition of individual goals will not suffice. Society is more than the sum of its parts. Put another way, a row of taxis do not a bus make. An arithmetic approach to *Charter* rights fails to encompass the aspirations imbedded in it. [para. 66]

63 It has been suggested that collective rights should not be recognized because they are inconsistent with the *Charter*'s emphasis on individual rights, and because this would give groups greater rights than individuals. In our view, neither criticism is well founded.

64 First, the *Charter* does not exclude collective rights. While it generally speaks of individuals as rights holders, its s. 2 guarantees extend to groups. The right of peaceful assembly is, by definition, a group activity incapable of individual performance. Freedom of expression protects both listeners and speakers: *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 28. The right to vote is meaningless in the absence of a social context in which voting can advance self-government: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 31. The Court has also found that freedom of religion is not merely a right to hold religious opinions but also an individual right to establish communities of faith (see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567). And while this Court has not dealt with the issue, there is support for the view that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection" of freedom of religion (*Hutterian Brethren*, at para. 131, per Abella J., dissenting, citing *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII (First Section), at para. 118). See also [page46] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

65 It has also been suggested that recognition of a collective aspect to s. 2(*d*) rights will somehow undermine individual rights and the individual aspect of s. 2(*d*). We see no basis for this contention. Recognizing group or collective rights complements rather than undercuts individual rights, as the examples just cited demonstrate. It is not a question of *either* individual rights *or* collective rights. Both are essential for full *Charter* protection.

66 In summary, s. 2(*d*), viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.

C. *The Right to a Meaningful Collective Bargaining Process*

67 Applying the purposive approach just discussed to the domain of labour relations, we conclude that s. 2(*d*) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, affirming the central holdings of *Health Services* and *Fraser*. This guarantee includes a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome or access to a particular model of labour relations.

[page47]

68 Just as a ban on employee association impairs freedom of association, so does a labour relations process that substantially interferes with the possibility of having meaningful collective negotiations on workplace matters. Without the right to pursue workplace goals collectively, workers may be left essentially powerless in dealing with their employer or influencing their employment conditions. This idea is not new. As the United States Supreme Court stated in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), at p. 33:

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment ... . [Emphasis added.]

69 Similarly, this Court recently affirmed the importance of freedom of expression in redressing the imbalance inherent in the employer-employee relationship in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, *2013 SCC 62*, *[2013] 3 S.C.R. 733*, at paras. 31-32:

> A person's employment and the conditions of their workplace can inform their identity, emotional health, and sense of self-worth ... .
>
> Free expression in the labour context can also play a significant role in redressing or alleviating the presumptive imbalance between the employer's economic power and the relative vulnerability of the individual worker ... . It is through their expressive activities that unions are able to articulate and promote their common interests, and, in the event of a labour dispute, to attempt to persuade the employer. [Citations omitted.]

70 The same reasoning applies to freedom of association. As we have seen, s. 2(*d*) functions to [page48] prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(*d*) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

71 The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees ..." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*).

72 The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(*d*) seeks to achieve, [page49] so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.

73 Against this conception, the Attorney General of Canada, relying on *Fraser*, argues that collective bargaining is at best a "derivative right" from the basic or "core" right to associate (the constitutive approach). It follows, according to the Attorney General, that collective bargaining is protected only if state action makes it *effectively*

impossible to associate for workplace matters. Here that impossibility is lacking, the Attorney General asserts, because the SRRP process is a means by which RCMP members can associate for workplace purposes. The Court of Appeal accepted this position. We disagree. We will address the terms "effectively impossible" and "derivative right" in turn.

74 The reference in *Fraser* to the effective impossibility of achieving workplace goals must be understood with reference to the legislative schemes at issue. For instance, in discussing *Dunmore*, the majority in *Fraser* explained that Bastarache J. had "concluded that the absence of legislative protection for farm workers to organize in order to achieve workplace goals made meaningful association to achieve workplace goals impossible and therefore constituted a substantial interference with the right to associate guaranteed by s. 2(*d*) of the *Charter*" (para. 31 (emphasis added)). Similarly, the majority in *Fraser* explained that the legislation impugned in *Health Services* - legislation that unilaterally nullified terms concerning seniority and lay-offs in existing collective agreements and precluded future bargaining over those matters - "rendered the meaningful pursuit of [workplace] goals impossible and effectively nullified the right to associate of its employees" (para. 38).

[page50]

75 These passages from *Fraser* and *Health Services* use terms like "impossible" and "effectively nullified" to describe the effect of legislative schemes (including legislative exclusions), not the legal test for infringement of s. 2(*d*). Explaining the reasoning in *Dunmore*, the majority in *Fraser* states that: "The *effect* of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association ..." (para. 33 (emphasis in original)). In *Fraser*, the majority further explains that there cannot "be any doubt that legislation (or the absence of a legislative framework) that makes achievement" of collective workplace goals "substantially impossible, constitutes a limit on the exercise of freedom of association" (para. 32 (emphasis added)). It is clear that such passages do not adopt "substantial impossibility" as the threshold test for finding an infringement of freedom of association. Rather, the passages demonstrate that the majority in *Fraser* adopts substantial interference as the *legal test* for infringement of freedom of association.

76 Dissenting in the case at bar, Rothstein J. highlights the fact that the majority reasons in *Fraser* "referred to the test of impossibility - either effective or substantial impossibility - *no less than 12 times*, tracing its origins in the decisions of *Dunmore* and *Health Services* ... see *Fraser*, at paras. 31-34, 38, 42, 46-48, 62 and 98" (para. 213 (emphasis in original)). In virtually every case (see paras. 31-33, 38, 42, 46-48, 62 and 98), the "impossibility" in question refers explicitly to the *effect* of legislation or the absence of a legislative framework. A test of substantial interference or substantial impairment is also explicitly stated as the standard for finding a s. 2(*d*) infringement at paras. 31, 33, 47-48 and 62. Finally, the majority in *Fraser* reaffirmed the holding in *Health Services* that "[t]he fundamental inquiry is whether the state action would *substantially impair* the ability of 'union [page51] members to pursue shared goals in concert' (para. 96 (emphasis added))": para. 64 (emphasis in original); see *Health Services*, at paras. 92 and 96.

77 This said, we agree that some of the passages in *Fraser* seem to unnecessarily complicate the analysis by referring to both effective impossibility (as the effect of certain state action) and substantial interference or impairment (as the test for infringement of s. 2(*d*)). For the reasons just discussed, however, such references should be understood consistently with the majority reasons in *Fraser*, read in their entirety, and with this Court's precedents in *Dunmore* and *Health Services*. More generally, they must be understood consistently with this Court's purposive and generous approach to s. 2(*d*), as explained above.

78 We turn now to use of the term "derivative right" in *Fraser*. On the Court of Appeal's interpretation of *Fraser*, the right to a meaningful process of collective bargaining is "derivative" in the sense that it exists only where employees establish that it is effectively impossible for them to act collectively to achieve workplace goals (paras. 110-11 and 135). However, in *Fraser*, the majority explained that "collective bargaining is a derivative right" in the sense that it is "a 'necessary precondition' to the meaningful exercise of the constitutional guarantee of freedom of association": para. 66. The majority cited *Criminal Lawyers' Association* where the Court stated, at para. 30: "Access [to information in government hands] is a derivative right which may arise where it is a necessary precondition of

meaningful expression on the functioning of government" (emphasis added). The Court of Appeal understood this to mean that the right to collective bargaining similarly *may arise* as a necessary precondition to meaningful association in the workplace only where some other condition is first met. The Court of Appeal [page52] took that condition to be the effective impossibility of acting collectively to achieve workplace goals.

79 However, the majority in *Fraser* did not qualify the right to collective bargaining in this way. It held that collective bargaining is "a 'necessary precondition' to the meaningful exercise of the constitutional guarantee of freedom of association": para. 66. Similarly, at para. 99, "the right of an employees' association to make representations to the employer and have its views considered in good faith" is described as "a derivative right under s. 2(*d*) of the *Charter*, necessary to meaningful exercise of the right to free association" (emphasis added). To the extent the term "derivative right" suggests that the right to a meaningful process of collective bargaining only applies where the guarantee under s. 2(*d*) is otherwise frustrated, use of that term should be avoided. Furthermore, any suggestion that an aspect of a *Charter* right may somehow be secondary or subservient to other aspects of that right is out of keeping with the purposive approach to s. 2(*d*).

80 To recap, s. 2(*d*) protects against substantial interference with the right to a meaningful process of collective bargaining. Historically, workers have associated in order "to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict", namely, their employers: *Alberta Reference*, at p. 366. The guarantee entrenched in s. 2(*d*) of the *Charter* cannot be indifferent to power imbalances in the labour relations context. To sanction such indifference would be to ignore "the historical origins of the concepts enshrined" in s. 2(*d*): *Big M Drug Mart*, at p. 344. It follows that the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as [page53] to substantially interfere with their ability to meaningfully engage in collective negotiations.

D. *Essential Features of a Meaningful Process of Collective Bargaining Under Section 2(d)*

81 We have concluded that s. 2(*d*) protects the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. The government therefore cannot enact laws or impose a labour relations process that substantially interferes with that right. This raises the question - what are the features essential to a meaningful process of collective bargaining under s. 2(*d*)? In this section, we conclude that a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them.

82 Collective bargaining constitutes a fundamental aspect of Canadian society which "enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work" (*Health Services*, at para. 82). Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.

83 But choice and independence are not absolute: they are limited by the context of collective bargaining. In our view, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. In the same vein, the degree of independence required by the *Charter* for [page54] collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members.

84 In the following subsections, we lay out the theoretical underpinnings of choice and independence and we explain how they are inherent to the nature and purpose of collective bargaining. We then explain how the requirements of choice and independence can be respected by a variety of labour relations models, as long as such models allow collective bargaining to be pursued in a meaningful way.

(1) Choice and Independence Are Inherent to the Nature and Purpose of Collective Bargaining

(a) *Employee Choice*

85 The function of collective bargaining is not served by a process which undermines employees' rights to choose what is in their interest and how they should pursue those interests. The degree of choice required by the *Charter* is one that enables employees to have effective input into the selection of their collective goals. This right to participate in the collective is crucial to preserve employees' ability to advance their own interests, particularly in schemes which involve trade-offs of individual rights to gain collective strength (J. E. Dorsey, "Individuals and Internal Union Affairs: The Right to Participate", in K. P. Swan and K. E. Swinton, eds., *Studies in Labour Law* (1983), 193).

86 Hallmarks of employee choice in this context include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations. Employee choice may lead to a diversity of associational structures and to competition between associations, but it is a form of exercise of freedom of association that is essential to the existence of employee organizations and to the [page55] maintenance of the confidence of members in them (*PIPSC*, at p. 380, per Cory J., in dissent; P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 200).

87 Accountability to the members of the association plays an important role in assessing whether employee choice is present to a sufficient degree in any given labour relations scheme. Employees choose representatives on the assumption that *their* voice will be conveyed to the employer by the people *they* choose (A. Bogg and K. Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2012), 33 *Comp. Lab. L. & Pol'y J.* 379, at p. 405). A scheme that holds representatives accountable to the employees who chose them ensures that the association works towards the purposes for which the employees joined together. Accountability allows employees to gain control over the selection of the issues that are put forward to the employer, and the agreements concluded on their behalf as a result of the process of collective bargaining.

(b) *Independence From Management*

88 The function of collective bargaining is not served by a process which is dominated by or under the influence of management. This is why a meaningful process of collective bargaining protects the right of employees to form and join associations that are independent of management (*Delisle*, at paras. 32 and 37). Like choice, independence in the collective bargaining context is not absolute. The degree of independence required by the *Charter* for collective bargaining purposes is one that permits the activities of the association to be aligned with the interests of its members.

89 Just as with choice, independence from management ensures that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process and allowing it to function properly. Conversely, a lack of independence means that [page56] employees may not be able to advance their own interests, but are limited to picking and choosing from among the interests management permits them to advance. Relevant considerations in assessing independence include the freedom to amend the association's constitution and rules, the freedom to elect the association's representatives, control over financial administration and control over the activities the association chooses to pursue.

90 Independence and choice are complementary principles in assessing the constitutional compliance of a labour relations scheme. *Charter* compliance is evaluated based on the *degrees* of independence and choice guaranteed by the labour relations scheme, considered with careful attention to the entire context of the scheme. The degrees of choice and independence afforded should not be considered in isolation, but must be assessed globally always with the goal of determining whether the employees are able to associate for the purposes of meaningfully pursuing collective workplace goals.

91 We now turn to the practical implications of choice and independence for labour relations models.

(2) Labour Relations Models Must Permit Collective Bargaining to Be Pursued in a Meaningful Way

92 A variety of labour relations models may provide sufficient employee choice and independence from

management to permit meaningful collective bargaining. As discussed, choice and independence are not absolute in the context of collective bargaining. By necessity, a collective framework not only serves employees' interests, but imposes limits on individual entitlements in order to permit the pursuit of collective goals. Collective bargaining is "an exercise in solidarity in which individual interests are not simply aggregated but transformed in the process of democratic deliberation" (J. Fudge, "Introduction: Farm Workers, Collective Bargaining [page57] Rights, and the Meaning of Constitutional Protection", in F. Faraday, J. Fudge and E. Tucker, eds., *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (2012), 1, at p. 17; see also G. Murray and P. Verge, *La représentation syndicale: visage juridique actuel et futur* (1999), at pp. 2-3; Dorsey, at pp. 195 and 219). As Professor Wellington states: "Accommodating the interests of the dissenter and those of the majority is always difficult. The hallmark of a truly democratic society is its unwillingness to give up easily either majority rule or individual freedom" (*Labor and the Legal Process* (1968), at p. 129).

93 This Court has consistently held that freedom of association does not guarantee a particular model of labour relations (*Delisle*, at para. 33; *Health Services*, at para. 91; *Fraser*, at para. 42). What is required is not a particular model, but a regime that does not substantially interfere with meaningful collective bargaining and thus complies with s. 2(*d*) (*Health Services*, at para. 94; *Fraser*, at para. 40). What is required in turn to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s. 2(*d*) inquiries, the required analysis is contextual.

94 The Wagner Act model of labour relations in force in most private sector and many public sector workplaces offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. That model permits a sufficiently large sector of employees to *choose* to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of "bargaining units" and the processes of certification and decertification - all under the supervision of an independent labour relations board - ensure that an employer deals with the association most representative of its employees: G. W. Adams, *Canadian [page58] Labour Law* (2nd ed. (loose-leaf)), at paras. 2.3800 to 2.4030; D. D. Carter et al., *Labour Law in Canada* (5th ed. 2002), at pp. 286-87; P. Verge, G. Trudeau and G. Vallée, *Le droit du travail par ses sources* (2006), at pp. 41-42.

95 The Wagner Act model, however, is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining. The designated bargaining model (see, e.g., *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5) offers another example of a model that may be acceptable. Although the employees' bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. This is but one example; other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.

96 Labour schemes are responsive to the interests of the parties involved and the particular workplace context. Different models have emerged to meet the specific needs of diverse industries and workplaces. The result has been ongoing debate on the desirability of various forms of workplace representation and cooperation and on their coexistence: D. J. Doorey, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2013), 38 Queen's L.J. 511; B. W. Burkett, "The Future of the *Wagner Act*: A Canadian-American Comparison" (2013), 38 Queen's L.J. 363; D. Taras, "Reconciling Differences Differently: Employee Voice in Public Policymaking and Workplace Governance" (2007), 28 *Comp. Lab. L. & Pol'y J.* 167; Adams, at paras. 1.290 to 1.340.

[page59]

97 The search is not for an "ideal" model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue. Choice and independence do not *require* adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. This said, genuine collective bargaining cannot be based on the suppression of

employees' interests, where these diverge from those of their employer, in the name of a "non-adversarial" process. Whatever the model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2(*d*) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.

98 The respondent argues that this view of s. 2(*d*) would require an employer, even a government employer, to recognize and bargain with every association chosen by employees, whatever the size. In our view, this result does not follow. Freedom of association requires, among other things, that no government process can substantially interfere with the autonomy of employees in creating or joining associations of their own choosing, even if in so doing they displace an existing association. It also requires that the employer consider employees' representations in good faith, and engage in meaningful discussion with them. But s. 2(*d*) does not require a process whereby *every* association will ultimately *gain* the recognition it seeks (see M. Coutu et al., *Droit des rapports collectifs du travail au Québec* (2nd ed. 2013), vol. 1, *Le régime général*, at para. 98). As we said, s. 2(*d*) can also accommodate a model based on majoritarianism and exclusivity (such as the Wagner Act model) that imposes [page60] restrictions on individual rights to pursue collective goals.

99 In summary, a meaningful process of collective bargaining is a process that gives employees meaningful input into the selection of their collective goals, and a degree of independence from management sufficient to allow members to control the activities of the association, having regard to the industry and workplace in question. A labour relations scheme that complies with these requirements and thus allows collective bargaining to be pursued in a meaningful way satisfies s. 2(*d*).

100 Before turning to the application of these principles to the constitutional questions raised in this case, we address Rothstein J.'s dissenting reasons. In Rothstein J.'s view, "[t]he essential feature of a labour relations regime that allows employees to exercise their constitutional right to make meaningful collective representations on their workplace goals is representativeness: the voice that speaks on behalf of employees must represent their interests and be ultimately accountable to them. Representativeness is the constitutional imperative required in order to ensure that s. 2(*d*) rights are protected in the collective bargaining context, nothing more" (para. 172).

101 So stated, the notions of choice and independence, on the one hand, and representativeness, on the other, overlap considerably. However, we consider choice and independence best suited for the constitutional analysis at issue. If employees cannot choose the voice that speaks on their behalf, that voice is unlikely to speak up for their interests. It is precisely employee choice of representative that guarantees a representative voice. Similarly, if employees must "have confidence in their spokespersons" (Rothstein J.'s reasons, at para. 219), the way to ensure such confidence is through a sufficient degree of employee choice in the selection of representatives.

[page61]

102 Justice Rothstein argues that "the touchstone is representativeness" (para. 195). He acknowledges, however, that employees must be able to hold their representatives "to account" (paras. 193 and 222). Yet employees will be unable to hold representatives accountable if those employees lack sufficient choice in selecting their representatives or if their representatives are dependent on management (for instance, in determining the acceptable subject matter of employee grievances, or the relative priority of employee concerns).

103 Representativeness and accountability rest on choice and independence. We conclude that the latter two principles are the most appropriate in assessing s. 2(*d*) compliance in the context of labour relations. That said, these principles are tools in an analysis that must in each case determine whether the right to the meaningful pursuit of collective workplace goals is respected. In our view, the disagreement between majority and Rothstein J. on the terminology of "choice and independence" versus "representativeness" is more semantic than real. The real difference lies in how the concepts are understood and applied.

104 Against this background, we therefore turn to the constitutional questions raised in the case at bar, that is whether the imposition of the SRRP and the exclusion of RCMP members from the application of the *PSLRA* violate s. 2(*d*) of the *Charter*, and if so, whether the violation is a reasonable limit prescribed by law, which can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

E. *Whether the Imposition of the SRRP Infringes Section 2(d) of the Charter*

105 This is not a case of a complete denial of the constitutional right to associate and of its related constitutional guarantees. It is rather a case of substantial interference with the right to associate for the purpose of addressing workplace goals through [page62] a meaningful process of collective bargaining, free from employer control, as understood by Dickson C.J. in the *Alberta Reference*. We conclude that the flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2(*d*). The SRRP process fails to respect RCMP members' freedom of association in both its purpose and its effects.

106 Section 96 of the *RCMP Regulations* imposed the SRRP on RCMP members as the sole means of presenting their concerns to management. Section 56 of the current-day *RCMP Regulations, 2014* continues to impose the SRRP under nearly identical terms. RCMP members are represented by an organization they did not choose and do not control. They must work within a structure that lacks independence from management. Indeed, this structure and process are part of the management organization of the RCMP. The process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.

(1) The Purpose of the Imposition of the SRRP Infringes Section 2(*d*)

107 We earlier described the history of RCMP labour relations. This history evidences a long-standing hostility on the part of RCMP management and successive Canadian governments to unionization in the Force. In the early 20th century, the federal government deployed one of the RCMP's predecessor bodies - the Royal Northwest Mounted Police - to confront labour unrest, most famously in breaking the Winnipeg General Strike of 1919. At a time when municipal police forces in Canada were beginning to unionize, the Canadian government issued Order in Council P.C. 1918-2213, which prohibited members of the Dominion Police and the Royal Northwest Mounted Police from becoming "a member of or in any wise associated with any Trades Union Organization ... or with any Union, Society [page63] or Association ... connected or affiliated therewith" on penalty of immediate dismissal.

108 This stance was softened in the early 1970s, with the repeal of P.C. 1918-2213 (P.C. 1974-1339), but the federal government continued to resist the formation of independent RCMP members' associations. The DSRRP, precursor to the present SRRP, was openly presented as an alternative to unionization. The year it was created, RCMP Commissioner Nadon commissioned a report on the effects of police associations and the advantages and disadvantages of implementing such an association in the RCMP: J. P. Middleton, *A Study Report on Police Associations* (1974). The Middleton report was largely supportive of the formation of an RCMP members' association or union. In circulating the report, however, Commissioner Nadon included a brief foreword, in which he stated:

> At the outset I wish to make the Force's position very clear; the Force is opposed to the formation of an association or union of members and this position has been made known to our Minister. [p. i]

109 Section 3(2) of the *Commissioner's Standing Orders (Division Staff Relations Representative Program)*, which formed the legal basis of the DSRRP from 1974 to 2003, prohibited DSRRs from promoting "*alternate* programs in conflict with the non-union status of the Division Staff Relations Representative Program".

110 Even before this Court, the Attorney General of Canada does not contend that the current-day SRRP provides RCMP members with an independent association. Indeed, the Attorney General appears to concede that the SRRP continues to be imposed on members of the RCMP for the purpose of preventing collective bargaining through an independent association. Its position is rather that s. 2(*d*) [page64] does not guarantee RCMP members a right to form and bargain through an association of their own choosing. We have rejected this view. Accordingly, it follows

that the purpose of the imposition of the SRRP, to prevent the formation of independent RCMP members' associations for the purposes of collective bargaining, is unconstitutional.

(2) The Effects of the Imposition of the SRRP Infringe Section 2(*d*)

111 While it would be sufficient to find a violation of s. 2(*d*) solely on the basis of the purposes of the imposition of the SRRP as a labour relations regime (*Big M Drug Mart*), we also find that imposing this regime infringes s. 2(*d*) in its effects. Our inquiry here is directed at whether RCMP members can genuinely advance their own interests through the SRRP, without interference by RCMP management. We are satisfied, on the record before us, that they cannot.

112 The organizational structure of the SRRP has evolved significantly since its predecessor was first established in 1974. These changes are detailed above. While these changes have expanded the SRRs' freedom to direct the program, they nonetheless fall short of respecting RCMP members' right to join associations that are of their choosing and independent of management, to advance their interests.

113 At the level of institutional structure, the SRRP is plainly not independent of RCMP management. Rather, it is squarely under its control. It is a part of the labour-management structure of the RCMP. In 1989, the Government of Canada formalized the SRRP (then known as the DSRRP) by adding s. 96 to the *RCMP Regulations*: SOR/89-581. The Regulatory Impact Analysis Statement that accompanied the amendment to the *RCMP Regulations* expressly stated that the DSRRP was "co-ordinated and monitored at R.C.M.P. Headquarters" and "subject to biannual reviews at R.C.M.P. Divisions [page65] with reports to the Commissioner from the Internal Communications Officer". Although not determinative nor exhaustive of a regulation's purpose or interpretation, regulatory impact analysis statements are a useful tool to understand how regulations are intended to work: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 33; *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 352-53.

114 The lack of independence of the current-day SRRP is further emphasized by the 2007 Brown Report: *Rebuilding the Trust: Report of the Task Force on Governance and Cultural Change in the RCMP* (2007). In June 2007, an independent investigator raised issues regarding the RCMP's handling of reports of mismanagement or irregularities in the administration of the RCMP's pension and insurance plans in a report that was submitted to the Minister of Public Safety and the President of the Treasury Board: *A Matter of Trust: Report of the Independent Investigator into Matters Relating to RCMP Pension and Insurance Plans* (2007). The investigator recommended that the Government of Canada establish a task force to examine issues pertaining to the RCMP's governance and culture. This led to the Brown Report. While the Task Force did not focus exclusively on labour relations at the RCMP, it did consider comments from members and employees about the SRRP.

115 In the Brown Report, the Task Force reported the comments of some officers who said they were not sure what happens to their concerns after they give them to SRRs: "... it is not clear whether they have been passed on by the SRRs at all, or whether management has decided not to act on them" (Brown Report, at p. 33). The Task Force also noted that the SRRs had become "part of the chain of command of the RCMP organization" (*ibid.*), specifically that the presence of SRRs as [page66] observers at meetings of the Senior Executive Committee, composed of the Commissioner and Deputy Commissioners, gave the impression of their concurrence with the decisions of RCMP management. The authors of the report expressed the view that "more distance from management [was] appropriate" (*ibid.*). They ultimately recommended that the SRRs "focus entirely on labour relations and thus be independent from management" (p. 34).

116 We note the following additional areas of concern. First, pursuant to the Agreement between the Commissioner and the NEC of the SRRP, significant aspects of the program structure are determined by RCMP management, including the number of SRRs and the program budget. Members of the SRRP are prohibited from communicating with anyone outside the RCMP concerning RCMP programs and activities without permission of the Commissioner. An exception relating to conditions of work and employment exists, but the conditions for its exercise are narrowly restricted and obviously slanted toward management. The NEC must submit an annual report

to management on its activities. The operation of the SRRP is to be regularly reviewed jointly by the SRRP and RCMP management, and the consent of both the SRRP and management is required to amend the program.

117 Second, the SRRP deliberately restricts members' freedom to advocate for the ability to be represented by an independent association. As a matter of policy and practice, RCMP members who are active in such associations are excluded from full participation in the SRRP, and SRRs are prohibited from promoting alternative modes of representation for RCMP members. Yet members have no option outside of the SRRP to meet with management to promote their interests in other forms of representation.

118 Simply put, in our view, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed [page67] on RCMP members by management. Accordingly, the element of employee choice is almost entirely missing under the present scheme.

119 While the Attorney General of Canada observes that adoption of the SRRP was endorsed by members in all divisions outside Quebec in a referendum in 1974, we do not consider this fact determinative, for two reasons. First, the referendum in question evidently offered the SRRP a "take it or leave it" proposition. It does not reflect whether members would have preferred representation through an independent association. Second, the referendum took place 40 years ago. Today, there is no opportunity for RCMP members to indicate their support for an alternative form of association. Members have no ability to opt out of participation in the SRRP, and there is no other means for them to communicate their workplace concerns to management. As we have seen, the structure has no independence from management; it is but a part of management itself.

120 These constitutional defects in the SRRP are not cured by the election of SRRs. On this point we agree with the conclusion of the application judge, that "agreeing to populate a structure created by management for the purpose of labour relations cannot reasonably be construed as a choice not to conduct labour relations through an association of the members' own making" (para. 63).

121 In conclusion, s. 96 of the *RCMP Regulations*, which imposed the SRRP as the sole recognized vehicle for engagement between RCMP membership and senior management, constituted a substantial interference with freedom of association in both its purpose and effects. Before considering whether that infringement could be justified under s. 1 of the *Charter*, we consider the related challenge to para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA*.

[page68]

F. *Whether Paragraph (d) of the Definition of "Employee" in Section 2(1) of the PSLRA Infringes Section 2(d) of the Charter*

122 The appellants challenge the exclusion of RCMP members from the application of the *PSLRA* and ask that para. (*d*) of the definition of "employee" in s. 2(1) of that Act be struck down. Most employees in federally regulated workplaces are governed by the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("*CLC*"), but the collective bargaining regime established by Part I of the *CLC* is inapplicable to employees of the Crown, with limited exceptions: s. 6.

123 For employees in the federal public service, the *PSLRA* provides the general framework through which they can join and participate in employee associations; these associations can be certified as bargaining agents, and good faith collective bargaining can occur. The *PSLRA* provides for mediation, conciliation and arbitration when problems arise during collective bargaining and provides remedies for unfair labour practices. While being significantly different from private-sector labour relations models in many ways, the *PSLRA* and its predecessor, the *PSSRA*, are generally referred to as a Wagner Act model of labour relations (C. Rootham, *Labour and Employment Law in the Federal Public Service* (2007), at pp. 19-20).

124 Paragraph (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* excludes RCMP members from the

application of the *PSLRA*. This Court in *Delisle* held that the exclusion of the RCMP from the *PSSRA*, the *PSLRA*'s predecessor legislation, did not violate s. 2(*d*) of the *Charter*. This raises a threshold question: Should the Court's decision in *Delisle* be reconsidered? In our view, it should, for two reasons.

125 First, *Delisle* was decided before this Court's decisions in *Health Services* and *Fraser*, [page69] which marked a shift to a purposive and generous approach to labour relations. At the time *Delisle* was decided, the right to a meaningful process of collective bargaining was not recognized as part of the s. 2(*d*) *Charter* guarantee. All three sets of reasons in *Delisle* make clear that the Court in that case was *not* addressing the issue of whether the purpose of the *PSSRA* exclusion was to prevent RCMP members from engaging in collective bargaining: para. 5, per L'Heureux-Dubé J.; para. 20, per Bastarache J.; paras. 51, 88 and 107, per Cory and Iacobucci JJ. As formulated by Bastarache J., writing for the majority, the question in *Delisle* was whether the purpose of the exclusion "was to prevent RCMP members from forming any type of independent association": para. 20. The question of an interference with the right to a meaningful process of collective bargaining was neither asked nor answered in *Delisle*.

126 Second, in *Delisle*, only part of the scheme governing the labour relations of RCMP members - their exclusion from the *PSSRA* - was before this Court. In the present appeal, the challenge targets the entire labour relations scheme - the exclusion from the application of the *PSLRA* and the imposition of the labour relations regime that we have found is intended to deny RCMP members the right to form an independent association capable of engaging in a meaningful process of collective bargaining. In other words, the majority in *Delisle* found that the legislative exclusion, viewed in isolation, did not prevent the creation of an independent association, but the Court now considers the complete scheme which is clearly intended to prevent associational activity protected under s. 2(*d*) of the *Charter*.

127 Overturning precedents of this Court is not a step to be lightly taken (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 24; *Fraser*, at para. 56; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47). However, as explained, *Delisle* was decided before [page70] this Court's shift to a purposive and generous approach to the exercise of freedom of association and *Delisle* considered a different question and narrower aspects of the labour relations regime than those at issue here. It follows that the result in *Delisle* must be revisited.

128 We therefore propose to examine whether para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes s. 2(*d*) in its purpose.

(1) The Purpose of the *PSLRA* Exclusion Infringes Section 2(*d*)

129 The statutory exclusion of RCMP members must be read and its constitutionality assessed in relation to P.C. 1918-2213, the Order in Council that constituted the labour relations regime that applied to members of the RCMP at the time of enactment of the *PSSRA*. The blanket prohibition of associational activity in pursuit of workplace goals imposed by P.C. 1918-2213 unquestionably violates s. 2(*d*) of the *Charter*. The implementation of this labour relations regime was made possible by the exclusion of the RCMP members from the labour relations regime governing the federal public service under the *PSSRA*.

130 Although they originated from different legal sources, the *PSSRA* exclusion and P.C. 1918-2213, working together, constituted a labour relations regime that was designed to interfere with the right to freedom of association of RCMP members. The *PSSRA* exclusion cannot be viewed in the abstract, independently from the Order in Council. These two prongs of the predecessor labour relations regime shared a common purpose. They were both intended to deny to RCMP members the constitutional exercise of their freedom of association. Like P.C. 1918-2213, para. (*e*) of the definition of "employee" in s. 2(1) [page71] of the *PSSRA*, now re-enacted as para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA*, is tainted by an improper purpose and breaches s. 2(*d*) of the *Charter*.

131 The purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA*, viewed in its historical context,

thus violates s. 2(*d*) of the *Charter*. The *PSSRA* and, later, the *PSLRA* established the general framework for labour relations and collective bargaining in the federal public sector. A class of employees, the members of the RCMP, has, since the initial enactment of this regime, been excluded from its application in order to prevent them from exercising their associational rights under s. 2(*d*). Thus the issue to be addressed is whether the purpose of excluding a specific class of employees from the labour relations regime impermissibly breaches the constitutional rights of the affected employees. The issue is not whether Parliament must impose a new statutory labour relations regime in the presence of a legislative void.

132 Paragraph (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* excludes every person "who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members".

133 Before 1967, the concept of collective bargaining was unknown to the federal public service generally and, of course, to the RCMP specifically. Parliament adopted the *PSSRA* to implement a process of collective bargaining in the federal public service (Rootham, at p. 37; R. Caron, *Employment in the Federal Public Service* (loose-leaf), at para. 1: 200; J. C. Anderson and T. A. Kochan, "Collective Bargaining in the Public Service of Canada" (1977), 32 *Relat. ind.* 234, at p. 234). The *PSSRA*'s successor, the *PSLRA*, reflected a similar commitment to collective bargaining (see the preamble of the *PSLRA* and Advisory Committee on Labour Management [page72] Relations in the Federal Public Service, *Working Together in the Public Interest* (2001), at p. 14).

134 The exclusion of RCMP members from the *PSSRA* in 1967 - the only vehicle available for meaningful collective bargaining in the federal public service - was intended to prevent them from engaging in collective bargaining. The then-Commissioner of the RCMP acknowledged this in correspondence to the Solicitor General of Canada in 1980, stating: "There is no enabling legislation which allows members to collectively bargain and we must infer that Parliament has not intended that members of the Force have that right" (see A.F., at para. 106).

135 The *PSSRA*'s successor, the *PSLRA*, reduced the categories of excluded public servants. RCMP members, however, continued to be excluded in identical terms as under the *PSSRA*, and no other statute permitted RCMP members to engage in a process of collective bargaining (*Delisle*, at para. 85, per Cory and Iacobucci JJ., dissenting; R. MacKay, "The Royal Canadian Mounted Police and Unionization", Parliamentary Research Branch, September 3, 2003, at p. 20). Nothing indicated that the purpose of the initial exclusion of RCMP members from collective bargaining had changed: *Interpretation Act*, R.S.C. 1985, c. I-21, at s. 44(*f*); see also *Big M Drug Mart*, at p. 335. Indeed, the *PSLRA* exclusion makes possible the current imposition of the SRRP, which we have found to substantially interfere in both purpose and effect with RCMP members' right to a meaningful process of collective bargaining. Working in tandem with P.C. 1918-2213, the *PSSRA* exclusion had similarly sought to deny the members of the RCMP the exercise of their right to freedom of association. The simple re-enactment of this exclusion in the *PSLRA* did not cure this constitutionally impermissible purpose. The *PSLRA* exclusion is but a part of a constitutionally defective regime of labour relations, designed to prevent the exercise of the s. 2(*d*) rights of RCMP members. We therefore [page73] conclude that the purpose of the *PSLRA* exclusion infringes s. 2(*d*) of the *Charter*.

(2) Summary

136 We conclude that the purpose of the exclusion in s. 2(1) of the *PSLRA* substantially interferes with freedom of association. At this point, we need not consider the effects of the *PSLRA* exclusion independently from those of the imposition of the SRRP as a labour relations regime.

137 This conclusion does not mean that Parliament must include the RCMP in the *PSLRA* scheme. As discussed above, s. 2(*d*) of the *Charter* does not mandate a particular model of labour relations. Our conclusion with respect to the constitutionality of the *PSLRA* exclusion means only that Parliament must not substantially interfere with the right of RCMP members to a meaningful process of collective bargaining, unless this interference can be justified under s. 1 of the *Charter*. For example, it remains open to the federal government to explore other collective

bargaining processes that could better address the specific context in which members of the RCMP discharge their duties.

138 We now turn to whether the infringements of s. 2(*d*) rights caused by the legislative imposition of the SRRP and by the exclusion of RCMP members from the application of the *PSLRA* are justified under s. 1 of the *Charter*.

G. *Are the Limits Imposed on the RCMP Members' Section 2(d) Rights Justified Under Section 1 of the Charter?*

139 Section 1 of the *Charter* permits Parliament to enact laws that limit *Charter* rights if it establishes [page74] that the limits are reasonable and demonstrably justified in a free and democratic society. This requires that the objective of the measure be pressing and substantial, and that the means by which the objective is furthered be proportionate, i.e. that the means are rationally connected to the law's objective, minimally impair the s. 2(*d*) right, and are proportionate in effect (*R. v. Oakes*, [1986] 1 S.C.R. 103; *Health Services*, at paras. 137-39). The onus rests on the party seeking to uphold the limitation of the *Charter* right, and the burden of proof is a preponderance of probabilities (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 137-38 ("*RJR-MacDonald (1995)*"). At the outset, we note that a *Charter*-infringing measure adopted by regulation is undoubtedly "prescribed by law" for the purposes of s. 1 (*Hutterian Brethren*, at paras. 39-40).

140 We have already seen that s. 2(*d*) gives Parliament much leeway in devising a scheme of collective bargaining that satisfies the special demands of the RCMP. Beyond this, s. 1 provides additional room to tailor a labour relations regime to achieve pressing and substantial objectives, provided it can show that these are justified.

141 In their written submissions on s. 1, the parties addressed the limits imposed by s. 96 of the *RCMP Regulations* and para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* together. We do the same.

(1) Is the Objective of Imposing the SRRP Pressing and Substantial?

142 The question at this stage is whether the objective of the infringing measure is sufficiently important to be capable in principle of justifying [page75] a limitation on the rights and freedoms guaranteed by the constitution (*RJR-MacDonald (1995)*, at para. 143). The Attorney General of Canada says the objective of excluding RCMP members from the *PSLRA* and the objective of the *RCMP Regulations* is to maintain and enhance public confidence in the neutrality, stability and reliability of the RCMP by providing a police force that is independent and objective. We conclude that the need for an independent and objective police force constitutes a pressing and substantial objective under s. 1 of the *Charter*.

(2) Are the Means by Which the Objective Is Furthered Proportionate?

(a) *Rational Connection*

143 The government must demonstrate that the infringing measure is rationally connected to its objective. This test "is not particularly onerous" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228; *Health Services*, at para. 148). It is not necessary to establish that the measure will *inevitably* achieve the government's objective. A reasonable inference that the means adopted by the government will help bring about the objective suffices (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 40; *Health Services*, at para. 149). The assessment is a matter of causal relationship.

144 Philosophical, political and social claims are not always amenable to proof by empirical evidence: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 104; *Sauvé*, at para. 18. For this reason, courts have not always insisted on direct proof of a relationship between the infringing measure and the legislative objective, accepting conclusions supported by logic and reason (*RJR-MacDonald (1995)*, at para. 154; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 101). However, this does not relieve the government from establishing that it was at least reasonable to conclude that a causal relationship existed between the *PSLRA*

exclusion and the imposition of the SRRP and the preservation [page76] of neutrality, stability and reliability in the RCMP. As McLachlin J. (as she then was) wrote in *RJR-MacDonald (1995)*, at para. 129:

> While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning.

145 The position of the Attorney General of Canada is that the creation of a separate labour relations regime, free from collective bargaining and unionism, is rationally connected to the goal of ensuring a stable, reliable and neutral police force. In our view, the Attorney General has not established that this is a reasonable inference.

146 First, it is not apparent how an exclusion from a statutorily protected collective bargaining process ensures neutrality, stability or even reliability. The exclusion of RCMP members from the federal public service collective bargaining regime when it was first enacted in 1967 fostered, rather than inhibited, dissatisfaction and unrest within the RCMP. This unrest was what ultimately led to the creation of the SRRP, which was introduced "after R.C.M.P. members began bringing employment-related grievances to the attention of the media and began to complain in public about the absence of mechanisms through which their grievances could be addressed" (Hardy and Ponak, at p. 89).

147 Second, it is not established that permitting meaningful collective bargaining for RCMP members will disrupt the stability of the police force or affect the public's perception of its neutrality. The government offered no persuasive evidence to that effect. Empirical research tends to show the opposite, as does provincial experience with unionized police forces (see, e.g., D. Forcese, "Police Unionism: Employee-Management Relations in [page77] Canadian Police Forces" (1980), 4 *Canadian Police College Journal* 79: "There is nothing inherently disruptive about police unions" (p. 120)). Indeed, the evidence suggests that respecting associational rights has the potential to ensure, rather than undermine, a positive working relationship and therefore enhance labour stability.

148 We conclude that the government has failed to establish a rational connection between denying RCMP members' their s. 2(*d*) right to meaningful collective bargaining, and maintaining a neutral, stable and reliable police force. While this conclusion is sufficient to dispose of the s. 1 analysis, we will nonetheless go on to address the requirement that the limit on the right be minimally impairing.

(b) *Minimal Impairment*

149 At this stage, the question is whether the measure impairs the s. 2(*d*) right as little as possible in order to achieve the government's objective. The government is not required to pursue the least drastic means of achieving its objective, but it must adopt a measure that falls within a range of reasonable alternatives:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ... . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Citations omitted.]

(*RJR-MacDonald (1995)*, at para. 160; see also *Hutterian Brethren*, at paras. 53-55; *Health Services*, at para. 150.)

[page78]

150 The appellants argue that (1) other police forces throughout Canada have access to meaningful collective bargaining regimes without disruption of their neutrality, stability or reliability; and (2) the government has not shown that the RCMP is different in any way that would make collective bargaining more disruptive to their neutrality,

stability or reliability. It follows, they argue, that denying RCMP members any meaningful process of collective bargaining is therefore more restrictive than necessary to maintain the Force's neutrality, stability and reliability.

151 The RCMP "is the only police force in Canada without a collective agreement to regulate the working conditions of its officers" (application judge's reasons, at para. 96). In the rest of the country, the police have the benefit of collective bargaining regimes that provide basic bargaining protections. In Ontario, Quebec, and Newfoundland and Labrador, provincial forces are regulated under their own statutes which provide for, among other things, the establishment of employee associations, the negotiation of collective agreements between management and employee associations, grievance procedures, conciliation and arbitration: *Ontario Provincial Police Collective Bargaining Act, 2006*, S.O. 2006, c. 35, Sch. B; *An Act respecting the Syndical Plan of the Sûreté du Québec*, CQLR, c. R-14; *Royal Newfoundland Constabulary Act, 1992, S.N.L. 1992, c. R-17.* In other provinces, the police are covered by general labour relations statutes, with specific provisions applicable to them. For example, in Saskatchewan, conciliation and arbitration are provided as a means of resolving labour disputes, and restrictions are placed on strikes and lock-outs, pursuant to *The Police Act, 1990*, S.S. 1990-91, c. P-15.01, ss. 83 to 86.

152 Unless it is established that the RCMP is materially different from the provincial police forces, it is clear that total exclusion from meaningful collective bargaining cannot be minimally impairing. A material difference has not been shown. [page79] Moreover, concerns about the independence of the members of the Force could easily be considered in determining the scope of the police bargaining unit under schemes like the *PSLRA*, without requiring total exclusion from bargaining in the present regime. For example, s. 4 of the *Labour Code*, CQLR, c. C-27, restricts the membership and affiliations of municipal police associations.

153 The only argument advanced by the Attorney General of Canada in order to support the view that the RCMP's particularities warrant the exclusion of members from the *PSLRA* and the imposition of the SRRP is that in the event of an unlawful strike or other debilitating job action by other police forces, or other security-related workers such as prisons guards, it could ultimately be left to the RCMP to provide policing services to the public affected by those events. While the RCMP's mandate differs from that of other police forces, there is no evidence that providing the RCMP a labour relations scheme similar to that enjoyed by other police forces would prevent it from fulfilling its mandate. Again, no material difference in RCMP labour relations has been shown.

H. *Remedy*

154 Within the impugned legislative scheme, the imposition of the SRRP and the exclusion in s. 2(1) of the *PSLRA* deny members of the RCMP the right to any meaningful process of collective bargaining. And, while s. 2(*d*) does not protect the right to any *particular* process of collective bargaining, it does protect the right to a *meaningful* process. Having found that s. 96 of the *RCMP Regulations* and para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringe the freedom guaranteed to RCMP members under s. 2(*d*) of the *Charter*, and that these provisions cannot be saved under s. 1, we conclude that the appropriate remedy is to strike down the offending provision of the *PSLRA* [page80] under s. 52 of the *Constitution Act, 1982*. We would similarly strike down s. 96 of the *RCMP Regulations* were it not repealed.

155 The Attorney General of Canada argues that this conclusion would go against the proposition, which we accept, that s. 2(*d*) does not guarantee a right to a particular labour relations process. The Attorney General argues that striking down the offending provision of the *PSLRA* would constitutionalize the labour relations process set out in that Act.

156 This argument misconstrues our conclusion. We do not conclude that the *PSLRA* process is constitutionalized, but rather that the existing labour relations scheme and the purpose motivating the *PSLRA* exclusion are inconsistent with the *Charter* and fail under s. 52 of the *Constitution Act, 1982*. This conclusion does not mandate a particular labour relations regime or bar the federal government from pursuing an avenue other than the *PSLRA* to govern labour relations within the RCMP. Should it see fit to do so, Parliament remains free to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in s. 2(*d*) and s. 1 of the *Charter*.

VII. Conclusion

157 We would allow the appeal, with costs to the appellants throughout, and answer the constitutional questions as follows:

1. Does s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

Yes.

[page81]

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

3. Does para. (*d*) of the definition of "employee" at s. 2(1) of *Public Service Labour Relations Act*, S.C. 2003, c. 22, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

Yes.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

158 Had s. 96 of the *RCMP Regulations* not been repealed, it would have been declared to be of no force or effect. Paragraph (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* is of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*. We suspend the declaration of invalidity for a period of 12 months.

The following are the reasons delivered by

ROTHSTEIN J. (dissenting)

I. Introduction

159 In a constitutional democracy, the judicial branch of government is entrusted to rule on whether laws enacted by the legislature pass constitutional muster. But this Court's rulings are not subject to review. Its rulings are binding on the legislative branch, unless that branch invokes the rarely resorted-to s. 33 of the *Canadian Charter of Rights and Freedoms* to provide that its legislation will operate notwithstanding breaches of certain constitutional rights. This means that constitutional [page82] decisions of this Court have the power to freeze matters in time and restrict Parliament's ability to change course in the future, where facts and policy imperatives may suggest or require a different approach.

160 It is fundamental, therefore, that the judicial and legislative branches of government have respect for the role and responsibility of the other. The legislative branch must respect the decisions of the courts and comply with them. Courts must equally respect the role of the democratically elected legislature and its policy choices. The judicial branch must not exercise its great constitutional power to make rulings that are not firmly rooted in the text, context, and purpose of Canadian constitutional law. While a purposive approach to *Charter* interpretation has long been accepted, in the words of Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, "it is important not to overshoot the actual purpose of the right or freedom in question". See also *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 19, per Abella J.

161 Courts must be especially cautious when dealing with questions of socio-economic policy. Just as the government and legislature must respect the courts' expertise as judicial bodies, so too must courts appreciate that they are not best placed to make determinations as to which specific social or economic policy choice is most

appropriate. The evaluation and implementation of social and economic policy require flexibility and fine-tuning. Courts should not expand *Charter* rights in such a way as to prevent governments from responding to new information or changing social and economic conditions.

[page83]

162 In my respectful opinion, the majority has departed from these core principles of constitutional law in this case. I am compelled to dissent. The courts must respect that concerns such as maintaining "the balance between employees and employer" and attaining "equilibrium" in labour relations (see majority reasons, at paras. 72 and 82) fall within the proper role and expertise of governments and legislatures, not the judiciary.

163 Parliament enacted legislation creating a non-adversarial labour relations scheme for the Royal Canadian Mounted Police ("RCMP") - the Staff Relations Representative Program ("SRRP") - that balances the competing policy interests arising in the context of a national police force. RCMP members democratically elect Staff Relations Representatives ("SRRs") to represent their interests directly to management. Members can also communicate their workplace concerns to SRRs through independent employee associations, such as the appellant associations. The evidence is that, as the constitutional protection of freedom of association now guarantees, SRRs make collective representations on behalf of RCMP members and management considers those representations in good faith.

164 This labour relations model permits RCMP members to exercise their freedom of association under s. 2(*d*) of the *Charter*. That the SRRP does not mimic the adversarial, Wagner model of labour relations prevalent in much labour legislation in Canada is of no consequence for constitutional purposes: *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 44-47. The majority in *Fraser* rejected the submission that *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, "constitutionalizes a full-blown Wagner system of collective bargaining" and clarified that *Health Services* "unequivocally [page84] stated that s. 2(*d*) does not guarantee a particular model of collective bargaining or a particular outcome": paras. 44-45; *Health Services*, at para. 91.

165 The majority now reverses this Court's recent interpretation of s. 2(*d*) of the *Charter* in both *Fraser* and *Health Services* so as to effectively compel a single model of collective bargaining. I cannot agree with such an approach. The evolution of labour relations in Canada will surely inspire further legislative changes to address changing circumstances and accumulated experience. This Court should not interpret s. 2(*d*) so as to stymie future reform and progress in this area. As acknowledged in *Health Services*:

> ... it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years ([P. A. Gall,] "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword", in J. M. Weiler and R. M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), 245, at p. 248). [para. 91]

166 Moreover, the majority in *Fraser* articulated the test for constitutionality under s. 2(*d*), in the labour relations context: whether the government action "makes meaningful association to achieve workplace goals effectively impossible" (para. 98). Now, less than four years after that case was decided, the majority resiles from this test as it does not justify the conclusion it wishes to reach.

167 I respectfully disagree with this constitutional reversal. As this Court has indicated, once rendered, constitutional decisions should only be subject to change or reversal under limited and rigorous conditions: *Fraser*, at para. 57. In [page85] *Fraser*, this Court issued a stern warning: "The seriousness of overturning ... recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated" (*ibid.*). The majority in this case does precisely that.

II. Facts and Judicial History

168 I accept, in general terms, the majority's summary of the facts and lower court decisions in this case. Where I disagree, it is noted in the analysis below.

III. Analysis

A. *Freedom of Association*

169 This Court has frequently been called upon to determine the ambit of freedom of association under s. 2(*d*) of the *Charter*. At its core, freedom of association protects an individual's ability "to act in association with others to pursue common objectives and goals" (*Fraser*, at para. 25). However, the way in which this general proposition applies in the labour relations context has been hotly contested. In its 2007 decision in *Health Services*, the Court departed from earlier decisions and found that s. 2(*d*) encompasses a right to collective bargaining that "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation": para. 90. The majority of the Court affirmed this conclusion in 2011 in *Fraser*.

170 Since the decisions in *Health Services* and *Fraser*, employees have had a constitutional right to make collective representations, which their employer must consider in good faith. The test to find an infringement of s. 2(*d*) in the labour relations context is "whether the impugned law or state [page86] action has the effect of making it impossible to act collectively to achieve workplace goals" (*Fraser*, at para. 46). Collective bargaining is protected, but only "in the minimal sense of good faith exchanges" (*Fraser*, at para. 90; see also para. 42).

171 Now, less than four years after *Fraser* was decided, the majority in this case expands freedom of association, requiring much more than good faith negotiations. It finds that the only way to have meaningful collective bargaining is through a process which "provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests" (para. 5). The majority also retreats from the effective impossibility test. Instead, it finds that s. 2(*d*) will be infringed by "[a] process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power" (para. 71 (emphasis added)).

172 By relaxing the standard required to find a s. 2(*d*) violation, the majority takes freedom of association far beyond the ordinary meaning of those words and well beyond what the concept of "association" has been held to include. *Health Services* and *Fraser* provide that s. 2(*d*) protects the right to associate to make collective representations and to have employers consider those representations in good faith. The essential feature of a labour relations regime that allows employees to exercise their constitutional right to make meaningful collective representations on their workplace goals is representativeness: the voice that speaks on behalf of employees must represent their interests and be ultimately accountable to them. Representativeness is the constitutional imperative required in order to ensure that s. 2(*d*) rights are protected in the collective bargaining context, nothing more. Only if legislation impairs the right of employees to have their interests advanced honestly and fairly [page87] will that legislation be constitutionally suspect. That is not the case here.

173 Facially, the type of right described in s. 2(*d*) does not impose obligations on third parties. However, freedom of association has now been interpreted as imposing obligations on others; in *Health Services* and *Fraser*, this Court found that employers are obliged to engage in good faith collective bargaining. Nonetheless, courts must be particularly cautious when considering an expansion of a constitutional right that would impose a constitutional obligation on a third party. The expansion of such rights, although beneficial for some, comes at the expense of the freedom of others, a trade-off that requires careful deliberation. This is particularly true given that such a decision removes matters from the scope of Parliament's powers to adjust the balance between parties as a matter of ordinary lawmaking.

174 The interpretation of a *Charter* right must be principled and must not be so divorced from the text of the provision as to depart from the foundation of the right. When, in *Health Services* and *Fraser*, this Court recognized a derivative right to collective bargaining stemming from the purpose of s. 2(*d*) of the *Charter*, it extended

constitutional rights beyond what had previously been accepted. To now add to that shaky foundation a further, attenuated addition - a derivative right onto the derivative - makes for an unsound and indefensible structure.

175 The language used by the majority in this case creates greater rights, and imposes greater restrictions on the government, than either a plain or generous reading of s. 2(*d*) can logically provide, and rights beyond those that have been recognized [page88] in the context of s. 2(*a*), (*b*) and (*c*) of the *Charter*. There is no basis in s. 2(*d*) for such a departure.

B. *A Meaningful Process of Collective Bargaining*

176 What the majority proposes as a meaningful process of collective bargaining under s. 2(*d*) of the *Charter* now requires more than that "the parties ... meet and engage in meaningful dialogue": *Fraser*, at para. 41; see also *Health Services*, at para. 101. Now the majority says that the only way to achieve meaningful collective bargaining is through a process that "provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests".

177 I would not dispute that individuals may generally form or join associations of their choosing and may have those organizations be independent from other entities. However, *Health Services* and *Fraser* construed s. 2(*d*) in a particular context: association for the purposes of engaging in meaningful collective bargaining. Neither the choice of the organization representing employees for bargaining purposes nor the independence of that association are necessary to ensure that meaningful collective bargaining can occur.

178 Choice and independence are central to Wagner-style labour relations. As will be explained, by selecting choice and independence as constitutional requirements for meaningful collective bargaining, the majority mandates an adversarial model of labour relations and precludes others which may be just as or more effective in contributing to meaningful collective bargaining.

[page89]

(1) Choice

179 Individuals have the constitutional right to form or belong to lawful associations of their choosing and there is nothing in the record before us to suggest that such a right has been infringed. RCMP members are free to join the appellants or other employee associations to seek fulfillment, autonomy, and self-actualization. Through those organizations they can participate in lobbying, educational, social, and other incidental activities. Those associations can also seek to advance the workplace interests of RCMP members by communicating with SRRs on their members' behalf.

180 However, the appellants and the majority in this appeal propose that freedom of association extends beyond the right of employees to form and belong to an association of their choosing and includes the right to choose the association to represent employee interests for bargaining purposes and with which the employer must bargain. However, recognizing that the Wagner model in place in workplaces across Canada imposes limits on choice, the majority does not suggest that freedom of association protects an *individual's* right to choose the association to which he or she wishes to belong. Instead, the majority limits the constitutional right to the ability of employees, *en masse*, "to form and bargain through an association of their own choosing" (para. 110).

181 The majority also acknowledges that even the collective right to bargain through an association of the group's choosing will not always be protected. For example, designated bargaining models such as the one established under Ontario's *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5, "may be acceptable" (para. 95), even though they provide the employee group with no choice of association. The bargaining agent for the group is designated. In order to legitimize its restriction on choice, the majority restates its requirement as a [page90] vague constitutional right to the "degree of choice ... that enables employees to have effective input into the selection of [their] collective goals" (para. 83).

182 However, logically, effective input into the selection of collective workplace goals is not a matter of the choice of representative; it is a matter of having the right to choose the priorities that should be advanced on behalf of employees. The majority states that employees' ability "to set and change collective workplace goals" is one hallmark of employee choice (para. 86). But the ability to have one's views represented in shaping workplace goals is more than a hallmark: it is the key element in meaningful collective bargaining. What the majority's restatement describes is a right to fair representation by a spokesperson, not a right to choose that representative.

183 In the labour relations context, "choice" is ill suited as a criterion upon which to base the constitutional protection afforded to collective bargaining. There are schemes in place throughout the country, based on the Wagner model, that provide a mechanism by which a single employee representative association is designated for the purposes of bargaining with the employer, under the principle of majoritarian exclusivity. This principle mandates that the employer recognize an exclusive bargaining agent selected by a majority of employees to represent their interests within a given industry, sector, or business. However, there may be a large minority of employees whose preferred representative is not selected. Under such a model, their freedom of association will be constrained not only as to their choice of representative association, but also as to their ability to establish or join a rival association to bargain with management. Choice is similarly circumscribed for so-called Rand employees, who are denied the choice of paying union dues and refusing representation by the bargaining [page91] agent. Such a limit on choice has been recognized as a valid limit on employees' freedom of association, since permitting unbounded choice of association would undermine the collective bargaining strength of employees and render the process of good faith bargaining unworkable for employers: see *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209.

184 The majority defines "choice" in terms of four hallmarks: "the ability to form and join new associations, to change [employee] representatives, to set and change collective workplace goals, and to dissolve existing associations" (para. 86). The majority asserts that a designated bargaining model, such as Ontario's *School Boards Collective Bargaining Act, 2014*, where specific bargaining agents are legislatively imposed, allows employees to "retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining" (para. 95). However, this model lacks three of the so-called hallmarks of choice: Ontario teachers cannot form and join new associations to bargain with employers, they cannot change the legislatively imposed bargaining agents that represent them, and they cannot dissolve those bargaining agents. The hallmark that this model does possess is what I have termed "representativeness": the ability to set and change collective workplace goals (that is, the ability of teachers to have their interests represented). This suggests that the constitutional standard of s. 2(*d*) is likely met. The majority's acceptance of the Ontario *School Boards Collective Bargaining Act, 2014* model undermines its argument that choice is an essential element of freedom of association.

[page92]

185 Even the Wagner model does not rely exclusively on choice and independence to protect employee interests. The statutory provisions and associated case law recognize the central importance of representativeness by providing a number of protections for employee interests unrelated to choice or independence *per se*.

186 Under the Wagner model of labour relations, the association designated as an exclusive bargaining agent cannot discriminate in carrying out its duties towards the employees it represents or go off in pursuit of its own agenda. Legislation and jurisprudence have evolved to guard against abuses of power by single bargaining agents, by imposing upon those agents a duty to represent all employees, even those who choose not to become "members" of that association: see the discussions in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, at pp. 518-20; and *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, at pp. 1309-15. It is the jurisprudence and legislation that ensures that the bargaining agent is representative of the interests of its constituency in whatever work that it undertakes on their behalf, whether the individual employees have chosen it or not.

187 Similarly, a designated bargaining model, like Ontario's *School Boards Collective Bargaining Act, 2014*, only

leads to meaningful collective bargaining where there are statutory safeguards built in to ensure that the designated bargaining agent represents the interests of all employees and is ultimately accountable to them.

188 The majority claims that choice and independence "overlap considerably" with representativeness and that the difference between them "is more semantic than real" (paras. 101 and 103). With respect, such blurring of distinct concepts [page93] only creates confusion and ambiguity. Choice and independence may be a means by which representativeness is obtained, but there may be others, such as the statutory safeguards discussed above.

189 A statutorily designated bargaining model such as the scheme established by the Ontario *School Boards Collective Bargaining Act, 2014*, can ensure that employees' interests will be effectively represented to management even where the employees do not choose their individual representatives or the system in which this representation takes place. Section 2(*d*) of the *Charter* requires that bargaining agents represent the interests and workplace concerns of employees, what I call representativeness. The method by which the representative is determined is not a constitutional diktat.

190 Mandating choice and independence as constitutional requirements forecloses an entire class of collaborative bargaining approaches that could be designed to address particular contexts in which a Wagner model of labour relations may be ill suited.

191 In the case at bar, the context of a national police force led to the adoption of a statutory collaborative labour relations model. Within that model, RCMP members democratically select their representatives and those representatives have a statutory duty to represent employee interests. They can be replaced if they fail to uphold that duty.

192 What protects the interests of employees under the Wagner model, a designated bargaining model such as that found in the Ontario *School Boards Collective Bargaining Act, 2014* or the RCMP's SRRP scheme is the obligation of representatives to act honestly and fairly in putting forward [page94] the views of the employees they represent and the establishment of a mechanism to remove those representatives if they do not.

193 Neither the choice of the associational framework (*Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 33) nor the selection of a particular bargaining agent is a necessary component of freedom of association. Rather, because employees have a right to a "meaningful proces[s] by which they can pursue workplace goals" (*Fraser*, at para. 117), the voice with which they communicate with their employer as a collective must be representative of their interests. Provided that the spokespersons through whom employees make representations to their employer have a duty to represent the interests of all employees and that there is a means to hold those representatives to account, the workers' "constitutional right to make collective representations and to have their collective representations considered in good faith" is met (*Fraser*, at para. 51). Representativeness is what *Fraser* mandates and there is no justification to embark upon the imposition of unnecessary constitutional constraints as the majority seeks to do in this appeal.

(2) Independence of the Association

194 The majority says that independence of the employee association from management is constitutionally required. However, it concedes that independence may not be absolute. The argument is that independence is sufficient if it permits the activities of the association to be "aligned with the interests of its members" (para. 83).

195 With respect, the relevant question is not whether a legislatively prescribed association or process is independent in the sense that it segregates employees from management, but whether that process prevents employees, such as RCMP members, from associating to advance their collective workplace goals. To reiterate, the touchstone is representativeness.

[page95]

196 The requirement that an employee association be independent from the employer originates from the *Wagner Act* (*National Labor Relations Act*, 49 Stat. 449 (1935)) - it did not pre-exist it. In recounting the history of labour relations in Canada, the majority of this Court in *Health Services* acknowledged that it was the *Wagner Act* that "explicitly recognized the right of employees to belong to a trade union of their choice, free of employer coercion or interference" and that "imposed a duty upon employers to bargain in good faith with their employees' unions": para. 56.

197 In the years preceding the enactment of the *Wagner Act*, "company unions" - that is, employee associations featuring some degree of employer influence - were plentiful in both the United States and Canada: L. S. MacDowell, "Company Unionism in Canada, 1915-1948", in B. E. Kaufman and D. G. Taras, eds., *Nonunion Employee Representation: History, Contemporary Practice, and Policy* (2000), 96, at p. 97. Though some company unions were contrived by employers to thwart legitimate worker representation, other non-union plans were designed to actively foster representation: see D. G. Taras, "Why Nonunion Representation Is Legal in Canada" (1997), 52 *Relat. ind.* 763.

198 In 1935, Senator Robert Wagner introduced in the U.S. Senate the bill that would become known as the *Wagner Act*. This Act effectively abolished company unions: B. E. Kaufman, "Accomplishments and Shortcomings of Nonunion Employee Representation in the Pre-Wagner Act Years: A Reassessment", in Kaufman and Taras, 21, at p. 26.

199 Canada implemented its own version of the *Wagner Act* in 1944: the *Wartime Labour Relations Regulations*, P.C. 1003. This Order in Council, made under the authority of the *War Measures Act*, R.S.C. 1927, c. 206, incorporated the Wagnerian principle that employee associations be independent from the employer. At the end of the war, the Wagner model was continued in Canada by the federal *Industrial Relations and Disputes Investigation Act*, [page96] S.C. 1948, c. 54, and similar legislation enacted by most of the provinces: R. J. Adams, "A Pernicious Euphoria: 50 Years of Wagnerism in Canada" (1995), 3 *C.L.E.L.J.* 321, at p. 328.

200 Thus, the *Wagner Act* consciously introduced the notion that trade unions should be independent from the employer for the purposes of collective bargaining. Canadian labour legislation, largely modelled on the *Wagner Act*, likewise imported this principle of independence. The notion of independence gained popularity in this particular historical context. It is not however an inherent aspect of collective bargaining.

201 But even if independence were an essential feature of meaningful collective bargaining, the SRRP satisfies two of the majority's indicia of independence: the freedom to elect employee representatives and control the association's financial administration and activities. RCMP members democratically select the SRRs who will bring their workplace goals to management for consideration, and the Staff Relations Sub-Representatives ("sub-SRRs") have the power to replace those SRRs who are not representative of employee interests. The SRRP administers its own budget. RCMP members cannot change their bargaining representative (the SRRP) without the consent of management and the government. But it is certainly open to them to change their SRRs if they are of the view that their collective workplace goals are not being adequately represented by the SRRP. Ontario teachers similarly cannot change their bargaining representatives without legislative approval. If the Ontario teachers' bargaining statute meets the majority's constitutional requirements, the SRRP must also meet those requirements.

202 The majority states that "a lack of independence means that employees may not be able to advance their own interests, but are limited to picking and choosing from among the interests management permits them to advance" (para. 89). Similarly, [page97] the appellants suggest that employee representatives working within a cooperative employee-management labour relations model cannot properly represent the interests of employees. According to them, employees who are dependent on management for salary increases, performance appraisals, and promotions will be reluctant to put forward employee interests that may not be looked upon favourably by management.

203 However, both the majority and the appellants ignore representativeness. Representatives must fairly

represent the interests of all employees. Any representative who limits representation based on what management permits or who places their own employment interests above the interests of all employees will be held accountable for his or her own actions. So long as employees have recourse to ensure that their views are put forward to management and that their representatives are working in their interests, the labour relations process will not be dominated by management and employees will have the means to work towards their collective workplace goals.

204 Thus, the Wagner model is by no means the only way to achieve meaningful collective bargaining: alternative schemes could be equally or more effective. It is not the role of this Court to preclude legislative reform by entrenching key features of a particular system and shoehorning them into the fundamental *Charter* guarantee of freedom of association.

C. *Adversarialism*

205 By requiring independence, and defining it as it does, the majority constitutionalizes adversarial labour relations, a central feature of the Wagner model. As explained above, s. 2(*d*) of the *Charter* currently protects a process whereby employees may make representations and have them considered in good faith by employers. Nothing in that requirement mandates that employees must [page98] make their representations through an adversarial advocate rather than through a collaborative model.

206 Research has suggested that adversarialism generates outcomes that are less beneficial for employees than systems involving labour-management cooperation: see R. J. Adams, "Public Employment Relations: Canadian Developments in Perspective", in G. Swimmer, ed., *Public-Sector Labour Relations in an Era of Restraint and Restructuring* (2001), 212, at p. 221. Critics have decried the inherently adversarial nature of the Wagner model of labour relations as inconsistent with modern "high performance workplace" systems, and have noted that the Wagner model's encouragement of conflict may be associated with lower levels of performance: Adams, "A Pernicious Euphoria", at pp. 344-45. Roy J. Adams has noted the negative consequences of the Wagner model, including the model's encouragement of employee exclusion from managerial decision making: *ibid.*, at pp. 342-45.

207 It is a mistake to view an adversarial approach as essential to meaningful collective bargaining. Where there are discussions between employees and management allowing employee concerns to be taken into account in future planning, a collaborative form of negotiation can be better at furthering workplace goals than an adversarial negotiation that takes place after managerial planning and decisions have been made and positions hardened.

208 No labour relations model is perfect. That is why governments need flexibility to select the appropriate model in any given situation and to adapt to changing circumstances. The majority concedes that there "has been ongoing debate on the desirability of various forms of workplace representation and cooperation and on their coexistence" [page99] and that "[t]he search is not for an 'ideal' model" (paras. 96-97). The majority also acknowledges that "nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways" (para. 97). I agree that s. 2(*d*) has not been interpreted to impose a particular type of labour relations framework, until now.

209 By making the independence of an employee association a necessary condition to satisfy s. 2(*d*) of the *Charter*, the majority ensures that conflict-based rather than collaborative schemes will be inevitable. To say that parties are still free to cooperate with each other is unrealistic once this Court has entrenched a requirement for a Wagner-style scheme, which inescapably leads to confrontation and posturing. A bargaining agent that takes a cooperative approach to negotiating with an employer will be vulnerable to the same criticisms leveled by the appellants here - that they have become one with management and are not identifying and advancing employee workplace goals free from management influence or interference. Inevitably, bargaining agents will have to embrace a confrontational rather than cooperative style of negotiations, not only to justify their existence but to keep more aggressive, rival bargaining agents at bay. The result will be to widen differences between employee and employer bargaining positions and make negotiation and resolution more difficult to achieve.

210 Implicit in the majority's articulation of meaningful collective bargaining is the view that management is the

enemy of the employees and the only way in which employees may improve their position is through adversarial confrontation. [page100] However, a collaborative model that provides an opportunity for employees to have input and influence at the strategic planning stage of decision making can enhance rather than undermine employee control over their working conditions. Collaborative models are consistent with the majority's holding in *Health Services*, that the employees' right to collective bargaining "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation" (para. 90 (emphasis added)).

211 To hold that the derivative right to collective bargaining in s. 2(*d*) of the *Charter*, as determined in *Fraser*, mandates that workplace associations be structurally independent of the employer constitutionalizes an adversarial model of labour relations and effectively excludes collaborative models. To enshrine an adversarial model of labour relations as a *Charter* right reverses this Court's findings in *Health Services* and in *Fraser* that s. 2(*d*) does not guarantee a particular model of collective bargaining or a particular outcome: *Fraser*, at para. 45; *Health Services*, at para. 91. The majority in *Fraser* further noted that "the logic of *Dunmore* and *Health Services* is at odds with the view that s. 2(*d*) protects a particular kind of collective bargaining": para. 46. Less than four years after *Fraser*, the majority reverses not only the Labour Trilogy (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460), *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, and *Delisle*, but also *Health Services* and *Fraser* in order to arrive at the result it seeks in this case. In doing so, the majority ignores the caution given in *Fraser*:

[page101]

> The seriousness of overturning two recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated. This is particularly so given their recent vintage. *Health Services* was issued only four years ago, and, when this appeal was argued, only two years had passed. [para. 57]

212 As this Court recently observed in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101: "Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies" (para. 38). Certainty in the law is essential: it permits Canadians to know what to expect from the courts, their governments, and each other. It is open to this Court to depart from its previous jurisprudence in some circumstances, but the importance and value of certainty demand that such departures be made infrequently and only where they have been carefully and explicitly considered to ensure that the departure is justified and that the implications of such a deviation from the normal rule of *stare decisis* have been fully and carefully analyzed. The majority has failed to do so and its departure from authoritative precedents does not satisfy this high standard.

D. *Is It Effectively Impossible to Achieve Workplace Goals?*

213 In *Fraser*, the test for infringement of s. 2(*d*) of the *Charter* was stated to be whether the government action or legislation made it *effectively impossible* for employees to join in meaningful association to make representations to the employer and to have their views considered in good faith: para. 98. There is no escaping the majority's decision in that case; it referred to the test of impossibility - either effective or substantial impossibility - *no less than 12 times*, tracing its origins in the decisions of *Dunmore* and *Health Services* and then applying it to the case before the Court: see *Fraser*, at paras. 31-34, 38, 42, 46-48, 62 and 98. Despite the emphatic finding in *Fraser* that "the question is [page102] whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals" (para. 46 (emphasis added)), less than four years later, the majority now says that "the majority in *Fraser* adopts substantial interference as the *legal test* for infringement of freedom of association": para. 75 (emphasis added). With respect, by resiling from a test so recently established and refusing to acknowledge this departure, the majority undermines the legitimacy of its approach in this appeal.

214 The majority attempts to excuse its departure from the *Fraser* standard by asserting that the Court in that decision used "effective impossibility" to describe the effect of a legislative scheme but used "substantial interference" as the legal test for infringement of s. 2(*d*). Inconveniently for my colleagues, at para. 46, the majority

in *Fraser* unambiguously states: "In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals" (emphasis added).

215 Such clear language is now dismissed by the majority as "unnecessarily complicate[d]" (para. 77). However, the real complication is that the language in *Fraser* does not support the majority's revised s. 2(*d*) standard. There is no doubt that the majority in *Fraser* firmly established a high threshold for infringement of the derivative right to collective bargaining. A labour relations regime that permits representatives to advance the interests of employees to the employer, who must in turn consider and discuss these representations in good faith, will not meet this threshold and therefore will not infringe s. 2(*d*) of the *Charter*.

[page103]

216 The majority, however, now lowers this threshold by adopting a substantial interference test, stating that "the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(*d*) seeks to achieve, so as to substantially interfere with meaningful collective bargaining" (para. 72). With respect, the majority's numerous references to balance and equilibrium blur the true effect of its decision: to impose adversarial collective bargaining on the complex labour negotiation process.

217 Despite *Fraser*'s repeated articulation of the effective impossibility test, the majority now reverts to a less stringent test in order to reach its desired outcome. It finds that the SRRP substantially interferes with the ability of RCMP members to associate to achieve collective workplace goals because the collaborative scheme does not achieve the employer-employee balance it says s. 2(*d*) of the *Charter* now requires. Fairness and certainty require that where settled law exists, courts must apply it to determine the result in a particular case. They may not identify a desired result and then search for a novel legal interpretation to bring that result about.

E. *Application to the Facts of This Case*

(1) The Imposition of the SRRP

218 The majority finds that in both purpose and effect, the imposition of the SRRP violates s. 2(*d*) because RCMP members "are represented by an organization they did not choose and do not control", the SRRP is not independent of management, and the "process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining", leaving members in "a disadvantaged, vulnerable position" (para. 106). I respectfully disagree. The correct standard against [page104] which the SRRP should be evaluated is whether the process renders meaningful collective bargaining effectively impossible. Collective bargaining will be meaningful where the employee association is representative of employee interests. SRRs are able to fairly represent employee interests to management and the employer, in turn, considers their representations in good faith. Whether the *Fraser*-mandated effective impossibility test or even the majority's new substantial interference test is applied, it is clear that the SRRP does not infringe s. 2(*d*) of the *Charter*.

(a) *Representativeness*

219 RCMP members did not choose their associational framework for bargaining purposes. But this is not the crucial issue. Rather, this Court must consider whether the labour relations structure that was imposed by s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 (repealed and replaced by SOR/2014-281), enables RCMP members to have confidence in their spokespersons and whether those representatives have a duty to represent the interests of all employees and can be held to account. Management then has a constitutional obligation to consider in good faith the representations made on behalf of RCMP members: see *Fraser*, at para. 99.

220 The SRRP must represent "the interests of all members of the Royal Canadian Mounted Police" (SRRP Constitution, s. 1 (emphasis added)) and must "facilitate [the] participation" of RCMP members "in the development and implementation of Force policies and programs" (SRRP Constitution, s. 2; see also SRRP Agreement, s. 1). RCMP members within a particular division or zone elect SRRs and sub-SRRs for that area (SRRP Constitution, ss. 4 and 16; SRRP Agreement, s. 3), and any RCMP member who is not in a conflict of interest may run for election. SRRs serve for a two-year term. They must "[c]onsult with members and/or their [page105] representatives on

issues affecting or potentially affecting them" (SRRP Constitution, s. 13(C)(3)), while sub-SRRs must "[e]stablish and maintain good working relations and open channels of communication with members, supervisors and the area commander" (SRRP Constitution, s. 14(B)(1)). The program is designed, in part, to "facilitate effective representation and participation at all appropriate levels" (SRRP Constitution, s. 3(D)). All sub-SRRs in a given division, zone or designated area may unanimously declare that they do not have confidence in an SRR, removing that SRR from office. Accordingly, SRRs can be held to account to ensure that they represent employee interests.

221 RCMP members may also form and join independent employee organizations of their choice, such as the appellant organizations and the Mounted Police Members' Legal Fund: see *Delisle*, at para. 31. These associations are able to submit the concerns of their members about workplace issues to the SRRs and sub-SRRs. The SRRP Constitution specifies that SRRs have the duty to represent members' interests: this includes the duty to "[c]onsult with members and/or their representatives on issues affecting or potentially affecting them that are the subject of discussion in committees, at [the SRRP] Caucus or as part of studies or reviews" (s. 13(C)(3)). Sub-SRRs are similarly responsible for liaising between SRRs and members, and must "alert the SRR and management to emerging issues and concerns requiring redress at their level": SRRP Constitution, s. 14(B)(2).

222 The appellants present some evidence that SRRs do not always engage with independent employee associations. But this does not render the system unconstitutional, as long as the SRRs represent the interests of all employees and can be held [page106] to account. Moreover, if it is the case that some SRRs don't fully represent the interests of the members, the situation can be remedied without abolishing the entire labour relations model and certainly without declaring the scheme unconstitutional.

223 The current SRRP is far removed from the original target of U.S. Senator Wagner's labour bill: "... the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules or regulations without his consent, and which cannot live except by the grace of the employer's whims": explanatory statement by Senator Wagner on February 21, 1935, in the Senate upon introducing bill S. 1958 (79 Cong. Rec. 2368, at 2372), in *Legislative History of the National Labor Relations Act, 1935*, vol. 1 (1949), at p. 1313.

224 Following this Court's decision in *Delisle*, a number of changes were made to the SRRP that, as the trial judge acknowledged, enhanced its autonomy. The Staff Relations Program Officer, chosen by the RCMP Commissioner, was replaced by a Program Director selected by, and accountable to, the SRRP's National Caucus. In 2003, the Commissioner's Standing Orders which had governed the SRRP were replaced with the SRRP Constitution and SRRP Agreement adopted the previous year. Further, SRRs are able to challenge the conduct of RCMP management, in the labour relations context, in the courts. The companion case *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125, is an illustration of that fact.

225 Should management or the government now attempt to unjustifiably strip away RCMP members' representational rights, the requirement to bargain in good faith will not be met. In these circumstances, the members will have judicial recourse [page107] to assert their *Charter* right to meaningful collective bargaining.

226 The appellants point out that executive members or leaders of employee associations such as the appellant organizations have been prevented from running as SRRs. The appellants intimate that this is indicative of management interference with freedom of association. However, the evidence is that the SRRP Caucus is responsible for this rule, not management. And nothing precludes other members of the appellant associations from running for SRR positions. Employee associations like the appellants are essentially rivals of the SRRP. Were a Wagner-type model in place for the RCMP, only one of the appellants could succeed in their bid to be the members' bargaining agent. Similar restrictions would apply against holding a leadership role within rival, independent employee associations. Restrictions of this nature reasonably seek to preclude conflicts of interest in the duties and commitments undertaken for competing associations. They do not indicate employer interference with the SRRP.

227 In oral argument, the appellants expressed concerns that financial constraints on the SRRP may limit the efficacy of representation. However, the appellants conceded that there was no evidence that budgetary constraints

had prevented the SRRP from representing members. It may be that a government employer cannot provide an unlimited budget for its collaborative model of labour relations. However, as the appellants know, independent employee associations also face funding limits based on their income from union dues and other sources.

228 On an operational level, the SRRP benefits from a high level of financial autonomy: while the RCMP determines an annual budget for the SRRP, which is approved by managers at the various levels, the National Executive Council ("NEC") [page108] of the SRRP is responsible for managing it (SRRP Agreement, ss. 12 and 14). The Commissioner does not influence, guide, or control the budgetary decisions of the NEC. The SRRP Agreement also contains a procedure through which the SRRP may request additional funding: s. 13.

229 The SRRP allows for meaningful collective bargaining between RCMP members and their employer. The evidence before this Court is that SRRs fairly advance employee interests to management and thus the SRRP meets the constitutional requirement of representativeness mandated under this Court's interpretation of s. 2(*d*).

(b) *The SRRP Does Not Render Collective Bargaining Effectively Impossible*

230 The majority contends that the imposition of the SRRP was designed to thwart association. It says that the SRRP's predecessor program was "openly presented as an alternative to unionization" (para. 108). Yet both the SRRP Constitution and the SRRP Agreement, which continued that program under its current form and name, indicate that the purpose of the SRRP is not to preclude freedom of association. Rather, its purpose is to create a collaborative system of labour relations "governed by the spirit of cooperation, mutual respect and trust in which the Program was conceived" (SRRP Constitution, s. 3(B)) and to ensure "the promotion of mutually beneficial relations" (SRRP Agreement, s. 1). Further, the trial judge found as fact that "the collaboration that occurs between the SRRs and management is extensive and that it is carried out in good faith by everyone involved": *(2009), 96 O.R. (3d) 20*, at para. 31.

231 As an alternative to the formation of an adversarial association, a collaborative labour relations scheme was a reasonable policy choice for a national police force. As noted by the Attorney General of Canada, the RCMP is the only police [page109] force wholly responsible for national security. It can be called upon to play a role when there are strikes among provincial correctional services workers, and may be the only provider of a particular police service in a geographical area. Those dependent upon its security services cannot be left vulnerable during a confrontational work stoppage, or doubt its neutrality during a prison strike. The constitutional inquiry is not whether the SRRP is sufficiently independent or adversarial, but, according to *Fraser*, whether it renders associative activities by RCMP members in order to achieve workplace goals effectively impossible. It plainly does not.

232 The SRRP facilitates association insofar as it is "responsible for representation of the interests of all members of the Royal Canadian Mounted Police", from Constable to Commissioner: SRRP Constitution, s. 1.

233 Democratically elected SRRs and sub-SRRs are tasked with representing RCMP members at all levels of the Force before management. The specific duties of SRRs include providing information, guidance, and support to RCMP members; attempting to resolve workplace issues informally and at the lowest level possible; representing members' interests and ensuring their participation in the overall management of the RCMP; and supporting the effectiveness of the SRRP: SRRP Constitution, s. 13. Sub-SRRs have similar duties, and are also obliged to "liaise between the SRRs and members, dealing with first-level needs and notifying the SRR of emerging issues": SRRP Constitution, s. 14(B). Both SRRs and sub-SRRs are expected to communicate with management at the appropriate level (SRRP Constitution, ss. 13(B) and 14(B)(1); SRRP Agreement, s. 9(a)) and to represent member interests in meetings, committees, and studies: SRRP Constitution, ss. 13(C) and 14(C); SRRP [page110] Agreement, s. 9(b) to (d). These procedures ensure that RCMP members may submit their workplace concerns to management through the SRRP.

234 The SRRP also prescribes duties and obligations for management. For instance, the SRRP Constitution states that "[c]ommunication between Staff Relations Representatives and RCMP management will be conducted openly and honestly" and that "[r]equests for information or assistance should be met in the spirit of cooperation within

reasonable time frames" (s. 3(G)). Management must also respond to SRR and NEC requests and proposals "in a timely and open fashion" (SRRP Agreement, s. 11(b)); grant access to documents necessary for the conduct of SRRP business (s. 11(c)); and "provide rationale for major decisions" (s. 11(d)). And, the trial judge accepted "that RCMP management listens carefully and with an open mind to the views of SRRs in the consultative process established by the SRRP" (para. 68). Viewed together, these duties ensure that management considers the representations of SRRs and sub-SRRs in good faith. It cannot be said that such a process makes it effectively impossible for RCMP members to pursue collective workplace goals.

235 There is evidence of the effectiveness of the SRRP. While the achievement of workplace goals is not protected by s. 2(*d*) of the *Charter*, the fact that the SRRP has been effective in some respects supports a conclusion that the program does not render meaningful collective bargaining effectively impossible. Changes were made to RCMP pensions in response to concerns raised by an SRR. The SRRP was also successful in obtaining an increase both to members' entitled funeral expenses and to [page111] the minimum life insurance coverage for pensioners over 70 years of age, and in resolving inequities related to the Force's relocation program, to name a few examples. The action commenced by Messrs. Meredith and Roach challenging the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393, in the companion case of *Meredith*, indicates that SRRs do bring challenges against the employer in defence of employee interests.

236 *Meredith* deals with issues relating to the Pay Council, which is separate from the SRRP, but which is one of two other bodies forming part of the labour relations regime of the RCMP. Two SRRs sit on the Pay Council to advocate the views of RCMP members on issues that have been identified by the SRRP Caucus or by management. The Pay Council makes recommendations about pay and benefits of RCMP members to the RCMP Commissioner. The Pay Council's objective is that RCMP members receive compensation near the average of the total compensation of the top three comparator police forces in Canada. Between 2000 and 2008, that objective was achieved in all but one year.

237 In *Meredith*, the majority indicates that notwithstanding its finding that the labour relations regime imposed on members of the RCMP infringes freedom of association, the record established that RCMP members used the Pay Council to advance their compensation-related workplace goals: para. 25. With respect, if the scheme in place permits employees to make representations for good faith consideration by management in pursuit of collective workplace goals such as ensuring competitive rates of compensation, there is no principled basis upon which to hold it unconstitutional.

238 The evidence indicates that the labour relations model adopted by Parliament does not make it effectively impossible for RCMP members to achieve their collective workplace goals. Even according to the new test articulated by the majority, [page112] the imposition of the SRRP as a labour relations scheme does not substantially interfere with a meaningful process of collective bargaining for RCMP members.

239 The trial judge ultimately held that the SRRP provides a process of consultation, but not collective bargaining. This conclusion appears to rest on the fact that, despite the process of consultation envisaged by the SRRP, final decisions are made by management: see trial reasons, at paras. 69-70.

240 However, the constitutional right to collective bargaining prescribes no particular model of labour relations and does not necessitate a dispute resolution process. In *Fraser*, this Court held that the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16 ("*AEPA*"), applicable to Ontario agricultural workers satisfied the requirements of collective bargaining under s. 2(*d*) of the *Charter*: para. 117. It is incongruous for this Court to strike down the SRRP, which provides a process of collective bargaining that is more robust than the one contained in the *AEPA* and which was previously upheld by this Court. This inconsistent result is even all the more jarring given the vulnerability of Ontario agricultural workers when compared with the advantageous position of RCMP members, who are "educated, empowered, and organised" (R.F., at para. 86). This is yet further evidence that the majority in this case departs from this Court's recent decision in *Fraser*.

241 The SRRP facilitates "'a process of collective action to achieve workplace goals', requiring engagement by

both parties": *Fraser*, at para. 117. It also involves good faith consideration of employee representations by management. That Parliament chose a collaborative model like the SRRP as a means of facilitating employer-employee engagement for the national police force does not mean that that model has rendered it effectively impossible for RCMP members to achieve collective workplace [page113] goals. The SRRP does not infringe s. 2(*d*) of the *Charter*.

(2) Paragraph (*d*) of the Definition of "Employee" in Section 2(1) of the *PSLRA*

242 The *Public Service Staff Relations Act*, S.C. 1966-67, c. 72 ("*PSSRA*"), was enacted in 1967 and created the first comprehensive collective bargaining rights regime for federal public servants. However, a number of categories of federal public servants were not included in this new regime, including casual employees, employees in managerial or confidential positions, and RCMP members (paras. (*e*), (*g*) and (*j*) of the definition of "employee" in s. 2).

243 In 2003, the *PSSRA* was repealed and replaced by the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 ("*PSLRA*"), which modernized labour relations in the federal public service. Section 2(1) of the *PSLRA* defines "employee" as a "person employed in the public service" subject to a list of exceptions. Paragraph (*d*) states that "a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members" is excluded from the definition of "employee". The result of this provision is that the *PSLRA* labour relations scheme does not apply to RCMP members.[2]

244 The majority finds that para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes RCMP members' rights under s. 2(*d*) of the *Charter*. However, it is evident that it is not [page114] the purpose of the exclusion of RCMP members from the *PSLRA* to interfere with freedom of association nor is the effect of this exclusion to render collective bargaining effectively impossible. Moreover, the appellants' challenge to the exclusion of RCMP members from the federal public service labour relations regime was decisively dealt with in *Delisle*.

245 The majority finds that the exclusion of RCMP members from the definition of "employee" in s. 2(1) of the *PSLRA* was "intended to deny RCMP members the right to form an independent association capable of engaging in a meaningful process of collective bargaining" (para. 126). In other words, the majority concludes that it was Parliament's intent to deny RCMP members' freedom of association. However, in *Delisle*, Bastarache J. found that "para. (*e*) of the definition of 'employee' in s. 2 of the *PSSRA* does not infringe s. 2(*d*) of the *Charter* in its purpose": para. 23.

246 The conclusion of the majority in *Delisle* was that "the purpose of the exclusion of RCMP members is simply to not grant them any status under the *PSSRA*- trade union representation and all it entails - which does not violate the appellant's freedom of association": para. 22, per Bastarache J. The purpose of excluding RCMP members from the *PSLRA* is not to interfere with collective bargaining, but is driven by a legitimate concern that the model imposed under that legislation is ill suited to the national police force.

247 It is true that *Delisle* was decided before *Health Services* and *Fraser* ushered in a more "purposive and generous approach to labour relations" (majority reasons, at para. 125). But the jurisprudential developments since *Delisle* do not allow this Court to conclude that the purpose of the exclusion is to deny RCMP members' associational rights. On the [page115] contrary, the conclusion in *Delisle* was reaffirmed by this Court's statements in *Health Services* and *Fraser* that s. 2(*d*) of the *Charter* does not guarantee the right to a particular labour relations model or process. I do not agree with the reversal of these decisions.

248 The evolution in the legal understanding of s. 2(*d*) bears no relation to the majority's finding in *Delisle* as to the purpose of the *PSSRA*, and thus cannot be used to support revisiting the issues settled in *Delisle*. Contrary to the majority's view in the case at bar, *Bedford* does not stand for the proposition that an evolution in one aspect of the law allows this Court (and lower courts) to discard all aspects of a previous decision. In this respect, *Bedford* merely

stands for the proposition that courts can revisit *the particular legal issue* that has been found to have evolved dramatically.

249 There has been no change of circumstances since this Court's 1999 decision in *Delisle* that would justify abandoning the determination of the purpose of the exclusion of RCMP members from the general federal public service labour relations scheme at issue in that case. In fact, quite the opposite: changes to the SRRP since 1999 have reinforced the understanding that the program's goal is to enhance representation of the interests of RCMP members without the imposition of an adversarial model. The SRRP Constitution, adopted in 2002, provides that its primary purpose is "to promote mutually beneficial relations between Force management and the wider membership" and states that the SRRP "will be recognized as the system and program of choice for management-employee relations for members of the RCMP" (ss. 2 and 3(A)). Likewise, an October 2002 agreement between the NEC of the SRRP and the RCMP Commissioner states that "[m]anagement at all appropriate levels will ... recognize the role of the [SRRP]; ... respond to proposals ... from [the [page116] SRRs] ... in a timely fashion; and ... provide rationale for major decisions" and that "[m]anagement and the [SRRP] will consult on specific human resources initiatives and national policy center committees in a timely and meaningful fashion" (SRRP Agreement, ss. 11(a), (b) and (d), 24). That Agreement also states that "[a]lthough final decisions rest with management, consultation will promote an active participatory regime" (s. 24).

250 Even if we were to accept that *Delisle* was incorrectly decided and that the purpose of para. (*e*) of the definition of "employee" in s. 2 of the *PSSRA* in 1967 was to deny RCMP members meaningful collective bargaining, it does not follow that this continues to be the purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* today. The legislative context in which the exclusion operates has changed significantly since the *PSSRA* was enacted in 1967. To argue that Parliament may never revise its views as to the purpose of a statute or of a particular provision thereof in light of changes to the framework in which the statutory provision operates and must forever be held to the purpose it envisioned for the statute on the day of its initial enactment, is a fiction and fails to take into account the actual history of the legislative provision.

251 When the *PSSRA* was enacted in 1967, there were two Orders in Council which forbade RCMP members from engaging in any collective bargaining activity. These were later revoked and, in 1974, the Division Staff Relations Representative Program was created, the predecessor of the SRRP (*Commissioner's Standing Orders (Division Staff Relations Representative Program)*, made pursuant to s. 21(2) of the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9).

[page117]

252 By 2003, when the *PSSRA* was replaced by the *PSLRA*, the RCMP labour relations scheme was considerably changed from that which existed in 1967. When s. 2 of the *PSSRA* was replaced by s. 2(1) of the *PSLRA*, Parliament reduced the number of exclusions from the definition of "employee" in the Act, thus expanding the categories of public servants who would be subject to the new statutory labour relations scheme. Parliament, however, maintained the exclusion of RCMP members. The decision to continue the exclusion was made with the knowledge that doing so did not deny members collective bargaining rights. These individuals were subject to a parallel labour relations regime - the SRRP.

253 In *Big M Drug Mart*, this Court rejected the idea that legislative provisions could have shifting purposes in response to changing social conditions (see pp. 334-36). However, in this appeal, we are faced not with a question of social change, but of legislative change. The purpose of the exclusion of RCMP members from the *PSSRA* and subsequently from the *PSLRA* has changed, as can be seen in the evolution of relevant statutory and regulatory provisions. Subsequent legislative changes may evidence a change in the purpose of Parliament in re-enacting a statutory provision. This is precisely what has occurred in this case. To ignore the significantly different context in which the exclusion of RCMP members was re-enacted in the *PSLRA* disregards the current legislative reality.

254 Parliament chose to create a collaborative labour relations model for the RCMP, to address concerns about divided loyalties and interruptions in the essential services provided by this national police force. The majority now

makes the policy choice that an adversarial Wagner-type model of labour relations is necessary. With respect, Parliament, as the provider of the essential service delivered by the RCMP, must be accorded deference [page118] in the manner in which it ensures stability and reliability of that service. Courts must be cognizant of the delicate balance that labour relations regimes seek to maintain between employers, employees, and the public, and of the different contexts for which legislatures must adapt their labour relations policies. As earlier explained, para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* does not have the effect of infringing the constitutional right of RCMP members to a meaningful process of collective bargaining, and thus Parliament's policy judgments should not be disturbed.

255 The majority asserts that s. 2(*d*) of the *Charter* does not mandate the Wagner model of labour relations. With respect, the effect of its decision is precisely that: it has restricted the government to the *PSLRA* or a regime with essentially the same characteristics. The constitutional entrenchment of choice and independence show that the majority creates an illusion of flexibility by saying that "it remains open to the federal government to explore other collective bargaining processes" for the RCMP (para. 137).

256 Courts are not best placed to decide which specific labour relations scheme is best suited for a particular group of employees. In my view, requiring RCMP members to be included in the *PSLRA* or equivalent scheme is "to enter the complex and political field of socio-economic rights and unjustifiably encroach upon the prerogative of Parliament": *Delisle*, at para. 23.

(3) Section 1 of the *Charter*

257 Although my conclusions as to the constitutionality of both the imposition of the SRRP [page119] as a labour relations scheme and the exclusion of RCMP members from the application of the *PSLRA* make it unnecessary to consider whether *Charter* infringements are justified, I will nonetheless comment briefly on the s. 1 analysis conducted by the majority.

258 The majority concedes that the government's objective in this case - maintaining an independent and objective police force - is pressing and substantial. Although the majority acknowledges that the rational connection test is not onerous, it concludes that that test is not met in this case. To satisfy the rational connection test, the government must demonstrate that it is logical and reasonable to conclude that the impugned action will help bring about its objective - not that it will inevitably succeed: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, *2000 SCC 69*, *[2000] 2 S.C.R. 1120*, at para. 228; *Health Services*, at paras. 148-49; *Canada (Attorney General) v. JTI-Macdonald Corp.*, *2007 SCC 30*, *[2007] 2 S.C.R. 610*, at para. 40.

259 The state need not always adduce direct proof of a relationship between the infringing measure and the legislative objective. So long as it has been shown that logic and reason would lead one to conclude that the impugned measure will help the government attain its objective, the rational connection threshold has been met: *RJR-MacDonald Inc. v. Canada (Attorney General)*, *[1995] 3 S.C.R. 199*, at para. 154; *Ross v. New Brunswick School District No. 15*, *[1996] 1 S.C.R. 825*, at para. 101. The low threshold discussed above is met where the legislature has implemented a collaborative model of labour relations in order to achieve a neutral, stable, and reliable national police force. It is reasonable to conclude, as explained below, that a police force which is polarized by adversarial posturing or that could be called to inaction when other bargaining units are on strike, will be viewed as less objective, neutral and reliable by the public.

[page120]

260 The majority does not accept the argument made by the Attorney General of Canada that labour action by the RCMP could disrupt the stability of the Force and affect the perception of it as a neutral law-enforcing body. The majority, however, disregards the fact that RCMP members play a special role in cases of national security, in emergency situations occurring in communities which do not have access to other police forces, and in situations where they can be called upon to interject in the labour disputes of others. Although unionized provincial police forces do not generally have the right to strike, there have been incidents of working to rule and job actions by

municipal police forces in Hamilton, Toronto, Montréal and Québec. Some have even resorted to illegal strikes. Parliament is entitled to address concerns that an adversarial association might order its members to refuse to intervene in certain circumstances involving the labour disputes of others or that belonging to such associations could inhibit members from responding to such situations impartially.

261 In considering whether the SRRP minimally impairs freedom of association, the majority again starts from the premise that a labour relations scheme that is non-adversarial will not be within the range of reasonable alternatives that satisfy the minimal impairment standard. While acknowledging that the government is not bound to follow the least impairing means to achieve its end, the majority finds the SRRP inadequate in comparison to the adversarial labour relations schemes of provincial police forces. Again, the majority refuses to acknowledge that the RCMP is materially different from other Canadian police forces.

262 The majority argues that

[page121]

> concerns about the independence of the members of the Force could easily be considered in determining the scope of the police bargaining unit under schemes like the *PSLRA*, without requiring total exclusion from bargaining in the present regime. For example, s. 4 of the *Labour Code*, CQLR, c. C-27, restricts the membership and affiliations of municipal police associations. [para. 152]

With respect, the scope of the bargaining unit is beside the point. A unionized national police force would be inconsistent with the government's pressing and substantial objective, as any adversarial, Wagner-style collective bargaining; whether the bargaining unit is restricted to RCMP members or not risks compromising the objectivity and independence of the Force.

263 As acknowledged by LeBel J., at para. 275 of *Advance Cutting*, "differences between legislative approaches to similar problems are part of the very fabric of the Canadian constitutional experience". He observed that in a "system of divided legislative authority", where members within the federation have different cultural and historical experiences, "the principle of federalism means that the application of the *Charter* in fields of provincial jurisdiction does not amount to a call for legislative uniformity" (*ibid.*). This reasoning also applies to the legislative policy choices of Parliament which must address not only local interests but also the broader public interest, including national security.

264 It follows that the salutary effects of the imposition of the SRRP outweigh any deleterious effects.

265 The RCMP is a unique Canadian law enforcement organization. Not only is it our national police force, but it also provides provincial and municipal policing services in much of the country, as well as providing police services to international [page122] airports and hundreds of Aboriginal communities. The RCMP provides protective services to Canadian and foreign dignitaries, security at significant national and international events in Canada, and border policing. It provides specialized policing services to all police services in Canada, including criminal intelligence, biological evidence recovery, DNA analysis, fingerprint and criminal record information, and ballistics identification. The RCMP also runs the Canadian Firearms Program, the Canadian Police Information Centre, the Canadian Police College, the National Child Exploitation Coordination Centre, the National Sex Offender Registry, and the Technological Crime Program. Across Canada, the RCMP enforces a host of federal laws, including those dealing with commercial crime, counterfeiting, drug trafficking, organized crime, and terrorism.

266 The government must be entitled to organize RCMP labour relations in view of the distinctive and essential role the Force plays as our national police force. Labour action by RCMP members could cause disruption on a different order of magnitude than that of similar action by other police forces. It could also have adverse effects on other law enforcement agencies across Canada.

267 Parliament's decision to use a collaborative scheme for labour relations within the RCMP is consistent with international instruments regarding freedom of association. While international conventions and covenants do not

prevent domestic law from granting associational rights to police forces, the wording of those instruments reflects the fact that other countries may find it reasonable to restrict such rights in comparable contexts. See, for [page123] example, the International Labour Organization's *Convention (No. 87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S. 17, art. 9, the United Nations' *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, art. 8, and the United Nations' *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 22.

268 Even if para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* were found to breach s. 2(*d*) of the *Charter*, it constitutes a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society and is therefore justified under s. 1 of the *Charter*.

IV. Conclusion

269 The appellants have failed to establish that the SRRP makes meaningful association to achieve workplace goals effectively impossible. This labour relations scheme is responsive to employee interests and accountable to employees. The majority departs from this Court's recent jurisprudence on freedom of association in order to justify a particular result in this case. So long as it is not effectively impossible for employees to make collective representations on workplace issues, through individuals who are representative of their interests, and that those representations are considered by management in good faith, there is no violation of s. 2(*d*) of the *Charter*.

270 I would dismiss the appeal with costs to the respondent.

Appeal allowed with costs, ROTHSTEIN J. *dissenting.*

Solicitors:

Solicitors for the appellants: Laura Young Law Offices, Toronto.

[page124]

Solicitor for the respondent: Attorney General of Canada, Toronto.

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, Vancouver.

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.

Solicitors for the intervener Association des membres de la Police Montée du Québec Inc.: Duggan avocats, Montréal.

Solicitors for the intervener the Mounted Police Members' Legal Fund: Fasken Martineau DuMoulin, Toronto.

Solicitors for the intervener Confédération des syndicats nationaux: Laroche Martin, Montréal.

Solicitors for the intervener the Canadian Police Association: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Bennett Jones, Toronto.

Solicitors for the intervener the Public Service Alliance of Canada: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Moore, Edgar, Lyster, Vancouver.

1 Repealed since the hearing of this appeal (*SOR/2014-281, s. 58*) and replaced by a substantially similar provision, s. 56 of the *Royal Canadian Mounted Police Regulations, 2014*, *SOR/2014-281* ("*RCMP Regulations, 2014*").

2 Note that RCMP members are not excluded from Part 3 of the *PSLRA* - Occupational Health and Safety.

End of Document

Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

M.E. Saunders, P.A. Kirkpatrick and N.J. Garson JJ.A.

Heard: November 5-6, 2015.

Judgment: April 13, 2016.

Docket: CA39379

[2016] B.C.J. No. 717 | *2016 BCCA 156* | *31 C.C.E.L. (4th) 175* | *2016 CarswellBC 948* | *264 A.C.W.S. (3d) 644* | *353 C.R.R. (2d) 237* | *397 D.L.R. (4th) 712* | *[2016] 7 W.W.R. 665* | *84 B.C.L.R. (5th) 341* | *265 L.A.C. (4th) 123* | *385 B.C.A.C. 283* | *[2016] CLLC para. 220-033*

Between Federal Government Dockyard Trades and Labour Council (Esquimalt, B.C.) and Des Rogers, Appellants (Plaintiffs), and Her Majesty the Queen in Right of Canada as Represented by the Attorney General of Canada, Respondent (Defendant), and The Attorney General of the Province of British Columbia, Respondent (Pursuant to the Constitutional Question Act, R.S.B.C. 1996, s. 68)

(96 paras.)

Case Summary

Constitutional law — Canadian Charter of Rights and Freedoms — Fundamental freedoms — Freedom of association — Collective bargaining — Appeal by the plaintiffs from an order dismissing their constitutional challenge to the Expenditure Restraint Act which nullified a wage increase for 2006 awarded through binding arbitration dismissed — Act did not breach associational rights of appellants under s. 2(d) of Charter — Level of interference was not constitutionally impermissible — Rollback of single wage increase did not undermine capacity of union to collectively and effectively pursue its goals — Government's response was proportional to the looming fiscal emergency.

Labour law — Constitutional issues — Canadian Charter of Rights and Freedoms — Freedom of association — Appeal by the plaintiffs from an order dismissing their constitutional challenge to the Expenditure Restraint Act which nullified a wage increase for 2006 awarded through binding arbitration dismissed — Act did not breach associational rights of appellants under s. 2(d) of Charter — Level of interference was not constitutionally impermissible — Rollback of single wage increase did not undermine capacity of union to collectively and effectively pursue its goals — Government's response was proportional to the looming fiscal emergency.

Appeal by the plaintiffs from an order dismissing their constitutional challenge to the Expenditure Restraint Act which nullified a wage increase for 2006 awarded through binding arbitration. The appellants argued that the provisions of the Act enacting the wage rollback unjustifiably infringed on their right to collective bargaining as protected by s.á2(d) of the Charter. The trial judge concluded the nullification did not breach s. 2(d) of the Charter because the wage increase was imposed through binding arbitration. Alternatively, he concluded the Act did not breach s. 2(d) because the government fulfilled its obligation to collectively bargain in good faith.
HELD: Appeal dismissed.

The Act's nullification of the 2006 wage increase was not an impermissible interference with the protected process

of collective bargaining as required by s.á2(d) of the Charter. The test for infringement for unconstitutionality of public sector wage restraint was substantial interference with collective bargaining. The application of this threshold involved a fact specific, contextual inquiry. The Act did not prevent the appellants from collectively pursuing workplace goals. The trial judge did not err in his finding that the Act did not breach the associational rights of the appellants and in his final conclusion that the level of interference was not constitutionally impermissible. Sectioná2(d) protected the process and not the fruits of collective bargaining. The rollback of this single wage increase did not undermine the capacity of the union to collectively and effectively pursue its goals. The length and depth of government negotiations prior to its enactment were adequate. The government met its constitutional obligations through its attempts to negotiate until the last moment and to signal the potential effects of the impending legislation. Its response was proportional to the looming fiscal emergency.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 2(d)

Expenditure Restraint Act, S.C. 2009, c.á2, s. 16, s. 16(a), s. 18, s. 19, s. 57, s. 393

Public Services Essential Services Act, S.S. 2008, c.áP-42.2

Court Summary:

The Supreme Court of Canada remitted this appeal for disposition in accordance with its decisions in Meredith v. Canada (Attorney General), *2015 SCC 2*, and Mounted Police Association of Ontario v. Canada (Attorney General), *2015 SCC 1*. The appellants appeal an order dismissing their constitutional challenge to the Expenditure Restraint Act, which placed limits on wage increases in collective agreements or arbitral awards for five years, starting in 2006. The Act nullified a wage increase for 2006 awarded through binding arbitration. The summary trial judge concluded the nullification did not breach s. 2(d) of the Charter because the wage increase was imposed through binding arbitration. Alternatively, he concluded the Act substantially interfered with collective bargaining but did not breach 2(d), because the government fulfilled its obligation to collectively bargain in good faith. Held: Appeal dismissed. Meredith and Mounted Police Association of Ontario reaffirm the test for infringement of s. 2(d) as substantial interference with collective bargaining. This question should be approached contextually. The Act did not prevent the appellants from collectively pursuing workplace goals. The length and depth of government negotiations prior to its enactment were adequate, and its effects proportional, given the looming financial crisis. The summary trial judge did not err in his final conclusion that the level of interference was not constitutionally impermissible.

Appeal From:

On appeal from an order of the Court of Appeal, dated August 19, 2013 (*Federal Government Dockyard Trades and Labour Counsel v. Canada (Attorney General)*), *2013 BCCA 371*, Vancouver Docket CA39379).

Counsel

Counsel for the Appellants: J. Arvay, Q.C., C.J. Boies Parker.

Counsel for the Respondent, Attorney General of Canada: L. Lachance, K. Hucal.

Counsel for the Attorney General of British Columbia: K. Evans.

[Editor's note: A corrigendum was released by the Court April 27, 2016; the change has been made to the text and the corrigendum is appended to this document.]

Reasons for Judgment

The judgment of the Court was delivered by

N.J. GARSON J.A.

Introduction

1 This appeal is remitted to this Court by the Supreme Court of Canada, on application for leave to appeal, for disposition in accordance with its decisions in *Meredith v. Canada (Attorney General)*, 2015 SCC 2, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1: see [2013] S.C.C.A. No. 404.

2 The background to this dispute was fully canvassed by the summary trial judge (reasons indexed at 2011 BCSC 1210), and by this Court (reasons indexed at 2013 BCCA 371 ("*Dockworkers #1*")). In brief, the appeal concerns the constitutionality of the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 ("*ERA*"), which rolled back a binding arbitral award for federal government dockworker wages.

3 The dockworkers are represented in their negotiations and on this appeal by the Federal Government Dockyard Trades and Labour Council (Esquimalt, B.C.), ("the Council"). I shall, from time to time refer to the appellants as the Council, or the Dockworkers. The second appellant, Des Rogers, is the President of the Council.

4 At summary trial, the Council asserted that the provisions of the *ERA* enacting the wage rollback unjustifiably infringed on their right to collective bargaining, as protected by s. 2(d) of the *Charter*. The summary trial judge dismissed the application, holding that because the wage increase was imposed through arbitration, it did not form part of the collective bargaining process and there was no infringement. Alternatively, the judge concluded that if the *ERA* interfered with the process of collective bargaining, there was no *Charter* breach because the government fulfilled its obligation to consult and bargain in good faith.

5 This Court dismissed the Council's appeal. Saunders J.A., writing for the Court (Kirkpatrick and Garson JJ.A. concurring), held the fact that the wage increase was obtained through arbitration was not determinative of the question of a s. 2(d) breach, and that the judge erred by incorrectly distinguishing between collective agreement terms awarded through arbitration and terms established through negotiation. However, the Court dismissed the appeal, holding that the *ERA*'s nullification of the 2006 wage increase was not an impermissible interference with the protected process of collective bargaining, as required by s. 2(d) of the *Charter*.

6 We are now directed to reconsider this Court's decision in light of *Meredith* and *Mounted Police Association*. In those decisions, the Supreme Court of Canada decided that the *ERA* did not infringe s. 2(d), as it applied to the RCMP.

7 A remand hearing is not an appeal of this Court's first decision in this case. Rather, the hearing is conducted as an appeal *de novo* of the summary trial judge's decision in this instance to dismiss the appellants' action: *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2013 BCCA 300 at paras. 2, 3, 9. The Court may be informed by the first judgment on appeal: *Metzner v. Metzner*, 2000 BCCA 474 at para. 26.

8 For the reasons that follow, I see no basis to draw a different conclusion from that reached on our first consideration of the appeal. Neither *Meredith* nor *MPAO* touches upon the question of the distinction between terms reached through negotiation and terms reached through arbitration, and I see no reason to revisit that issue. I therefore propose to restrict my reasons to whether the judge erred in his alternative finding that the *ERA* did not breach the associational rights of the Council members.

Background

Factual Background

9 At paras. 3-11 of *Dockworkers #1*, Saunders J.A. summarized the background circumstances concerning the negotiations between the Council and the Government leading up to the arbitration. There is no dispute as to the following facts:

> [3] The circumstances are not complicated. The Council is the bargaining agent for the members of its constituent trade unions, who are employed by the Treasury Board in naval dockyards on the coast of British Columbia. The collective bargaining relationship between the Council and the Treasury Board is governed by the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (the "*PSLRA*").
>
> [4] The collective agreement between the Treasury Board and the Council expired in 2006. Under the scheme of the *PSLRA*, the Council was required to choose a dispute resolution mechanism, either conciliation or arbitration, before it gave notice to the employer to bargain. The Council opted for arbitration and gave notice to bargain collectively in June 2006. The parties exchanged bargaining proposals and negotiations took place in 2006 and 2007. The negotiations encompassed increases in wage rates and productivity issues. In April 2007, the Treasury Board made an offer to the Council, said to be final. The offer was rejected by 89% of those employees who voted.
>
> [5] Shortly after, in May 2007, the parties indicated they were at a bargaining impasse and that the matter should be referred to arbitration. The parties did not recommence negotiations. Rather, in March 2008, the Council formally requested that certain issues be referred to arbitration, as is allowed by the *PSLRA*.
>
> [6] By the fall of 2008, the international financial crisis was starting to bite and in October 2008, the government asked the Treasury Board to develop measures to restrain spending on employee compensation.
>
> [7] Bargaining between the Council and the Treasury Board was not the only collective bargaining ongoing between the federal government and unions representing its employees at about this time, and the government, seeking to address growth in public sector compensation, instructed its negotiators to return to the bargaining tables to negotiate wage increases within defined limits. The negotiators were instructed not to discuss details of draft wage restraint legislation, but were authorized to tell the unions that if they could not achieve collective agreements addressing government goals by the time an anticipated Economic and Fiscal Statement was issued, it was possible that legislation would be enacted achieving that objective for the government.
>
> [8] Pursuant to the new mandate, the Treasury Board negotiators informed the Council of the developing economic crisis and the possibility of legislation that would include caps on increases to wage rates, and sent the Council another final offer. For practical purposes, this offer took the same position on wages that the Treasury Board was advancing at arbitration. The Council rejected this new final offer.
>
> [9] By November 26, 2008, just before the Economic and Fiscal Statement was to be released, there were still several unresolved negotiations. Some bargaining agents were willing to continue bargaining and the government believed further agreements could be reached. The government set the deadline for achieving agreements as December 8, 2008.
>
> [10] On November 27, 2008, the government issued the anticipated Economic and Fiscal Statement. It promised legislation capping wage increases for the years 2007-8 through 2010-11. Statements to this effect were made in the House of Commons. None of these statements referred to the 2006-7 fiscal year.
>
> [11] The arbitration between the Council and the Treasury Board, requested in March 2008, proceeded in December 2008. The arbitration was preceded by unsuccessful mediation. The Arbitration Board issued its award on January 20, 2009, before the *Expenditure Restraint Act* was introduced in Parliament. The award gave a 5.2% wage lift as of October 2006, and provided for wage increases in 2006 through 2009 that are within the limits subsequently enacted by the *Expenditure Restraint Act*.

10 The *ERA* was enacted on March 12, 2009, and imposed limits on wage increases of 2.5% and 2.3% for the 2006-2007 and 2007-2008 fiscal years, applicable to collective agreements made after the December 8, 2008,

deadline. Accordingly, the legislation had the effect of nullifying the 5.2% wage increase awarded through the arbitration.

Judicial History

11 The Dockworkers challenged the constitutionality of the *ERA* in the Supreme Court, and their action was dismissed following a summary trial. As noted, the judge concluded first that because the wage increase was achieved through arbitration rather than collective bargaining, the *ERA*'s nullification of the award was "not an interference with the constitutionally protected right to collective bargaining" (at para. 189; *Dockworkers #1* at para. 31). Alternatively, he wrote that if he was incorrect in so concluding, he would have found that the *ERA* substantially interfered with the collective bargaining process, but that the process of interference nevertheless respected the principles of good faith negotiation and consultation. Accordingly, the judge would have held that there was no breach of s. 2(d) of the *Charter*.

12 On appeal, the Court did not agree with the distinction the chambers judge drew between the wage award as the result of arbitration as opposed to a collective agreement. It held that the arbitration was part of the collective bargaining process and therefore attracted the protection of s. 2(d) (*Dockworkers #1* at paras. 29-35).

13 Having decided that the arbitral nature of the award was not a proper basis to distinguish the impact of the *ERA* from other statutory regimes, the Court next considered whether the *ERA* interfered with the process of collective bargaining. After reviewing the evolution of the Supreme Court of Canada jurisprudence on when and to what extent a government acting as a legislator may interfere with the collective bargaining process in which it has participated qua employer (see *Reference re: Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313 (the "*Alberta Reference*"), *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20), Saunders J.A. concluded that the focus of the inquiry must be on impairment of the associational activity (at para. 46). She noted that *Fraser* described unconstitutional state activity interfering with s. 2(d) as that which made it "impossible to achieve collective goals" and "impossible to meaningfully exercise the right to associate due to substantial interference by law" (at para. 46).

14 Saunders J.A. then contrasted the effect of the impugned provisions of the *ERA* with the particularly broad and invasive legislation found to be unconstitutional in *Health Services* (at paras. 47, 52):

> [47] I read the strong language of *Fraser* as consistent with the description in *Health Services* of constitutional protection of collective bargaining as "a limited right", and statements to the effect that only substantial interference is prohibited. *Health Services* serves as an example of legislation that so interfered with the associational activity that the fundamental freedom to pursue collective goals was fatally undermined. Not only did the legislation negate important provisions, including those limiting the employer's right to contract out, it invalidated any provision in a collective agreement, past or future, dealing with those subjects.
>
> ...
>
> [52] Adopting the question as framed in *Association of Justice Counsel* [*v. Canada (Attorney General)*, 2012 ONCA 530] and *Meredith* [*v. Canada (Attorney General)*, 2013 FCA 112], it seems to me that *Health Services* is explained by the invasive extent of the nullification of collective agreement terms, combined with the exclusion of the topics of the nullified terms as subjects for collective bargaining so long as the *Act* remained in force. The *Act* in this case lacks that breadth. Although there has been cancellation of one wage increase, and wage increases are set for five years (a provision that is not challenged by the Council), there is no restriction on bargaining after that time. The prospective interference with collective bargaining evident in *Health Services* is simply not present here.

15 While noting that the wage increase was important to the Council, Saunders J.A. held that nullification of the arbitral award was not an unconstitutional interference with associational activity (at paras. 53-54):

> [53] The 5.2% wage increase in issue is certainly valuable to the employees represented by the Council. Its nullification, however, in my view, is not antithetical to associational activity. The term is not so essential to

the structure of the collective agreement, nor future restrictions on bargaining so durable, that its loss can be said to evidence impermissible interference with the protected process. It bears observing that this single foregone wage increase is an economic circumstance that may be discussed in future rounds of collective bargaining, along with other economic issues. Employment relations have about them an essential, pragmatic, dynamic, business aspect that precludes, in my respectful view, a single, time-limited wage increase from rising to such significance that its loss amounts to breach of the constitution of Canada.

[54] In my respectful view, the judge failed to reflect the significant difference between this case and *Health Services*, and in the result, expressed a view contrary to *Dunmore*, *Health Services* and *Fraser*. I consider that the *Act* does not substantially interfere with associational activity or the collective bargaining process so as to infringe freedom of association as contended by the Council, if there is an interference at all.

16 The appeal was dismissed.

Legislative Framework

17 I turn next to the legislative framework relevant to this appeal.

18 This appeal primarily concerns the combined effect of s. 16 and s. 18 of the *ERA*. Section 16 restrains compensation increases, starting with the 2006-2007 fiscal year:

> **16** Despite any collective agreement, arbitral award or terms and conditions of employment to the contrary, but subject to the other provisions of this Act, the rates of pay for employees are to be increased, or are deemed to have been increased, as the case may be, by the following percentages for any 12-month period that begins during any of the following fiscal years:
>
> (a) the 2006-2007 fiscal year, 2.5%;
>
> (b) the 2007-2008 fiscal year, 2.3%;
>
> (c) the 2008-2009 fiscal year, 1.5%;
>
> (d) the 2009-2010 fiscal year, 1.5%; and
>
> (e) the 2010-2011 fiscal year, 1.5%.

19 Section 18 of the *ERA* creates the deadline described above by providing that any wage increases in collective agreements entered into, or arbitral awards made, between December 8, 2008, and the date the *ERA* came into force, which are inconsistent with s. 16, are of no effect. Any such inconsistencies are deemed to be wage increases referred to in s. 16:

> **18** The provisions of any collective agreement that is entered into, or any arbitral award that is made, during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force that provide, for any particular period, for increases to rates of pay that are greater than those referred to in section 16 for that particular period are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide for the increases referred to in section 16.

20 By contrast, s. 19 exempts collective agreements entered into before the December 8, 2008, deadline from the effects of s. 16(a) and (b), which cap wage increases for the 2006-2007 and 2007-2008 fiscal year:

> **19** With respect to a collective agreement that is entered into, or an arbitral award that is made, before December 8, 2008,
>
> **(a)** section 16 does not apply in respect of any period that began during the 2006-2007 or 2007-2008 fiscal year; and
>
> **(b)** for any 12-month period that begins during any of the 2008-2009, 2009-2010 and 2010-2011 fiscal years, section 16 applies only in respect of periods that begin on or after December 8, 2008 and any provisions of those agreements or awards that provide, for any particular period, for increases to rates of pay that are greater than those referred to in section 16 for that particular period are of no effect or

are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide for the increases referred to in section 16.

21 Section 57 prohibits compensating for amounts not received as a result of restraints imposed under the *ERA*:

> **57** No provision of any collective agreement that is entered into -- or of any arbitral award that is made, or of any terms and conditions of employment that are established -- after the day on which this Act comes into force may provide for compensation for amounts that employees did not receive as a result of the restraint measures in this Act.

22 Thus, this appeal chiefly concerns s. 16(a), which had the effect of rolling back the 5.2% wage increase awarded for 2006 and replacing it with a 2.5% increase, which cannot be renegotiated.

23 Other provisions of the *ERA* that are relevant to this appeal are ss. 6-10. Section 6 affirms the right to collective bargaining. Sections 7-10 affirm various associated rights and concerns encompassed by collective bargaining:

> **Right to bargain collectively**
>
> **6** Subject to the other provisions of this Act, the right to bargain collectively under the *Canada Labour Code*, the *Parliamentary Employment and Staff Relations Act* and the *Public Service Labour Relations Act* is continued.
>
> **Right to strike**
>
> **7** Nothing in this Act affects the right to strike under the *Canada Labour Code* or the *Public Service Labour Relations Act*.
>
> **Amendments permitted**
>
> **8** Nothing in this Act precludes the bargaining agent for employees governed by a collective agreement or arbitral award and the employer of those employees from amending, by agreement in writing, any provision of the collective agreement or arbitral award, other than a provision relating to its term, so long as the amendment is not contrary to any provision of this Act.
>
> **Workplace improvements**
>
> **9** Nothing in this Act precludes the co-development of workplace improvements by bargaining agents and employers under the auspices of the National Joint Council or any other body that they may agree on.
>
> **Incremental and merit increases**
>
> **10** Nothing in this Act is to be construed as precluding the entitlement of any employee to incremental increases -- including any based on the attainment of further qualifications or the acquisition of further skills -- or to merit or performance increases, in-range increases, performance bonuses or similar forms of compensation.

Issues

24 I would frame the issues on appeal in the form of two questions:

a) What is the test to find that public sector wage restraint legislation unconstitutionally interferes with s. 2(d)?

b) Applying the correct test to the facts of this case, does the *ERA* impermissibly interfere with the Council members' constitutional rights under s. 2(d)?

Positions of the Parties

Appellants' Position

25 The appellants submit *Meredith* is of little relevance to this appeal, because the *ERA* did not apply in the same way to the Dockworkers as it did the RCMP. They note that the *ERA* contains a specific exemption allowing for

future consultation with the RCMP on allowances relating to their restructuring, and that this provision subsequently allowed for compensation increases which would otherwise have been inconsistent with the *ERA*. The appellants say the differences in bargaining structures applicable to the Council and the RCMP, as well as the different ways the *ERA* impacted the terms of employment and collective agreements, distinguishes their case from *Meredith*. Importantly, they say that because the RCMP was already precluded from adopting the traditional model collective bargaining, the *ERA*'s impact on it was substantially diminished as compared to the Dockworkers. The appellants say that unlike the Dockworkers, the RCMP's s. 2(d) rights were already attenuated.

26 The appellants argue that after *Fraser* and before *MPAO*, courts understood the threshold test for a s. 2(d) infringement to be effective impossibility of continuing associational activity. They submit that in substance, this Court applied an "effectively impossible" threshold in *Dockworkers #1*. They say that in *Meredith*, *MPAO*, and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, the Supreme Court of Canada retreated from this "effectively impossible" standard to a standard of "substantial interference". They submit that these cases recognize the importance of the substantive purpose of s. 2(d), which is to correct the power imbalance inherent in the employer-employee relationship. Relying on *MPAO*, they say that the substantial interference test is met where an action (in this case, nullification of the wage increase) "disrupts the balance sought to be achieved between employers and employees through the s. 2(d) protection". They say that s. 2(d) protects the activity of collective bargaining, not just its "associational aspect". Thus, they submit that on the correct, "purposive" approach to s. 2(d), a substantial interference may occur even if a union remains capable of carrying out associational activity, and some provisions of a collective bargain obtained through associational activity remain intact.

27 Additionally, the appellants are critical of this Court's description in *Dockworkers #1* of the foregone 5.2% wage increase as "an economic circumstance that may be discussed in future rounds of collective bargaining" (at para. 51). They point out the difficulty of reconciling this statement with *ERA* s. 57, which prohibits future compensation for amounts not received as a result of the legislative rollbacks.

28 The appellants say the *ERA*'s wage rollback infringes their s. 2(d) rights by "disrupting the balance" between employers and employees achieved through s. 2(d) protection, because:

a) wages are of central importance to collective bargaining, and the wage roll-back was a permanent elimination of a hard-won wage increase;

b) the impact was not shared by all public servants, rather it effectively singled out the appellant's members as the only group who had a previously settled wage increase nullified; and

c) the impact was not time limited, because of the prohibition on negotiating compensation for the wage loss.

Respondent Canada's Position

29 Canada also describes the test to determine if legislation infringes s. 2(d) as one of "substantial interference," rather than "effective impossibility". However, Canada does not frame the test as specifically dependent upon whether the impugned activity disrupts the "balance" sought to be achieved by s. 2(d).

30 Canada submits that *Meredith* is determinative of this appeal. It says that *Meredith* reaffirms that s. 2(d) protects a process rather than an outcome. Canada draws the following principles from *MPAO*, *Meredith*, *Health Services*, and *Fraser*, as well as this Court's interpretation of those cases in *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184:

a) section 2(d) does not protect the particular objectives of associational activity, or a certain substantive or economic outcome;

b) section 2(d) does not give constitutional status to collective agreements or privilege them over statutes;

c) legislation can alter the terms of collective agreements without infringing s. 2(d); and

d) s. 2(d) protects the right to a meaningful process to pursue collective workplace goals.

31 Canada submits that in substance, the appellants seek constitutional protection for the outcome of their collective bargaining or arbitration. Canada says the appellants' analysis is based on the flawed premise that any legislative alteration of a collective agreement wage term is a *prima facie* violation of s. 2(d). It says that the result of according such protection would be to place public service trade unions in a privileged position as against all other stakeholders in relation to the allocation of public resources.

32 Canada contends that the appellants ignore the important factual context surrounding the negotiations leading up to the arbitration. It notes that:

a) bargaining took place over 15 days, and involved some 100 different issues;

b) compensation was never addressed as a global subject, but as a series of potential changes;

c) government officials attempted to inform the appellants about the planned restraint actions, and to negotiate a voluntary collective agreement;

d) the appellants were made aware that legislation might nullify an arbitral award, and that some benefits that were then negotiable might not be negotiable after its enactment; and

e) despite this knowledge and the government's attempts to reach an agreement, the appellants chose to proceed with arbitration.

33 In particular, Canada emphasizes the relevance of the extent of its efforts to reach a negotiated settlement on reasonable terms. It distinguishes these circumstances from those in *Health Services*, in which "draconian" legislation was enacted without any notice or consultation.

Respondent British Columbia's Position

34 The submissions of the respondent British Columbia support those made by Canada. It submits that *Meredith* cannot be meaningfully distinguished from this case, and that there is nothing in *Meredith* or *MPAO* that would lead this Court to a different result than that reached in *Dockworkers #1*. It says the appellants' argument that *MPAO* supports a test that is met where the "balance" protected by s. 2(d) is disrupted misconstrues the Supreme Court of Canada's reasons. British Columbia submits that the discussion of workplace power balance in *MPAO* was not for the purposes of articulating a new s. 2(d) test; rather, it was to explain the historic rationale for the extension of the protection of s. 2(d) to workplace association.

Discussion

What is the test to find that public sector wage restraint legislation unconstitutionally interferes with s. 2(d)?

35 As is clear from the positions of the parties, the threshold for unconstitutionality of public sector wage restraint may be expressed in a number of ways. In my view, the most recent Supreme Court of Canada jurisprudence firmly expresses the test as one of "substantial interference", noting always that the application of this threshold involves a fact specific, contextual inquiry.

36 In order to explain the basis for my conclusion, I shall review this evolving area of the law, beginning with the Supreme Court of Canada's decision in *Health Services* and concluding with the recent decision of the Quebec Court of Appeal in *Canada (Procureur général) c. Syndicat canadien de la fonction publique, section locale 675, 2016 QCCA 163* ("*Syndicat canadien*"), which concerned the constitutionality of the *ERA* as it applied to certain CBC employees.

Health Services

37 The starting point for this discussion is *Health Services*. While *Health Services* does not set a standard for constitutionally impermissible interference with the collective bargaining process, it provides some useful guideposts for comparison purposes (see *Meredith* at para. 28).

38 *Health Services* involved a challenge to the constitutional validity of Part 2 of the *Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2.* The *Act* was adopted in response to challenges facing the British Columbia healthcare system. Enacted without any meaningful consultation with unions, it introduced changes to transfers and multi-worksite assignment rights, contracting out, the status of employees under contracting-out arrangements, job security programs, and layoffs and bumping rights. The effect was to give health care employers greater flexibility to organize relations with their employees as they saw fit. In some cases, it did so in ways that would not have been permissible under existing collective agreements, invalidating important provisions and effectively precluding meaningful collective bargaining on certain specific issues. The appellants challenged the validity of the legislation on the basis that it unjustifiably infringed on their right to freedom of association under s. 2(d) of the *Charter.*

39 A majority of the Supreme Court concluded that the s. 2(d) guarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace issues. Consistent with the Court's ruling in *Dunmore*, it held that the right concerns the "protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment" (at para. 89). Thus, the majority held that s. 2(d) guarantees the process of bargaining rather than the outcome. It stated that s. 2(d) only protects against "substantial interference" with associational activity (at para. 90):

> It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith.
>
> [Emphasis in original.]

40 To constitute substantial interference, the intent or effect of state activity must "seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer" (at para. 92).

41 The majority stated that the "substantial interference" test encompassed two inquiries (at para. 93). The first inquiry is into the relative importance of the matter affected by state action to the capacity of union members to come together and pursue collective goals. The second is into the manner in which the measure impacts upon the collective right to good faith negotiation and consultation (at paras. 97, 107, 133). As I will discuss, subsequent Supreme Court of Canada cases tend to merge these two inquiries.

42 *Health Services* is also important in emphasizing the necessity of a contextual analysis, in respect of both the "good faith" portion of the inquiry, and the substantial interference inquiry at large. At paras. 107 and 109, the Court said the following:

> In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. Moreover failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record. ...
>
> ...
>
> [109] In summary, s. 2(d) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(d). Conversely, less central matters may be changed more summarily, without violating s. 2(d). Only where the matter is both important to the process of

collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(d) be breached.

[Emphasis added].

43 In summary, *Health Services* describes the test as one of substantial interference with the process of collective bargaining, and indicates that the relevant inquiries should be undertaken with advertence to context.

Fraser

44 The Court revisited the right to collective bargaining in *Fraser*, which concerned the constitutionality of a labour relations regime applicable to farm workers in Ontario, as enacted through the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16 (the "*AEPA*"). The *AEPA* excluded agricultural workers from the general provincial labour relations regime, but granted them certain rights. These rights included (among others) the right to form and join an employees' association, and to make representations to their employers through their association on the terms and conditions of their employment. It also required the employer to listen to those representations or read them. The respondents argued that the following additional protections were required to meet the constitutional requirements of s. 2(d) of the *Charter*: (1) statutory protection for majoritarian exclusivity; (2) a mechanism to resolve bargaining impasses and interpret collective agreements; and (3) a statutory duty to bargain in good faith.

45 The majority of the Court reviewed its history of labour jurisprudence, and its reasons in *Health Services*. In discussing the ambit of the protection provided by s. 2(d), the majority appeared to retreat from a broader test which precludes substantial interference with associational activity towards a test which required effective impossibility of exercising associational rights. At paras. 46 and 47, the majority wrote the following:

> ... As discussed earlier, what s. 2(d) protects is *the right to achieve collective goals*. Laws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless. ... However, no particular type of bargaining is protected. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.
>
> ...
>
> ... If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.
>
> [Emphasis in original.]

46 Again, at para. 98, the majority said the following respecting the test for determining the constitutionality of the *AEPA*:

> The essential question is whether the *AEPA* makes meaningful association to achieve workplace goals effectively impossible, as was the case in *Dunmore*. If the *AEPA* process, viewed in terms of its effect, makes good faith resolution of workplace issues between employees and their employer effectively impossible, then the exercise of the right to meaningful association guaranteed by s. 2(d) of the *Charter* will have been limited.
>
> [Emphasis added.]

47 *Fraser* does not clarify the applicable test any further. Notably, it does not discuss a two-step process whereby the court examines first the importance of the matter to collective bargaining and freedom of association, and second, whether the measure or action respects principles of good faith bargaining.

48 This is perhaps explained by the nature of the legislative scheme at issue. Having concluded that *Health Services* does not guarantee a particular model of collective bargaining, the only question was whether the *AEPA* responded adequately to the respondents' third concern, namely, adequate protection for good faith. The matter would satisfy the first step in the *Health Services* test; the ability to make and have representations heard is the essence of collective bargaining and therefore essential to the right of freedom of association. Interfering with the

ability to make and have representations heard would affect the ability of an employee association to pursue goals collectively. Applying *Health Services*, the question then becomes whether, in effect, the impugned legislation or action preserves principles of good faith negotiation. The majority appears to short-circuit the first half of the analysis and move directly to the second half, where it asks whether the effect of the purported infringement is to make good faith resolution of workplace issues "effectively impossible."

MPAO

49 The Court resolved the apparently inconsistent language in *Fraser* and *Health Services* in *MPAO*. If *Fraser* suggested a test that requires "effective impossibility" of exercising associational goals, then *MPAO* represents an affirmation of the *Health Services* "substantial interference" standard.

50 In *MPAO*, the RCMP appealed the constitutionality of their exclusion from collective bargaining under the *Public Service Labour Relations Act* enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 ("*PSLRA*"), and the imposition of a non-unionized labour relations regime. The regime in question allowed RCMP members to advance workplace concerns through the Staff Relations Representative Program (the "SRRP"), which was the only form of employee representation recognized by RCMP management. The SRRP was governed by the National Executive Committee (the "NEC"), and staffed by elected Staff Relations Representatives ("SRRs").

51 Significant aspects of the SRRP were determined by RCMP management, including the number of SRRs and the program budget. SRRP members were prohibited from communicating with anyone outside of the RCMP concerning RCMP activities without the Commissioner's permission. The NEC was required to submit an annual report to management on its activities, and its operation was reviewed jointly by the SRRP and management. Amendment to the program required joint consent of the SRRP and management.

52 The RCMP alleged that the SRRP and their exclusion from the definition of "employee" under the ordinary labour relations regime unreasonably infringed on their s. 2(d) rights. McLachlin C.J. and Lebel J., writing for the majority, found that the labour relations regime and the exclusion did unjustifiably infringe on s. 2(d). In reaching this conclusion, the majority returned to the Court's decisions in *Health Services* and *Fraser* and clarified the scope of s. 2(d) and the test for infringement.

53 First, the majority reaffirmed that freedom of association is an independent right with independent content (at para. 49). It concluded that s. 2(d) must be interpreted purposively, recognizing that the content of the right should be defined by reference to the purpose of the guarantee of freedom of association (at para. 54). A purposive approach, it held, protects collective activity enabling those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of other entities (at paras. 54-55).

54 Applying the purposive approach, the majority concluded that s. 2(d) guarantees the right to a process of collective bargaining (at para. 67):

> ...[W]e conclude that s. 2(d) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, affirming the central holdings of *Health Services* and *Fraser*. This guarantee includes a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome.
>
> [Emphasis added.]

55 The majority reaffirmed that the test for infringement is one of substantial interference:

> [72] The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the

> balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.
>
> [Emphasis added.]

56 As noted, the appellants in this case attach particular significance to the "balance" described in para. 72. I will return to this issue below.

57 At para. 75, the majority stated that "effective impossibility", as used in *Fraser*, refers to the effect of an interference rather than the legal test for infringement of s. 2(d):

> ... [P]assages from *Fraser* and *Health Services* use terms like "impossible" and "effectively nullified" to describe the effect of legislative schemes (including legislative exclusions), not the legal test for infringement of s. 2(d). ... It is clear that such passages do not adopt "substantial impossibility" as the threshold test for finding an infringement of freedom of association. Rather, the passages demonstrate that the majority in *Fraser* adopts substantial interference as the *legal test* for infringement of freedom of association.

58 Having found that s. 2(d) guarantees a meaningful process of collective bargaining, the majority went on to define the essential features of that process. It held that a meaningful process is one which provides employees with a degree of choice and independence sufficient to enable them to determine and meaningfully pursue their collective interests (at para. 81).

59 It held that the SRRP labour relations regime did not satisfy these requirements, because of excessive management involvement, and restriction on members' ability to advocate for representation by an independent association (at paras. 116?117). It found the SRRP to be, in substance, a labour relations scheme imposed by management, almost entirely devoid of freedom of choice (at para. 118).

60 The majority also found that exclusion of the RCMP from the definition of "employee" under the *PSLRA* infringed on s. 2(d) in purpose. They noted that the exclusion, when originally enacted, was to prevent them from exercising their associational rights (at para. 131). They found that when the exclusion was re-enacted, there was nothing to indicate that the purpose had changed (at para. 135).

61 The majority determined that neither infringement was justified under s. 1, as neither was rationally connected to their objective, or minimally impairing.

62 To summarize, *MPAO* reaffirms that the test for an infringement under s. 2(d) is substantial interference. It confirms that s. 2(d) protects the right to meaningfully associate to advance workplace goals, and extends to a meaningful process of collective bargaining. It does not discuss the two-part inquiry for infringement set out in *Health Services*. It does, however, emphasize the importance of a contextual inquiry (see paras. 47, 48, 93).

Meredith

63 As noted, in *Meredith*, the Court considered the constitutionality of provisions in the *ERA* capping RCMP wage increases. Acting on recommendations from the Pay Council (an RCMP advisory board which included RCMP members), the Treasury Board announced wage increases for the years 2008 to 2010 ranging from 2% to 3.5% per year in June 2008. Following that announcement, the global financial crisis caused the Treasury Board to revisit its decision.

64 In December 2008, the Treasury Board communicated to the RCMP a revised wage decision providing for salary increases that were commensurate with the limits announced for the public sector. The Pay Council approached the Treasury Board to discuss the wage rollback, and presented it with a package of recommendations in February 2009. Those recommendations were rejected as inconsistent with the *ERA*.

65 As already noted, the *ERA* capped wage increases at between 2.5% and 1.5% for between 2006 and 2010. The RCMP challenged the provision as an unconstitutional infringement on their freedom of association.

66 A majority of the Court found that, notwithstanding that the Pay Council operated within a constitutionally inadequate labour regime, the *ERA* did not unjustifiably infringe on s. 2(d), because RCMP members were provided with a process for consultation on compensation-based issues (at para. 30).

67 The majority began by noting that for the reasons given in *MPAO*, s. 2(d) protects freedom to associate and pursue workplace goals through collective bargaining. It reaffirmed the substantial interference standard, and stated that the applicable test to the question is that set out in *Health Services*:

> [24] ... In s. 2(d) cases, the courts must ask whether state action has substantially impaired the employees' collective pursuit of workplace goals. The test applicable to this question is set out in *Health Services*.
>
> [Emphasis added.]

68 Notwithstanding the majority's endorsement of the *Health Services* test for substantial interference, it does not appear to have undertaken a two part analysis. Rather, it approached the question of substantial interference holistically, framing the appropriate inquiry on the facts of the case as follows:

> [25] ... We must examine whether the *ERA* substantially interfered with the existing Pay Council process, so as to infringe the appellants' freedom of association.

69 It did not expressly inquire into the importance of the matter legislated upon to the collective bargaining process. Rather, the majority focused on the magnitude and the effect of the purported interference. It compared the *ERA* to the legislation in *Health Services*, noting that the effect was not to radically change significant terms covered by previously concluded collective agreements (at para. 28). Instead, the *ERA* capped wages at a level "consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes". It "did not disregard the substance of the former procedure" or "preclude consultation on other compensation-related issues, either in the past or the future" (at para. 28). *Meredith* thus affirms the importance of prospective and retroactive interference with collective bargaining to the s. 2(d) assessment. It suggests that interference is more likely to exist where negotiation on significant terms in past or future collective agreements is undermined.

70 The majority likewise noted that the *ERA* did not in fact prevent the consultation process from moving forward, and that the RCMP was able to successfully negotiate various benefits as the result of subsequent proposals brought through the pay council process. While stating that actual outcomes are not determinative of a s. 2(d) analysis, the majority noted evidence of outcomes supported a conclusion that associational activity was only impacted in a minor way (at para. 29).

71 Summarizing its analysis, the majority stated the following:

> [30] Simply put, the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues within the constitutionally inadequate labour relations framework that was then in place. The *ERA* and the government's course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members ...

Saskatchewan Federation of Labour

72 *Saskatchewan Federation of Labour* involved challenges to the constitutionality of two statutes: *The Public Services Essential Services Act*, S.S. 2008, c. P-42.2, and *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26. The *PSESA* had the effect of limiting the ability of public sector employees performing essential services to strike. The *TUAA* changed the union certification process by, among other things, changing the level of written support and reducing the period for receiving written support from employees. Thus this decision coming after MPAO and Meredith could be considered a further refinement of the Supreme Court of Canada analysis of permissible or impermissible legislative interference with the bargaining process.

73 The reasons of the majority, delivered by Abella J., held that the right to strike was an essential part of a meaningful process of collective bargaining, and therefore protected under s. 2(d). In reaching this conclusion, Abella J. noted that *MPAO* confirms that the core of s. 2(d) is protecting the individual from state-enforced isolation in the pursuit of his or her ends (at para. 53), and empowering vulnerable and marginalized groups from having their legitimate ends thwarted (at paras. 53?54).

74 *Saskatchewan Federation of Labour* again confirms the primacy of the *Health Services Test*, as follows:

> [77] This brings us to the test for an infringement of s. 2(*d*). The right to strike is protected by virtue of its unique role in the collective bargaining process. In *Health Services*, this Court established that s. 2(*d*) prevents the state from substantially interfering with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process of collective bargaining (para. 90). And in *Mounted Police*, McLachlin C.J. and LeBel J. confirmed that
>
> > [t]he balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. . . . Whatever the nature of the restriction, *the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining* . . . . [Emphasis added; para. 72.]
>
> [78] The test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining. The *PSESA* demonstrably meets this threshold because it prevents designated employees from engaging in *any* work stoppage as part of the bargaining process. It must therefore be justified under s. 1 of the *Charter*.
>
> [Underlined emphasis added.]

75 Having found that s. 2(d) was infringed, the majority concluded that the infringement by the impugned provisions was not justified under s. 1, and allowed the appeal in respect to them.

76 Again, it is notable that there is no discussion of the two-part *Health Services* test for infringement. *Saskatchewan Federation* does not detract from or otherwise modify the Court's discussion of s. 2(d) in *Meredith*.

Syndicat canadien

77 Finally, I would briefly describe the reasons of the Quebec Court of Appeal in *Syndicat canadien*. Although no official English translation is yet available, by agreement counsel have provided an unofficial translation. As noted, the case concerns a very similar constitutional challenge to the *ERA* as it applied to CBC employees. In the first instance, the Court allowed the appeal, holding that the provisions of *ERA* were not unconstitutional: *2014 QCCA 1068*. The respondent employees sought leave to appeal to the Supreme Court of Canada, which remanded the case to the Court of Appeal on terms identical to the remand in this case: *[2014] S.C.C.A. No. 301*. Again, the Court allowed the appeal.

78 The Court distinguished the case before it from *Health Services*, *MPAO* and *Saskatchewan Federation of Labour*. In particular, the Court noted that the effect of the impugned legislation in *Health Services* was to create a structural impediment to common collective bargaining processes, removing a range of employment conditions from their ambit (at para. 27).

79 In considering the question of substantial interference, the Court rejected the employees' argument that any legislative change of negotiated clauses in a collective agreement constituted substantial interference. To accept that argument, the Court said, was to constitutionally protect the content of collective agreements, which went beyond the Supreme Court of Canada jurisprudence advocating a contextual analysis (at para. 31). While acknowledging that certain measures altering or neutralizing collective agreement clauses might constitute

substantial interference, the Court framed the question as one of degree or intensity (at para. 31). I agree with this approach, which, in my view, is consistent with *Health Services* and the cases following.

80 The Court ultimately concluded that the *ERA* did not substantially interfere with the employees' freedom of association, noting that while the interference was significant, the provisions of the *Act* did not undermine the process of good faith negotiation and consultation (at para. 47). In reaching that conclusion, it noted that while the *ERA* prohibited the employees from negotiating on wage increases lost as a result of the legislation, future increases could be negotiated with the cumulative effect of recovering the loss incurred during the restraint period (at para. 51). These comments are similar to the view of this court in Dockworkers #1, regarding the effect of *ERA* s. 57.

Summary

81 In summary, I would frame the applicable principles/test arising out of *Health Services*, *Fraser*, *MPAO*, *Meredith*, *Saskatchewan Federation of Labour* and *Syndicat canadien* as follows:

a) Section 2(d) of the *Charter* guarantees the right to meaningfully associate in the pursuit of collective workplace goals (*Health Services*, *Fraser*, *MPAO*).

b) Section 2(d) likewise guarantees the right to a meaningful process of collective bargaining, although it does not guarantee outcomes (*Health Services*, *Fraser*, *MPAO*).

c) Meaningful collective bargaining involves the ability to make representations and have them heard in good faith (*Fraser*).

d) Legislative or state action will infringe on s. 2(d) where it substantially interferes with meaningful collective bargaining (*MPAO*).

82 On the basis of the foregoing, it appears that the Court has not always applied the formalistic two-part test set out in *Health Services*, which (to repeat) requires the following inquiries:

a) whether the subject matter of a purported interference is sufficiently important that interference with it would impede collective activity; and

b) whether the government conduct or legislation nevertheless preserves principles of good faith negotiation.

83 In my view, the authorities indicate that the appropriate inquiry is a holistic, contextual, or blended one. The question of substantial interference should be approached contextually, taking into account the nature of the matter subject to the interference, the effect of the interference, and the context or exigent circumstances in which the interference occurred. If, on an assessment of all of those factors, it can be said that the interference was "substantial", then s. 2(d) is infringed. I do not understand the jurisprudence to stipulate any particular form of pre-legislative consultation; rather, it is a contextual examination driven by the circumstances driving the enactment of the legislation (see also this Court's reasons in *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184 at paras. 57, 58, 72, 79 ("*BCTF*")).

Does the *ERA* impermissibly interfere with the appellants' constitutional rights?

84 I now turn to the question of whether, in all the circumstances, the *ERA* substantially interferes with the appellants' right to collective bargaining, as protected by s. 2(d) of the *Charter*.

85 As I have indicated, s. 2(d) protects the process and not the fruits of collective bargaining. Accordingly, the appellants frame their dissatisfaction with the impact of the *ERA* in terms of its undermining of a process. In an affidavit relied on by the appellants, Mr. Rogers deposed as follows:

> ...What is unacceptable to our members is that the effect of the ERA is to make it as though the award, which was the culmination of the collective bargaining process, had never happened. This is especially true because of the fact that the wage adjustment for 2006 reflected the economic conditions existing in the 2006-2007 period. Our members are not "dissatisfied with the results of collective bargaining." They are

> angry that the process of collective bargaining, which resulted in a fair award, has been interfered with and rendered meaningless by the ERA.

86 Mr. Rogers also cites the frustration arising out of the fact that if the award had been issued only a short time earlier, it would not have been affected by the *ERA*. He notes that the Dockworkers feel singled out as the only group whose award was set aside as a result of the December 8, 2008, deadline. He concedes that the entire process of collective bargaining was not directed specifically at achieving the 5.2% wage increase. However, he deposes that the arbitral award was intended to provide a fair and reasonable resolution of the issues between the parties. Again, he reiterates dissatisfaction relating to the *ERA*'s effect on the "process" in the following terms:

> Our members' dissatisfaction has nothing to do with the result which emerged from letting the collective bargaining process run its course. Rather they are angry that after having engaged in the give and take of negotiations, and following through on the commitment of submitting to binding arbitration, the government has now set aside the arbitrator's award with respect to the period when there was, undeniably, no economic crisis.

87 The summary trial judge noted the Council's frustration and dissatisfaction with the effect of the *ERA*. However, like the Court in *Syndicat canadien*, he concluded that it did not pose a structural impediment to the Dockworkers' ability to associate collectively and pursue workplace goals (at paras. 167, 197):

> [167] Finally, the plaintiffs have failed to demonstrate that the removal of the pay adjustment interferes with their ability to come together to pursue collective goals through collective bargaining. The legislation had the effect of reducing the wage increase that the plaintiffs were entitled to for one year only. It did not affect the multitude of other terms and conditions of employment that were the subject of extensive bargaining in the collective bargaining round that culminated in the arbitration award in January 2009. The evidence demonstrates that the union/ employer relationship survived without any adverse consequences. Indeed, through additional bargaining in 2010 and 2011, the parties to the collective bargaining process resolved all of the issues that had not been dealt with either by the arbitration award itself or the *ERA*. The argument, I take it, is that the absence of any effect on the process of collective bargaining and the capacity of employees to associate to pursue workplace goals is proven by observing that in 2010 and 2011 (that is, after the *ERA*), collective bargaining actually produced a negotiated agreement, whereas the bargaining in 2006 and 2007 had failed to secure one.
>
> ...
>
> [197] It does appear reasonably clear that as a matter of fact, the *ERA* has had no discernable impact on the actual capacity of these employees to associate to collectively pursue workplace goals. While the *ERA* may have frustrated and angered the membership and caused them to doubt the integrity of the process they were operating within, there is nothing to suggest the bargaining agent was weakened or its activities undermined. Certainly, as a general matter, one could hardly conclude that the effect of the *ERA* was to render the associational process effectively useless, make it impossible for employees to pursue common goals, or seriously undercut or undermine the activity of these workers to join together to pursue the common goal of negotiating work place conditions and terms of employment: see, e.g. *Health Services*, at para. 92.

88 With these findings in mind, I return to the appellants' submissions on *Meredith* and *MPAO*. The appellants say that *Meredith* is distinguishable from their case despite the fact that the same legislation is at issue. They point to the different bargaining structures applicable to the aggrieved parties. They assert that because RCMP members were not in any event permitted to engage in s. 2(d) protected collective bargaining, many of the newly articulated principles from *MPAO* were not relevant to the Court's analysis in *Meredith*. In other words, they submit that because the RCMP have a more limited s. 2(d) entitlement than the Dockworkers, the finding *ERA* was not unconstitutional in *Meredith* is irrelevant to the Dockworkers.

89 There is no doubt that the RCMP associational rights are premised on a bargaining framework that is distinguishable from the labour regime that governs the Dockworkers. However, I am not persuaded that *Meredith* can be meaningfully distinguished from this case; both involved wage rollbacks under identical legislation. Nor am I

persuaded that applying the broad principles articulated in *Meredith* and *MPAO* to the facts of this case would lead to a result different from the one reached by the summary trial judge, although for somewhat different reasons.

90 The test prescribed in *Health Services*, which (despite all subsequent judicial pronouncements) remains the test for unconstitutional infringement of s. 2(d), is evaluated on the basis of substantial interference. I disagree with the appellants' articulation of the test as whether an enactment "disrupts the balance" the *Charter* achieves between employers and employees. While *MPAO* discusses the importance of s. 2(d) in negotiating a balance of power in the workplace, I agree with the respondent British Columbia that the Supreme Court was not attempting to articulate a new version of the substantial interference test. In my view, the remarks in question are best understood in the context of the historical discussion of the purpose of according workplace association s. 2(d) protection. *MPAO*, *Meredith* and *Saskatchewan Federation of Labour* firmly establish "substantial interference" as the relevant threshold.

91 In this case, the matter affected was a hard-won wage increase. It was subjectively important to the Council, but, like the summary trial judge, I am not persuaded the rollback of this single wage increase undermines the capacity of the union to collectively and effectively pursue its goals. The legislation itself explicitly guarantees the right to collective bargaining in ss. 6-10. As noted, the Council was able to successfully negotiate a subsequent agreement.

92 In my view, the length and depth of the negotiations and consultations prior to the *ERA*'s enactment was adequate, given the looming fiscal crisis. The summary judge examined the circumstances surrounding the negotiations, the arbitration, and the exigencies that led the government to enact the *ERA*. He concluded that, in the circumstances, the government's conduct did not rise to the level of interference necessary to establish a breach of s. 2(d). In reaching that conclusion he made the following findings:

a) The notice to the Council about the impending legislation was considerable compared to the 20 minute warning in *Health Services* (at para. 233). He described this as close to the "maximum" possible notice given the financial crisis facing government (at para. 234).

b) The government adopted an approach to controlling public sector wages that respected past collective bargaining and avoided extinguishing existing terms and conditions.

c) The government chose to limit wage increases for a temporary, limited defined period and only limited future wage increases if they had not been settled before December 8, 2008. Unlike *Health Services*, the legislation did not limit future bargaining on any term in the collective agreement other than in respect to the wage increase for 2006 (at para. 262).

d) The government chose a "negotiate first, legislate second" approach, informing the negotiators of the looming deadline (at paras. 240-241).

e) The government used its best efforts to consult in good faith with all parties including the Council (at para. 248).

f) The government negotiators made five different attempts to restart negotiations in the days before the deadline (at para. 249).

g) The Council and its members were well aware that they risked the legislation overriding an arbitration award if they pressed ahead with the arbitration (at para. 259).

93 These findings are critical. Fiscal and economic context cannot be ignored. The government met its constitutional obligations through its attempts to negotiate until the last moment, and to signal the potential effects of the impending legislation. Its response was proportional to the looming fiscal emergency. Moreover, I do not think it can be said, as contended by the appellants, that this legislation compromised the essential integrity of the collective bargaining process. It is not my view that this legislation can be said to significantly impair or thwart the associational goals of the Dockworkers. The legislation simply does not have that reach.

94 In summary, it is my view that the judge made no error in his final conclusion that the level of interference was not constitutionally impermissible.

95 Having found no breach of s. 2(d), it is unnecessary for me to consider section 1.

Disposition

96 I would dismiss the appeal.

N.J. GARSON J.A.
M.E. SAUNDERS J.A.:— I agree.
P.A. KIRKPATRICK J.A.:— I agree.

* * * * *

CORRIGENDUM

Released: April 27, 2016

Paragraph 75 of the reasons for judgment released April 13, 2016 is corrected to read:

> Having found that s. 2(d) was infringed, the majority concluded that the infringement by the impugned provisions was not justified under s. 1, and allowed the appeal in respect to them.

M.E. SAUNDERS J.A.

End of Document

1. Federal Public Sector Labour Relations Act

S.C. 2003, c. 22, s. 2

Assented to 2003-11-07

An Act respecting labour relations in the federal public sector

[Enacted by section 2 of chapter 22 of the Statutes of Canada, 2003; preamble, sections 1 to 3 and Part 1, in force April 1, 2005, see SI/2005-22; Part 2, other than subparagraph 209(1)(c)(ii), paragraph 211(b) and section 231, in force April 1, 2005, see SI/2005-23; Parts 3 and 4 in force April 1, 2005, see SI/2005-24; subparagraph 209(1)(c)(ii), paragraph 211(b) and section 231 in force December 31, 2005, see SI/2005-123.]

2. Preamble

Recognizing that

the public service labour-management regime must operate in a context where protection of the public interest is paramount;

effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;

collective bargaining ensures the expression of diverse views for the purpose of establishing terms and conditions of employment;

the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;

the Government of Canada recognizes that public service bargaining agents represent the interests of employees in collective bargaining and participate in the resolution of workplace issues and rights disputes;

commitment from the employer and bargaining agents to mutual respect and harmonious labour-management relations is essential to a productive and effective public service;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

3. Short Title

Marginal note:Short title

1 This Act may be cited as the *Federal Public Sector Labour Relations Act*.

- 2003, c. 22, s. 2 "1"

1. Certification of Bargaining Agents

Marginal note:Right to apply

- **238.13 (1)** Subject to section 55, an employee organization within the meaning of paragraph (b) of the definition *employee organization* in subsection 2(1) that seeks to be certified as the bargaining agent for the group that consists exclusively of all the employees who are RCMP members and all the employees who are reservists may apply to the Board, in accordance with the regulations, for certification as bargaining agent for that group. The Board must notify the employer of the application without delay.
- **Marginal note:Requirements for certification**

  (2) The Board may certify an employee organization referred to in subsection (1) as the bargaining agent for the group only if it determines that the employee organization — and, in the case of a council of employee organizations, each employee organization forming the council — meets the following requirements:

  - **(a)** it has as its primary mandate the representation of employees who are RCMP members;
  - **(b)** it is not affiliated with a bargaining agent or other association that does not have as its primary mandate the representation of police officers; and
  - **(c)** it is not certified as bargaining agent for any other group of employees.
- **Marginal note:Clarification**

  (3) For greater certainty,

  - **(a)** for the purposes of subsection (2), participation by an employee organization in the National Joint Council is not considered to be an affiliation with a bargaining agent or other association that does not have as its primary mandate the representation of police officers; and
  - **(b)** no application is permitted to be made under section 54 in respect of employees who are RCMP members or reservists.
- 2017, c. 9, s. 33

Determination of unit

238.14 If an application for certification is made under subsection 238.13(1), the Board must determine that the group that consists exclusively of all the employees who are RCMP members and all the employees who are reservists constitutes the single, national bargaining unit that is appropriate for collective bargaining.

- 2017, c. 9, s. 33

Marginal note:Limitation

238.15 An employee organization that is certified as the bargaining agent for the bargaining unit determined under section 238.14 is not entitled to seek to be certified as bargaining agent for any other group of employees.

- 2017, c. 9, s. 33

Marginal note:Limitation

238.16 Despite section 58, the Board does not have jurisdiction to determine that an employee who is not an RCMP member or a reservist is included in the bargaining unit determined under section 238.14.

- 2017, c. 9, s. 33

1. Revocation of Certification

Marginal note:Mandate or affiliation

- **238.17 (1)** The Board must revoke the certification of an employee organization as the bargaining agent for the bargaining unit determined under section 238.14 if the Board, on application by the employer or any employee in that bargaining unit, determines that the employee organization — or, in the case of a council of employee organizations, any employee organization forming part of the council — no longer has as its primary mandate the representation of employees who are RCMP members or that it is affiliated with a bargaining agent or other association that does not have as its primary mandate the representation of police officers.
- **Marginal note:Clarification**

  (2) For greater certainty,

  - **(a)** for the purposes of subsection (1), participation by an employee organization in the National Joint Council is not considered to be an affiliation with a bargaining agent or other association that does not have as its primary mandate the representation of police officers; and

- **(b)** the circumstances set out in subsection (1) apply in addition to the circumstances in which a certification may be revoked under sections 94 to 100.

- 2017, c. 9, s. 33

Association des membres de la Police Montée du Québec v. Treasury Board

Federal Public Sector Labour Relations and Employment Board Decisions

Federal Public Sector Labour Relations and Employment Board

Montreal, Quebec and Ottawa, Ontario

Panel: Catherine Ebbs; Steven B. Katkin; Marie-Claire Perrault

Heard: November 19-23, 2018; March 26 and 27, 2019.

Decision: July 11, 2019.

FPSLREB File Nos. 542-02-12 and 13

2019 LNFPSLREB 55 | *2019 LNCRTESPF 55* | *2019 FPSLREB 70*

Between Association des Membres de la Police Montée du Québec, Applicant, and National Police Federation, Applicant, and Treasury Board, Respondent, and Attorney General of Canada, Intervenor IN THE MATTER OF applications for certification under section 54 of the Federal Public Sector Labour Relations Act

(321 paras.)

Case Summary

Labour arbitration — The collective agreement — Interpretation — Legislation — Interpretation statutes.

Labour arbitration — Trade unions — Recognition.

In 2015 the Supreme Court of Canada struck down a law forbidding the Royal Canadian Mounted Police from unionizing. Soon after, certification applications were filed by both the National Police Federation and the Quebec Mounted Police Members Association with respect to Quebec members only. The members voted overwhelmingly to certify the NPF as their new bargaining agent. The QMPMA application was dismissed by the Federal Public Sector Labour Relations and Employment Board on the grounds that the legislation mandated a single, national bargaining unit for employees who were regular members or reservists in the RCMP. The QMPMA then asked the Board to rule on the issue of the constitutional validity of the provision of the Act that legislated a single bargaining unit for RCMP members and reservists. Specifically, the QMPMA requested a declaration that s. 238.14 of the Federal Public Sector Labour Relations Act (the Act) was inoperative on constitutional grounds. As a result, the NPF certification application was stayed pending the result of this motion.
HELD: Motion denied; certification application dismissed.

The Federal Public Sector Labour Relations and Employment Board did not have the authority to make a declaration of constitutional invalidity. It could, however, consider whether it found a provision inconsistent with the Constitution and could judge it to be of no force and effect by reason of the inconsistency. In this case the Board found that s. 238.14 of the Act was not inconsistent with the Constitution. The Act gave regular members and reservists the possibility of coming together, without employer interference, to argue their demands through collective bargaining. The Board was not satisfied that the Quebec members of the RCMP constituted a group that was so distinct that its interests could not be represented by a national bargaining unit. This decision lifted the stay imposed by the 2018 Order; the NPF's certification application was allowed to proceed.

Statutes, Regulations and Rules Cited:

Act respecting the Syndical Plan of the SretÚ du QuÚbec, *CQLR c R-14, s. 2*

An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures, S.C. 2017, c. 9, s. 33, s. 63(1)(a)

Canada Act 1982 (UK), 1982, c 11,

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 2(d)

Constitution Act, 1982, Part I

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

Federal Public Sector Labour Relations Act, *S.C. 2003, c. 22, s. 2*, s. 5, s. 54, s. 57, s. 83, s. 186, s. 187, s. 188, s. 238.05, s. 238.14, s. 238.17, s. 238.18

Official Languages Regulations,

Ontario Provincial Police Collective Bargaining Act, 2006, SO 2006, c 35, s. 2(1)

Police Officers Collective Bargaining Act, *RSA 2000, c P-18, s 1*(c)

Police Services Act, RSO 1990, c P-15, s. 118

Public Service Employee Relations Act, *RSA 2000, c P-43, s. 10*

Quebec Charter of human rights and freedoms,

Royal Canadian Mounted Police Regulations, 1988, SOR/88-361, s. 96

School Boards Collective Bargaining Act, 2014, *S.O. 2014, c. 5*,

Appearances

For the Association des Membres de la Police Montée du Québec: Vincent Jacob and Alexandre Plakhov, counsel.

For the National Police Federation: Christopher Rootham and Alison McEwen, counsel.

For the Treasury Board and the Attorney General of Canada: Sean Kelly and Kevin Dulude, counsel.

** Translation **

REASONS FOR DECISION

I. Applications before the Board

1 Following certification applications filed by the applicants, who are the Association des membres de la Police Montée du Québec (AMPMQ) and the National Police Federation (NPF), the Board issued a decision on October 11, 2017 (*National Police Federation v. Treasury Board of Canada*, *2017 FPSLREB 34*), declaring that the bargaining unit appropriate for collective bargaining is that legislated by the *Federal Public Sector Labour Relations Act* (*S.C. 2003, c. 22, s. 2*; "the *Act*"), as amended by *An Act to amend the Public Service Labour Relations Act, the*

Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures (S.C. 2017, c. 9, s. 33; "the*Act to amend the PSLRA*"), which states the following in s. 238.14:

> *238.14 If an application for certification is made under subsection 238.13(1), the Board must determine that the group that consists exclusively of all the employees who are RCMP members and all the employees who are reservists constitutes the single, national bargaining unit that is appropriate for collective bargaining.*

2 The certification applications were filed on April 5 and 18, 2017, respectively. The *Act to amend the PSLRA* was enacted on June 19, 2017. Consequently, the applications are governed by the transitional provisions of the *Act to amend the PSLRA*, which states the following at s. 63(1)(a):

> *63 (1) If, before the day on which section 238.13 of the Federal Public Sector Labour Relations Act, as enacted by section 33, comes into force, an employee organization makes an application under section 54 of the former Act to be certified as bargaining agent for a group of employees that includes employees who are members appointed to a rank, or employees who are reservists, the employee organization must not be certified as bargaining agent for the group, unless*
>
> > *(a) the group consists exclusively of all the employees who are members appointed to a rank, other than officers as defined in subsection 2(1) of the Royal Canadian Mounted Police Act, and all the employees who are reservists ....*

3 The effect of the provisions under the two statutes is the same. The legislator mandated a single, national bargaining unit for employees who are Royal Canadian Mounted Police (RCMP) members appointed to a rank ("regular members") or who are reservists. In a letter dated November 9, 2017, the AMPMQ asked the Board to rule on the issue of the constitutional validity of the provision of the *Act* that legislated a single bargaining unit for RCMP regular members and reservists.

4 As we set out in *National Police Federation v. Treasury Board*, *2018 FPSLREB 31* at para. 36 ("the 2018 Order"), the Board does not have the authority to make a declaration of constitutional invalidity. However, it may consider whether it finds the provision inconsistent with the Constitution and may judge it of no force and effect by reason of the inconsistency (see *R. v. BigMDrugMart Ltd.*, *[1985] 1 S.C.R. 295* at para. 143). For the reasons that follow, the Board finds that s. 238.14 of the *Act* and the transitional provision set out in s. 63(1)(a) of the *Act to amend the PSLRA* are not inconsistent with the Constitution. Accordingly, the AMPMQ's request is denied, and its certification application is dismissed. This decision lifts the stay imposed by the 2018 Order. The NPF's certification application will proceed, and the ballots will be tallied.

II. Summary of the evidence

5 The AMPMQ called the following people to testify: Gaétan Delisle, Paul Dupuis, and Serge Bilodeau. The employer called the following witnesses: Stephen White, Claude Castonguay, and Dennis Duggan. The NPF did not submit any evidence at the hearing.

6 The AMPMQ sought to submit in evidence an expert report prepared by Professor Michel Coutu and to call him to testify. The employer objected to the report being submitted and to Professor Coutu's testimony, essentially because the evidence did not meet the criteria applicable to expert testimony. At the hearing, we allowed the employer's objection and did not allow either the report's submission or Professor Coutu's testimony. The reasons for that decision are set out in the analysis section of this decision.

A. For the AMPMQ

1. Gaétan Delisle

7 Mr. Delisle was a member of the RCMP from 1969 to 2010. He reached the rank of staff sergeant. Early in his

career, he was posted to Nova Scotia as a patrol officer and to the Halifax airport. In 1974, he was posted to "C" Division in Montreal, where he remained until the end of his career.

8 In 1969, unilingual francophone recruits training in Regina had to take English classes three to four evenings per week, as training was in English. Francophone recruits wrote the same exams as anglophone recruits in the same troop, but their results were lower than those of the anglophones.

9 In the early 1970s, meetings were held across the country with members who wanted changes made to their working conditions, which they found inadequate. Other police forces were unionized and had better working conditions.

10 In 1972, a Division Staff Relations Representative Program (DSRRP) was created. For each of the 17 divisions, the division commander appointed a representative. Only representatives from "C" Division were elected by the members.

11 In 1974, the members were asked if they wanted to maintain the DSSRP. Only "C" Division voted to replace it with a certified association that could negotiate for its members. The other divisions accepted the system, which was implemented across the country. The only place to discuss working conditions was before the RCMP's commissioner ("the Commissioner") and Executive Committee, and representatives could only make recommendations.

12 In 1975, an association was created to form a national union for the 17 divisions. At the time, the association, of which Mr. Delisle was president in 1978, had 3000 members out of the 16 000 RCMP regular members. He testified that when he crossed the country to promote the association, he found that each division was distinct and that they were not all administered the same way.

13 In 1980, the Treasury Board compared RCMP salaries to those of the eight largest police forces in the country. In 1981, the government decided to compare RCMP salaries to military salaries instead of those of police forces, resulting in an influx of members to the association. The members held meetings to denounce the situation. Faced with the protests, the government granted the requested raises. The number of members then fell in all divisions except Quebec.

14 According to Mr. Delisle, the association of the 17 divisions did not work for several reasons, including the great regional diversity and demands, the language and the bilingualism bonus refused by other division representatives, and the members' freedom of expression, which was more important in Quebec.

15 In 1977, Mr. Delisle was a division representative, and the representative meetings were held in English. In Quebec, the vast majority of members held bilingual positions and wanted to receive the bilingualism bonus. In 1988, the DSRRP was enshrined in regulations (s. 96 of the *Royal Canadian Mounted Police Regulations, 1988, SOR/88-361*).

16 Mr. Delisle explained that the national caucus was made up of division representatives and that it met four times per year, consisting of two meetings of the representatives and two meetings with the Commissioner and Executive Committee. The national caucus established the items to be discussed with the Commissioner and Executive Committee. The RCMP Pay Council was created to liaise with division representatives to determine the working conditions of other police forces.

17 The inability of "C" Division's members to raise specific points with the association of division representatives and the loss of members of the association of 17 divisions are factors that led to the AMPMQ's creation.

18 "C" Division formed its own Association des membres de la Division "C" to obtain certification from the Canada Labour Relations Board, the predecessor to the Canada Industrial Relations Board (CIRB). The certification application was rejected in 1986.

19 In 1986, Mr. Delisle was both president of the Association des membres de la Division "C" and a division representative. He said that division representatives represented the employer, even though they claimed to be independent. Division representatives adopted a resolution prohibiting Mr. Delisle from acting as a representative because he was the president of that association. According to him, one of the reasons for that sidelining was that he required that meetings include simultaneous interpretation services, which irritated people. He had to file a request for an injunction with the Federal Court to prevent the members of the national caucus from prohibiting him from taking part in the conference of representatives with the Commissioner and Executive Committee.

20 Justice Reed found in his favour (see *Delisle v. Royal Canadian Mounted Police Commissioner (1990), 39 F.T.R. 217*). She was shocked by the t-shirt included with Mr. Delisle's affidavit, showing a bison defecating on the letters "GRC".

21 As for the AMPMQ's particularities, Mr. Delisle stated that its actions resulted in changes to the RCMP in the following areas: language of work, greater Executive Committee respect for members, the RCMP travel policy, and the relocation policy.

22 Mr. Delisle testified that when major events took place in "C" Division territory, the AMPMQ ensured that the travel policy was applied. According to him, members of other divisions could not believe that they were housed in comfortable premises and that overtime was paid (for work in excess of 40 hours per week).

23 Mr. Delisle stated that AMPMQ members have a strong solidarity and that there is still a core of members working to defend members' rights. The level of trust is very high in the AMPMQ's elected members.

24 He testified that the RCMP had a negative attitude towards unionization. He referred to his affidavit in support of the Mounted Police Association of Ontario (MPAO)'s request before the Ontario Superior Court of Justice and his exclusion from the caucus of representatives' deliberations in 2003.

25 Mr. Delisle also alluded to the Mounted Police Members' Legal Fund ("the Legal Fund") created by the division representatives. He asserted that there was a policy by which employees could be represented by Department of Justice lawyers when dealing with a situation as part of their duties. According to him, since time could pass before meeting with a lawyer, the AMPMQ offered lawyer representation services. The Legal Fund was established at the caucus's request and with the Commissioner's approval. Members wanting to take part in it had to complete a form for source deductions. Mr. Delisle and another member completed the form to take part, but they were advised after five deductions that they could not take part, while no one else was excluded.

26 Continuing with "C" Division's particularities, Mr. Delisle explained the RCMP's national structure. Each division represents a region or province. There is also Headquarters in Ottawa, along with protective services. Each division includes a commanding officer, post, sub-posts, and administrative services. All business lines report to a division headquarters.

27 Mr. Delisle stated that resources vary by division. French is the language of work in "C" Division. In other divisions, some bilingual positions are in place to provide services.

28 According to Mr. Delisle, only one RCMP position is designated as unilingual, the inspector position. According to him, a unilingual anglophone member can become the commissioner, while a unilingual francophone member can reach only the rank of sergeant.

29 He stated that he received three or four calls per week from francophone members in other divisions asking for help dealing with the employer in French for different files, such as grievances, disciplinary measures, medical and family services, schools, and transfers.

30 As for the distinction between working conditions in the different divisions, Mr. Delisle stated that members of "C" Division enforce only federal laws.

31 While he was a division representative, Mr. Delisle demanded several things, including the establishment of relocation and travel policies. He stated that after several years, the RCMP placed more importance on the consequences on families of transfers and promotions.

32 With respect to mentality and the differences between divisions, Mr. Delisle stated that the national caucus discussed vehicles, uniforms, and firearms. According to him, the discussion was more about the differences between divisions than the benefits members should receive. He stated that "C" Division was the most demanding, at least about the respect the members received.

33 In terms of the cultural differences with respect to conformity, Mr. Delisle noted that most anglophone members were more militarized and were used to receiving orders without any discussion, while "C" Division had more discussion.

34 When he was asked whether the other divisions recognized the particularities of "C" Division, Mr. Delisle replied that the division representatives did not. However, the members who took part in events in "C" Division territory talked about them and referred to them, as he received calls from those members following the events.

35 Mr. Delisle stated that the AMPMQ's most important particularity is the ability to speak French. It is the only organization defending the rights of francophone members in other divisions, and he has given presentations to House of Commons and Senate committees on that topic. According to him, the other divisions never encouraged his efforts to protect language rights.

36 As for the functional characteristic of "C" Division, Mr. Delisle stated that there was a difference in the exchange of points of view. For example, he mentioned problems with the travel policy, which led to 600 grievances being filed. A new commanding officer at "C" Division discussed it with the AMPMQ executive and the problem was resolved, while the other divisions applied the policy as mandated by Headquarters in Ottawa.

37 On the expertise specific or unique to "C" Division, Mr. Delisle mentioned events or activities such as the Summit of the Americas in Quebec in 2001and the G7 in Charlevoix in 2018. RCMP members must prepare the locations for such conferences. Moreover, "C" Division's members are often called on to support other divisions, such as during the Vancouver Olympic Games in 2010.

38 When he was asked whether more major events were held in Quebec than in other provinces, Mr. Delisle stated that eight of the major events in which he took part were held in Quebec, in addition to the Francophone Summit in Moncton in 1999, the Calgary Olympic Games in 1988, the Pope's visit in 1984, a Royal Family visit, and the G8 in Kananaskis.

39 When he was asked whether the entirety of the particularities led to specific demands, Mr. Delisle replied that the AMPMQ continues to support ad-hoc demands.

40 "C" Division enforces only federal laws, while in the other divisions, the RCMP has contracts with the province or municipalities that govern the number of members in place at all times and their activities. During the period relevant to Mr. Delisle, the commanding officers of divisions in other provinces were appointed with the provinces' approvals.

41 Mr. Delisle stated that during his career, he was personally aware of a lack of personnel in "C" Division and in "O" Division (Ontario). For instance, although the Treasury Board authorized 1000 members, at least 150 to 200 positions were not filled. When he retired, there were 1100 members in "C" Division, including civilian members.

42 As for the languages program, the RCMP set up a program in which hired francophones had to take English classes before being assigned to training in Regina. Some anglophone members who volunteered to learn French were moved with their families to Quebec to be in an entirely francophone environment.

43 Under cross-examination by the employer, Mr. Delisle stated that while he was assigned to Nova Scotia, he carried out contract and federal police work in the narcotics field.

44 He was a division representative from 1977 to 2010. When he met with the Commissioner, he acted as a division representative and as the AMPMQ's president.

45 Mr. Delisle acknowledged that meal, relocation, and travel policies were national and not unique to Quebec.

46 Mr. Delisle stated that francophone members worked outside Quebec and that in 2008, all unilingual French positions were in Quebec, i.e., about 60% of identified positions.

47 With respect to planned and unplanned events, Mr. Delisle acknowledged that the RCMP assigned members from several divisions to the event areas.

48 For situations in which different divisions worked together to thwart criminal activities, Mr. Delisle stated that he was very familiar with that cooperation between divisions and with the work with police forces across the country and internationally.

49 Mr. Delisle was referred to his testimony to the effect that the commanding officers of divisions carrying out contract work were appointed with the provinces' approval. When it was suggested to him that a provincial representative could sit on the selection committee but that the commanding officer was appointed by the Governor in Council, Mr. Delisle replied that in the 1980s, the contracts had a clause requiring provincial approval.

50 In response to the NPF's question, Mr. Delisle stated that he did not testify before House of Commons and Senate committees about Bill C-7.

2. Paul Dupuis

51 Mr. Dupuis joined the RCMP in 1980 and worked in "C" Division until August 2016, reaching the rank of staff sergeant. During his career, he worked in the following fields, among others: border patrol, federal investigations, the commercial crime and counterfeit currency section in Montreal, and the bankruptcy section. He also took part in planning several major events.

52 In 1993, Mr. Dupuis was elected as a sub-representative for the DSRRP and as a director of the AMPMQ. He became interested in the travel policy and the Legal Fund, which was created in March 1997 and used source deductions. In 2004, he was the president of the division executive for the Legal Fund. Although the Legal Fund's constitution did not include any provisions for excluding members, two SRRs, including Mr. Delisle, were excluded, without explanation. As a result, they could not take part in the national meeting and could not be represented by a lawyer.

53 Following the Supreme Court of Canada's decision in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (*MPAO*), the Commissioner cut the source deductions. According to Mr. Dupuis, the Commissioner stated that he did so to keep the RCMP independent from the Legal Fund. As for the RCMP Pay Council, Mr. Dupuis stated that no members of "C" Division were appointed to it.

54 During the Challenge 2000 national consultation, the two division representatives from "C" Division were not accepted on the committee that met with the RCMP policy centre. After Challenge 2000, it was resolved that the regions would identify and appoint the representatives they wanted on the committees, except the national

committee and the pay committee. The national caucus elected the pay committee. The national committee established the priorities proposed during meetings with the Commissioner. Each committee had a chair and a deputy chair, but the members of "C" Division were never invited to hold those positions. The national caucus was made up of approximately 40 full-time division representatives and included 8 committees. For the Ontario, Quebec, and corporate regions, Mr. Dupuis acted as a representative for "C" Division on the human resources, internal affairs, health, and travel policy committees. However, no "C" Division member chaired those committees.

55 Beginning in 2000, Mr. Dupuis was the AMPMQ's secretary; he was its president from 2015 until his retirement in August 2016. At the time, between 300 and 400 members of "C" Division, a majority, were AMPMQ members.

56 As for "C" Division's functional or administrative characteristics, Mr. Dupuis stated that being a federal police division results in human resources constraints. In divisions carrying out contract work, the RCMP underestimates its staffing needs to gain contracts, as they are profitable for it. According to Mr. Dupuis, the RCMP uses the police services of neighbouring cities or members assigned to federal work to add to the workforce. In 2016, "C" Division was supposed to have 1144 members but had only 900, a 20% vacancy rate. On staff shortages in other divisions, Mr. Dupuis stated that according to the figures, contract policing had trouble meeting a vacancy rate of 5%.

57 Mr. Dupuis stated that because foreign dignitaries often visited Montreal and Quebec or those cities hosted international meetings, the members of "C" Division had developed expertise in protecting dignitaries. Moreover, given their demands under the RCMP's travel policy, during certain planned events, members of "C" Division benefitted from more favourable working conditions than those of members from other divisions deployed to the same events. When he was asked whether other divisions had a similar level of expertise, Mr. Dupuis replied that "O" Division did but that it occasionally consulted with "C" Division.

58 "C" Division is the only one with a section dedicated to the proceeds of crime. In other divisions, such a section is part of federal police operations.

59 According to Mr. Dupuis, protecting francophone rights is very important to "C" Division. It is the only division with the language of work in French and in which a unilingual francophone member can work. When unilingual francophones join the RCMP, they join a francophone troop at the Regina depot. Those who do not receive a "B" in English return to Regina for three months to improve their English. They are then posted to a detachment and are often put to the test due to harassment and decide to leave. If they request a transfer to Quebec, they are informed that there are no openings. Thus, there is no place for a francophone member who is not bilingual.

60 Mr. Dupuis stated that the highest rank a unilingual francophone member in Quebec can reach is corporal. Although unilingual francophone members can be experts in a field, they cannot be in charge because usually a higher rank is in charge, i.e., a sergeant or an inspector.

61 Mr. Dupuis stated that "C" Division had to fight for simultaneous interpretation services at national meetings.

62 A specific problem arose for "C" Division members when the RCMP developed a national promotion program using a knowledge exam. The questions were developed in English and then were translated outside the RCMP. Several translations created ambiguity between the best and the correct answer. According to Mr. Dupuis, 6 industrial psychologists crossed the country looking into the problem. They found that francophone members who wrote the test in French had marks 10% lower than members who wrote it in English. They recommended that the questions be written in English, translated to French, and then translated again into English to ensure validity, which the RCMP refused to do. After the first exam, 3000 grievances were filed. The marks were adjusted following the grievances due to the faulty translation.

63 Mr. Dupuis stated that unilingual francophone members suffer psychological effects that can result in couples separating and in broken families. Unilingual francophone families who cannot adapt return to Quebec. The discrimination has a concrete impact on member recruitment. Moreover, the attrition rate is very high among

unilingual francophones who cannot learn English. Even a bilingual francophone can face harassment because of the jealousy of anglophone members who think that bilingual members steal promotions.

64 As for the survey of members, Mr. Dupuis noted that the employer hired an expert in non-unionized systems to design it.

65 Mr. Dupuis corroborated Mr. Delisle's testimony that the vast majority of "C" Division members have a very high level of trust in their representation by the AMPMQ.

66 Under cross-examination by the employer, Mr. Dupuis stated that in principle, "C" Division was francophone and that there were bilingual anglophone members, as it offers services in English and because the City of Montreal is designated a bilingual zone.

67 Mr. Dupuis did not know what percentage of unilingual francophone members worked at "C" Division in 2016. However, he noted that there were 3400 regular bilingual members across Canada at that time. He did not know how many members who identified as francophone worked outside "C" Division. He acknowledged that there are detachments across Canada that offer services to the public in French.

68 As for the member survey, Mr. Dupuis attended the public meeting at "C" Division. Question 4 was not open-ended. The members did not have time to consult, and no one consulted the AMPMQ. The questions were asked before the consultation. Mr. Dupuis did not agree with the result indicating that most members of "C" Division wanted a single, national grouping appropriate for collective bargaining, as the survey process was not legitimate.

69 As for his appearances before House of Commons and Senate committees about Bill C-7, Mr. Dupuis acknowledged that s. 238.14 was already included in the first draft of Bill C-7 and that he knew as much as of his appearances, which he considered important and for which he had prepared. He also acknowledged that at his appearances, he made no comments about s. 238.14 and that he did not submit any documents to the committees about it.

70 When he was asked whether the AMPMQ's priority is to be a regional bargaining unit for Quebec, Mr. Dupuis replied that it wants to represent regular members in Quebec but not necessarily that the AMPMQ does not want to represent francophone members outside Quebec.

71 Mr. Dupuis stated that the AMPMQ wanted to join other RCMP member associations, including the MPAO and the association in British Columbia. At that time, one unit was emerging between the associations, but something needed to be negotiated.

72 In cross-examination by the NPF, when it was put to Mr. Dupuis that he had suggested that members needed to be better informed to provide meaningful answers to the survey, he replied that within the RCMP, anti-union sentiment came from management. When the members were surveyed, they were uncertain as to what unionization consisted of.

73 Mr. Dupuis emphasized that AMPMQ members were told that it was an employer survey and that the employer was anti-union. The AMPMQ did not suggest boycotting the survey but told members that it was suspect and that it was up to each of them to decide whether to participate. The AMPMQ did not take steps to inform its members of its preferred answers to the survey; it did not attempt to influence their answers. Mr. Dupuis said that the AMPMQ took no steps to tell the members how to respond but that it would challenge the survey.

74 When he was asked how the AMPMQ would challenge the survey, Mr. Dupuis said that it did not endorse the survey. The AMPMQ did not challenge its validity or write to the RCMP that it was inappropriate. Since the RCMP knew that the AMPMQ did not endorse it, there was no use in writing. Mr. Dupuis stated that the RCMP knew that the AMPMQ did not endorse the survey because for over 40 years, the AMPMQ had contested several issues. When he was asked whether the AMPMQ had ever provided a survey to its members, Mr. Dupuis replied that they

know the AMPMQ and that they respect its philosophy. He added that people either respect that philosophy or do not respect it.

3. Serge Bilodeau

75 Mr. Bilodeau, who holds a bachelor of science in human resources administration, joined the RCMP in 2004. He was posted to "C" Division, in the economic crimes section, i.e., fraud and counterfeiting, until 2015. From 2015 to 2017, he was assigned to intelligence. He was promoted to the rank of corporal in 2017. Beginning in July 2017, he was assigned to planning the G7 conference held in Quebec City in 2018 and, since September 2018, he had been with the major fraud section. Throughout his career, Mr. Bilodeau has worked at "C" Division. Before joining the RCMP, he was a high-school teacher and a union representative at the school.

76 During his RCMP training, Mr. Bilodeau was part of the only francophone troop of 39 troops. The material provided to the francophones was not appropriate. During tests, he requested the English version to better understand it, despite his poor English skills. For example, in applied police sciences, anglophones were provided with *Martin's Criminal Code*, while the bilingual *Criminal Code* provided to francophones did not contain the same jurisprudence as *Martin's Criminal Code*. As the tests focused on that code, the francophones needed more time.

77 Mr. Bilodeau became an AMPMQ member while Mr. Dupuis was president. He was elected as a director and became secretary to the executive. When Mr. Dupuis retired, he was elected president.

78 As for the context of the AMPMQ filing its certification application on April 5, 2017, Mr. Bilodeau stated that following the Supreme Court of Canada's decision in *MPAO* and the parliamentary committees reviewing Bill C-7, the AMPMQ contacted the other two associations with the view of working together to submit a joint application. The AMPMQ met with the NPF in August 2017 and unsuccessfully tried to include the Mounted Police Professional Association of Canada (MPPAC). The AMPMQ sought representation for francophone members because no other one could represent them as well as it did.

79 Given that the bill had not been passed, the AMPMQ decided to proceed with the existing law, the *PSLRA*. The AMPMQ filed a certification application only for Quebec members, as that made it easier to meet the criteria of that Act. On April 18, 2017, the NPF filed a certification application for all RCMP members in Canada.

80 Mr. Bilodeau stated that in its certification application, the AMPMQ noted the geographic area and the French language as the first language of work. As for the community of interest, the application indicated that because they enforce only federal laws, "C" Division's members have a different community of interest than do members in other provinces, who enforce provincial and local laws.

81 Mr. Bilodeau affirmed that AMPMQ members continue to trust their representatives. As for the AMPMQ's intention to have regional representation, Mr. Bilodeau stated that it was evolving. He believed that with the other associations, the 40% threshold could have been reached. The AMPMQ wanted representation on the Executive Committee, to have a right to speak without a veto right, and a place on the Bargaining Committee.

82 When he was asked why the AMPMQ did not claim a bargaining unit for Quebec before Bill C-7 was passed, Mr. Bilodeau replied that it had focused on what would be excluded from an eventual collective agreement, as it wanted real bargaining power. As the passing of the bill was retroactive, it rendered the AMPMQ's certification application void.

83 Mr. Bilodeau emphasized the registration of a consultant lobbyist from the Legal Fund on May 10, 2017, with respect to Bills C-4 and C-7.

84 Mr. Bilodeau stated that the 800 RCMP members in "C" Division have a different culture, language, and structure. According to him, since he joined the RCMP in 2004, more major events were held in Quebec than in the other divisions. Moreover, the members perform border surveillance. In terms of the structure of investigations in

Quebec as compared to the other provinces, Mr. Bilodeau stated that members of "C" Division and "O" Division enforce federal laws and use different techniques than are used in other provinces, where members enforce municipal and provincial laws.

85 Under cross-examination by the employer, Mr. Bilodeau confirmed that all the documents in Exhibit A-14 were published on the AMPMQ's website. They included the following: a press release dated April 4, 2017, and entitled, "Quebec's RCMP officers file a request to unionize its 800 members"; a letter to AMPMQ members on April 4, 2017, which he signed as president; a message to RCMP officers across Canada that he signed; and a letter to AMPMQ members on May 1, 2018, that he and the AMPMQ's acting vice-president and treasurer both signed.

86 The April 4, 2017, press release announced that the AMPMQ had filed a certification application for the members it represented in Quebec. It quoted Mr. Bilodeau as saying that it would have been preferable had the other two associations (the MPPAC and NPF) filed a single certification application with the AMPMQ, as its efforts to unify had been in vain. Mr. Bilodeau testified that he mentioned that because the other associations did not want to recognize the particularities of "C" Division members.

87 In his letter to AMPMQ members of April 4, 2017, Mr. Bilodeau mentioned the certification application and the efforts to unite the associations, including the AMPMQ's requests to the other associations. The letter mentioned the discussions that had taken place with the other associations in the form of mediation for reconciliation.

88 In his letter to AMPMQ members dated May 1, 2018, Mr. Bilodeau advised them among other things of the progress of events, of the AMPMQ's requests to the NPF, and of the difficulties encountered with the NPF to ensure respect for the particularities of "C" Division members. The letter indicated that the NPF had not responded to the AMPMQ's offer of October 31, 2017, during mediation and included the following sentence: "[translation] Our application to challenge the constitutional validity is simply the result of the NPF's lack of will to discuss and to get along."

89 The employer then questioned the AMPMQ's claim that one of the particularities of "C" Division is a specialization in planning major events. Mr. Bilodeau stated that it is impossible to know what constitutes a major event without regularly participating in planning them. He was referred to an exhibit indicating the deployment of regular members to the following planned events: the 2010 Vancouver Olympics, the G8/G20 Summit in Toronto in 2010, the North American Leaders Summit in Ottawa in 2016, and the G7 Summit in Quebec in 2018. Mr. Bilodeau acknowledged that major events were held in locations other than on "C" Division territory and that members from all divisions were assigned to those events. According to him, the members of the federal police are assigned first to those deployments.

90 Mr. Bilodeau confirmed that regular members of "C" Division are not automatically members of the AMPMQ, as they must contribute to become members. When he was asked whether in "C" Division, some regular members are members of other associations, he stated that he knew of two.

91 In cross-examination by the NPF, Mr. Bilodeau was referred to the document indicating the registration on May 10, 2017, of a consultant lobbyist on behalf of the Legal Fund for among other things, monitoring Bills C-7 and C-4. When he was questioned as to whether he was asking the Board to draw a conclusion from the document that the Government of Canada was lobbied to present Bill C-7 to prevent the AMPMQ's certification application, Mr. Bilodeau replied that he had said that the lobbying registration was to promote Bills C-7 and C-4. The date of registration was 14 or 15 months after the bills were tabled but less than one month after the AMPMQ filed its certification application. He also said that the registration corresponded to when the AMPMQ was in discussions with the NPF. He was unaware as to whether lobbying took place, as his only reference was the registration form and its date.

B. For the employer

1. Stephen White

92 Mr. White has been the RCMP's deputy commissioner and associate chief human resources officer since 2016. He joined the RCMP in 1986 and has had a varied career in both national and international policing services. In May 2008, he was appointed the RCMP's director general of financial crime. From 2011 to 2016, he was the commanding officer of "O" Division for all RCMP activities in the province of Ontario. The mandate excludes the National Capital Region, which is covered by the National Division.

93 As associate chief human resources officer, he is responsible for the national oversight of all human resources (HR) activities in Canada. The RCMP as an organization has 30 000 employees, of which approximately 19 000 are regular members and 11 000 are civilian employees.

94 The RCMP offers contractual policing services in 150 municipalities as well as in 8 provinces, the 3 territories, and in many indigenous communities. It offers federal policing services in all of Canada. In Ontario and Quebec, it offers only federal policing.

95 Mr. White's entire career with the RCMP has been in federal policing, including in "C" Division. The federal policing mandate includes, according to the RCMP's *Departmental Results Report 2016-2017*, the following:

* *investigate drugs and organized crime, economic crime, and terrorist criminal activity*
* *enforce federal statutes*
* *secure Canada's border*
* *conduct international capacity building, liaison and peacekeeping*
* *ensure the safety of major events, state officials, dignitaries and foreign missions*

96 Federal policing is supported by specialized services focused on surveillance, technological crime, and aerial policing.

97 Mr. White introduced a table that shows the number of regular members and reservists in federal policing as of October 2, 2018. Out of a total of 3775 regular members and reservists, the 3 first divisions by size are "O" Division (975), "C" Division (755), and the National Division (Ottawa) (658).

98 Major operations and broad investigations require approval from Headquarters in Ottawa. Oversight is provided by the director general, whose rank is chief superintendent, to ensure consistency in operations throughout the country. Decisions can be made at the division level, but some operations require approval from Ottawa. Mr. White gave as an example an operation to trace the movement of narcotics entering Canada. Approval must be obtained from Ottawa to allow the importation of the narcotics; further coordination may be necessary if the narcotics travel through several provinces. Mr. White explained that major criminal activity is generally not confined to one province. The investigation may be led by one division, but other federal policing resources outside that division will be mobilized.

99 According to Mr. White, federal policing is the same in all divisions, but the scope of investigations may differ. Large centres, such as Montreal, Toronto, or Vancouver, lead similar investigations.

100 Mr. White was questioned about his responsibilities when he was the commanding officer of "O" Division. He answered that during that time, he was responsible for all RCMP activities in Ontario, i.e., the oversight of all investigations and operations. He was in charge of the budget and training, resourcing, and operations. His role also involved engaging with other police and government organizations.

101 In his current role of acting chief HR officer, Mr. White oversees all HR programs in the RCMP, including staffing, classification, recruitment, hiring, training, compensation (pay and benefits), and health and safety. One of the major responsibilities of the position is ensuring that HR activities are consistent throughout the country. As of April 1, 2018, the vacancy rate for contract policing was 4%, and for federal policing, 7%. Mr. White was asked if the

20% vacancy rate for "C" Division was accurate. He stated that the rate was not that high. It might be higher than 7%, but he pointed out that it was important to distinguish between what he called "permanent" and "temporary" vacancies, the first being positions that are funded but not staffed, the second being positions being held for incumbents away on extended leave, for example, due to medical reasons.

102 Mr. White stated that terms and conditions of employment, as well as pay and benefits, are established by the Treasury Board and apply everywhere in Canada.

103 Mr. White introduced a number of documents into evidence that all new recruits sign. One is a letter confirming enrollment in training at the Regina Depot; another is a cadet training agreement. The third document is entitled "Transfer Policy" and reads as follows:

> *I hereby acknowledge that the RCMP Transfer Policy has been explained to me. I fully understand that upon successful completion of the Cadet Training Program and subsequent engagement into the RCMP as a regular member that I will be posted to a detachment or unit to suit the needs of the RCMP. This posting can be anywhere in Canada. I further understand that any personal situations known to me prior to engagement as a regular member may not be considered for Human Resources management purposes during my subsequent employment with the RCMP.*
>
> *I agree to accept this policy as a condition of employment.*

104 Mr. White discussed the third chapter of the RCMP's career management manual, which deals with transfers and deployments. He affirmed that when new recruits who have finished their depot training are posted, their preferences are considered. This is confirmed by sections 3.2 and 3.3 of the chapter on transfers and deployments, which read as follows:

> *3.2 In the lateral planning process, although the member's personal circumstances and aspirations will be considered, the organizational needs of the RCMP take precedence.*
>
> *3.3 Before a transfer is ordered, the members affected*
>
> *will be consulted and their views will be recorded ...*

105 In addition, the acquisition of the second official language will be considered in the case of newly hired regular members. Section 11.1 in the same chapter reads as follows:

> *11.1 A newly engaged RM will not be ordered transferred to a locale where his/her first official language is not in general use, unless the member has been deemed functional in his/her second official language.*

106 Mr. White explained a chart of promotions and transfers for fiscal years 2016-2017 and 2017-2018 that shows the mobility of regular members transferring into or out of "C" Division (whether via promotion or lateral transfer). The table is current to October 3, 2018. There were 51 transfers in 2016-2017 and 59 in 2017-2018 into "C" Division; there were 33 transfers in 2016-2017 and 30 in 2017-2018 out of it. Mr. White added that mobility is encouraged for regular members' career progression.

107 Another important component of regular members' work is policing major events, whether planned (G7, G8, or G20 summits, the Olympics, etc.) or unplanned (natural disasters, a sudden influx of people entering Canada, the shootings in Moncton, etc.). All divisions contribute the services of their regular members to such endeavours. Members may volunteer, and if necessary, may be deployed. Mr. White agreed that "C" Division has considerable experience in major-event planning but added that this was also true of "O" Division (Ontario) and "E" Division (British Columbia) as they also regularly organize major events.

108 On the topic of bilingualism in the RCMP, Mr. White acknowledged that the Treasury Board's *Directive on Official Languages for People Management* applies to the RCMP. It deals with the linguistic identification of positions in the federal public service, which can fall into one of the following four categories: English Essential (duties require the use of English, and the position is considered unilingual English), French Essential, Bilingual

(duties require the use of both official languages; a bilingual position), and Either/Or (the incumbent may choose to work in the official language of his or her choice).

109 Mr. White introduced a table into evidence showing the number of bilingual offices or detachments in Canada. The numbers show a distribution throughout Canada as follows:

Division	Bilingual offices or detachments
B - Newfoundland and Labrador	8
C - Quebec	16
D - Manitoba	19
E - British Columbia	36
F - Saskatchewan	13
G - Northwest Territories	4
H - Nova Scotia	26
J - New Brunswick	35
K - Alberta	28
L - Prince Edward Island	3
M - Yukon	3
National - Ottawa	7
NHQ - Ottawa	2
O - Ontario	20
T - Depot	1
V - Nunavut	1

110 In October 2018, the Government of Canada announced amendments to the *Official Languages Regulations*. Among other changes, according to Mr. White, are some that will modify the way the RCMP delivers services to the Canadian population. While the former regulations provided that service in the second official language in a given community depended on the size and the percentage of people in a minority situation in terms of official languages, other factors will now be considered. For example, travellers on the Trans-Canada Highway will be entitled to service from the RCMP in the official language of their choice, irrespective of the language of the surrounding communities. This will mean an increase in the number of bilingual detachments and regular members.

111 According to the RCMP's data, as of July 4, 2018, 2831 regular members identified French as their first language. Of those, 823 were in "C" Division, which means that, as Mr. White pointed out, 70% of regular members who identify French as their first language work outside Quebec.

112 In cross-examination, Mr. White testified that to his knowledge, there were no unilingual French positions in Quebec for regular members. In the past, there might have been some in some detachments in Quebec, but no longer.

113 When he was asked if French is a language of work in detachments outside Quebec, Mr. White replied that it is highly probable in New Brunswick. He is aware of detachments in Ontario such as Cornwall that are designated bilingual and where it is common to hear French spoken at work.

114 Mr. White testified that communication through the RCMP's intranet was done in both official languages in all divisions.

2. Claude Castonguay

115 Since October 2016, Mr. Castonguay has been the criminal operations officer (CROPS) for Quebec at the rank of chief superintendent. In his 30-year career, he has worked in both contract policing in British Columbia (1990 to 1997 and 2005 to 2010) and in federal policing in "C" Division (1997 to 2005 and 2010 to 2016).

116 As the CROPS, he is responsible for criminal investigations in Quebec, which includes six main programs: organized crime, national security, financial integrity, the border area, criminal intelligence, and technological support for investigations. Superintendents manage those programs and report to Mr. Castonguay. The superintendents oversee teams led by inspectors. Most members of "C" Division report to Mr. Castonguay through superintendents, with the exception of the dignitary protection sector and HR administration, who report to the commanding officer of the Division, to whom Mr. Castonguay reports directly.

117 The priorities for the CROPS in Quebec are established based on a document entitled "2017-2020 Strategic Plan for Federal Policing". According to Mr. Castonguay, the work is organized in the same way as in "O" Division. The sectors are the same, with the only difference being the number of members. In the other provinces, there are not necessarily the same federal policing sectors, depending on the size of the division. The Prince Edward Island division does not have the six sectors but does more overall work. "E" Division (British Columbia) and "K" Division (Alberta), which are larger, have federal policing structures similar to "O" and "C" divisions. In terms of criminal investigations, federal policing is primarily present in large cities where there is more organized crime, such as Montreal, Toronto, and Vancouver.

118 The strategic plan focuses on priority issues, identified as follows:

* *Money laundering/terrorist financing*
* *Illegal migration/human smuggling*
* *Terrorist suspects*
* *Cybercrime*
* *Market enforcement teams*
* *Opioids*
* *Outlaw motorcycle gangs*
* *G7 security*

119 The Strategic Plan is established at Headquarters (HQ) in Ottawa, under the direction of Gilles Michaud, Deputy Commissioner, Federal Policing. HQ establishes priorities and the ranking of investigations. Investigations are assessed based on a number of factors and are assigned a rating. Once the assessment is complete, those deemed less important are not undertaken due to a lack of resources.

120 In terms of national security, Mr. Castonguay explained how an investigation could be conducted. Intelligence comes from the field, Montreal for example, but because national security falls under HQ's governance, approval to begin an investigation must come from Ottawa. The operational plan is developed in Montreal and then approved by HQ, i.e., by the chief superintendent and the director general of national security in terms of federal policing.

121 According to Mr. Castonguay, "C" Division has only limited autonomy in investigation projects. There is some flexibility as to targets or as to how to investigate, but everything is reported to HQ, which must approve the conduct of the investigation.

122 Criminal investigation work involves frequent collaboration with other divisions, whether it be the entry of illegal products into the ports of Halifax or St. John's or criminal networks located in Montreal and Toronto.

123 Mr. Castonguay gave the example of a recent investigation in which electronic surveillance allowed targeting a criminal plan to import fentanyl. HQ approved the investigation, which was deemed a priority. Electronic surveillance was set up of targets in Halifax, where the fentanyl was to arrive, and in Montreal, which was the final destination. Ottawa coordinated the investigation, along with two lead investigators, one in Montreal and the other in Halifax, who oversaw 30 investigators in "C" Division and 20 investigators in "H" Division (Nova Scotia).

124 Given the national security role of federal policing, it must maintain relations with several other partners in Canada (the Canadian Security Intelligence Service, the Canada Revenue Agency, the Canada Border Services Agency, etc.) and abroad (the Drug Enforcement Agency, the Homeland Security Agency, and the US Border Patrol in the United States, as well as police services in other countries) with whom the language of communication is generally in English (apart from francophone countries). In addition to state partners, the federal police also maintains relationships with private partners, such as Facebook, telecommunications companies, and banks.

125 Mr. Castonguay stated that the language of work in "C" Division is primarily French. English is spoken as well, more or less, depending on the detachment. There are no unilingual French positions for regular members. In Quebec, all positions are bilingual. Given the duties of federal policing, a regular member cannot function solely in French. It does not offer local policing services as in other provinces (except Ontario). The RCMP's mandate in Quebec is federal policing, with everything that it involves in terms of coordinating with neighbouring Canadian and American jurisdictions.

126 International events that require an RCMP presence are planned at HQ in Ottawa, which determines staffing needs. In a case such as the G7 Summit in Charlevoix in 2018, a team from Ottawa coordinated with a team on-site from "C" Division. Planning and logistics were shared.

127 Mr. Castonguay was questioned about "C" Division's expertise in counterfeiting and bankruptcy. He replied that it no longer handles those areas. However, it is the only division that has a team fully dedicated to the proceeds of crime. In other divisions, this work is part of the organized crime sector.

3. Dennis Duggan

128 Mr. Duggan works for the Treasury Board Secretariat as a senior labour relations consultant. He has been with the Treasury Board since 1980, working as a negotiator, a policy coordinator for separate employers, and a senior policy analyst. He has negotiated with several different bargaining agents.

129 At the hearing, Mr. Duggan was shown several collective agreements that he negotiated on behalf of the Treasury Board. The first one was between the Treasury Board and the Public Service Alliance of Canada (PSAC) with an expiry date of August 4, 2000, for the Operational Services group. Annex A shows the hourly rates of pay for the Hospital Services group; they varied from one region to another, as indicated by a grid. The regions are Atlantic, Quebec, Ontario, Manitoba, Saskatchewan, Alberta with Nunavut and the Northwest Territories, and British Columbia with the Yukon.

130 The second collective agreement, with an expiry date of August 4, 2018, covered the same group. In this one, the regional rates of pay were eliminated. Mr. Duggan explained that they had been included in the past to compete with the private sector and that they were remnants of a time predating collective bargaining. The parties to that particular agreement felt that they were no longer needed.

131 However, different work conditions may be negotiated for subgroups, and an example is given at Annex D, "... applicable to Pasture Managers, Pasture Riders and Range Riders", at Annex E, "... applicable to Lockmasters, Bridgemasters and Canalmen", and at Annex I, "... applicable to employees of the Department of Fisheries and Oceans Sea Lamprey Control Unit". Mr. Duggan explained that given the diversity of functions in the operational group, it is necessary to provide some flexibility to take that diversity into account.

132 Those same comments were made about to the collective agreement covering Technical Services, in which the appendices are generally memorandums of agreement to cover the different groups' particularities. Another example presented was a collective agreement with the Professional Institute of the Public Service of Canada covering Health Services (expiry date: September 30, 2018), in which regional rates of pay appear again, this time in response to retention issues, according to Mr. Duggan. The same holds true for the collective agreement between the Treasury Board and the Association of Justice Counsel for the Law group, in which a different rate of pay was negotiated for lawyers in Toronto, again for retention purposes.

133 As a senior labour relations consultant, Mr. Duggan was involved in developing Bill C-43, the legislative response to the Ontario Superior Court of Justice's decision that found the labour relations regime in the RCMP unconstitutional (see *Mounted Police Association of Ontario v. Canada (Attorney General)*, *2009 CanLII 15149*, *96 OR (3d) 20* (ON SC)). The bill was introduced sometime in 2010 and died on the order paper. It already contained the clause being challenged before the Board, mandating a single bargaining unit for regular members.

134 Mr. Duggan was also involved in the development of Bill C-7, which became the Act enacted on June 19, 2017, creating the new RCMP labour relations regime. This time, the bill was designed to respond to the final court decision on the matter, the Supreme Court of Canada's 2015 *MPAO* decision. It followed a report written by Alain Jolicoeur, the then-chair of the Pay Council, who conducted research to gather the views of the RCMP's regular members about the regime that should replace the one that the Supreme Court had declared unconstitutional. The research was carried out by means of a survey and by holding town-hall meetings across the country. The meetings were held after the survey was conducted, to better inform the members and to gather their specific comments.

135 Daphne Taras, Dean of the School of Business at the University of Saskatchewan, developed the survey in collaboration with Mr. Jolicoeur. As was pointed out in cross-examination, she has written extensively on non-unionized labour systems.

136 The survey was administered in July and August 2015. All regular members were invited to participate. The survey centre sent invitations to 17 366 active regular members as well as 1140 letters to members on leave. The participation rate was approximately 50%. Two questions were designed to determine to what extent the regular members favoured a single bargaining unit.

137 Question 4 was worded as follows (number of responses and percentage follow; the percentage is based on the number of people who answered the question):

> *Which of the following answers best reflects your preference for a grouping of members that is appropriate for collective bargaining?*
>
> * *A single, national grouping that is consistent with the RCMP's (Royal Canadian Mounted Police) unique situation as a national police organization* (5277, 62%)
> * *A number of different RCMP (Royal Canadian Mounted Police) groupings, perhaps divided by province or region* (2862, 34%)
> * *Don't know* (403, 5%)
>
> *Total* (8542, 100%)

138 Question 7 was used to validate question 4, a normal device in a survey, according to Mr. Duggan. It read as follows:

How important is it to you that the grouping of RCMP (Royal Canadian Mounted Police) members that is appropriate for collective bargaining is a single, national unit?

* *Not important* (617, 7%)
* *A bit* (408, 5%)
* *Somewhat* (1553, 19%)
* *A lot* (2010, 24%)
* Very important (3518, 42%)
* *Don't know* (289, 3%)
* *Total* (8395, 100%)

139 A breakdown of the responses to question 4 by region shows that support for a single bargaining unit was lower in Quebec and British Columbia than in the rest of the country, although it was still the majority view. While in other regions support for the single bargaining unit varied from 61 to 81%, in Quebec it was 54%, and in British Columbia, 53%.

140 As was pointed out in cross-examination, Question 7 is somewhat ambiguous and could be interpreted as not necessarily meaning support for a single bargaining unit but rather a concern. The percentage in Quebec who considered it "a lot" or "very important" is 66%, and in British Columbia, 57%. The validity of that question is unclear.

141 Bill C-7 was first introduced on March 9, 2016. The Senate passed it, with amendments, on June 21, 2016. Mr. Duggan was asked why the Senate's amendments were considered only on May 12, 2017, and whether it was related to the AMPMQ's certification application before the Board. He replied that to his knowledge, it was unrelated to the certification application. Rather, it was the process of Parliamentary bills; Parliament rose for the summer of 2016, and it took until May 2017 for the House of Commons to incorporate the great majority of the Senate's proposed amendments.

142 Mr. Duggan was questioned as to why s. 238.05 was added to Bill C-7. It gives specific direction to the Board in applying the *Act* to regular RCMP members and reservists. It reads as follows:

> ***238.05*** *In administering this Act and in exercising the powers and performing the duties and functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, with regulations made under it or with decisions made in respect of a matter coming before the Board, the Board must, in matters concerning RCMP members and reservists, take into account the unique role of the Royal Canadian Mounted Police as a police organization in protecting public safety and national security and its need to deploy its members and reservists as it sees fit.*

143 Mr. Duggan answered that the RCMP is the only police operation within the core public administration and that it was important to give direction to the Board to take into account the force's operational nature. Deployment, for example, cannot require the employee's consent, as it does for all other public servants.

144 Mr. Duggan was also questioned as to why the legislator chose to include s. 238.14, at issue in this case, instead of leaving it to the Board's discretion, as provided in s. 57 of the *Act*, to decide the appropriate bargaining unit or units for the RCMP's regular members and reservists.

145 Mr. Duggan answered that that option was chosen both to respect the Supreme Court's decision and to maintain effectiveness in administering the RCMP labour relations regime. He added that the collective bargaining of several bargaining units representing groups performing the same work could create internal morale issues that could jeopardize the RCMP's effectiveness.

146 Mr. Duggan mentioned as an example of a single bargaining unit the Canadian Coast Guard, which has offices in Quebec where the workplace language is French. It does not have a specific bargaining unit for Quebec.

147 Mr. Duggan was asked whether the government had taken into account the results of the survey to draft s. 238.14. He answered that the government was interested in the RCMP members' perceptions but that it had drafted the section with a view to addressing a unique organization's situation.

148 Mr. Duggan testified that he has negotiated with both large and small bargaining agents as a Treasury Board representative. The largest bargaining agent is the PSAC, which represents from 60% to 70% of core public administration employees. When he was asked whether the PSAC set the agreements for the smaller bargaining units, Mr. Duggan replied that the smaller units made their own assessments of terms and conditions, but he conceded that it would be difficult for smaller units to obtain more than what the larger units obtained, as the Treasury Board, which negotiated with all of them, would not want to undermine its position. For different terms to be negotiated, the bargaining agents have to clearly differentiate the circumstances, which would be rare.

149 Mr. Duggan also testified to the trend to an increase in the size of bargaining units and a corresponding decrease in their number between the 1970s and the 2000s, which made for a more efficient bargaining process.

III. Summary of the arguments

A. For the AMPMQ

150 According to the AMPMQ, the following two questions must be answered:

a. Does s. 238.14 infringe the AMPMQ's constitutional right to associate?

b. If so, is the infringement justifiable under s. 1 of the *Canadian Charter of Human Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11("the *Charter*")?

1. Does s. 238.14 of the *Act* infringe the AMPMQ's constitutional right to associate?

151 The AMPMQ argues that the Board should declare s. 238.14 inoperative because it infringes the freedom of association of "C" Division members.

152 According to the AMPMQ, the main objective of the constitutional freedom of association is to give the right to demand working conditions to a group whose members would not have that power individually.

153 The AMPMQ cites the decision in *MPAO* to identify what constitutes the constitutional right to associate and its components (see paragraph 29 of the AMPMQ'S written submissions):

> [Translation]
>
> *According to the Supreme Court of Canada, the cumulative elements of the constitutional right to associate are thus as follows:*
>
> i. *the right to choose and form a group with common goals or demands;*
>
> ii. *The right to make collective demands or defend rights, including the right to bargain collectively;*
>
> iii. *The right, in forming an association, to be on equal ground with the employer;*
>
> iv. *The possibility of association chosen for real accountability with respect to demands made to the employer.*

154 The Supreme Court of Canada, particularly in *Health Services and Support - Facilities Subsector Bargaining*

Assn. v. British Columbia, 2007 SCC 27 ("*B.C. Health Services*"), and *Ontario(Attorney General) v.Fraser*, 2011 SCC 20, has developed the concept of "substantial interference" with the right to bargain collectively as the standard for determining whether s. 2(d) of the *Charter* has been infringed. In particular, the AMPMQ cites paragraph 19 of *B.C. Health Services*, as follows:

> *19. At issue in the present appeal is whether the guarantee of freedom of association in s. 2(d) of the Charter protects collective bargaining rights. We conclude that s. 2(d) of the Charter protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the Charter ....*

155 The AMPMQ asserts that one of the fundamental aspects of the freedom of association is freedom of choice. In particular, it relies on a decision by the Court of Appeal of Quebec in *Syndicat des employées et employés professionnels-les et de bureau, section locale 574 (SEPB) CTC-FTQ c. Association syndicale des employés(es) de production et de services (ASEPS)*, 2017 QCCA 737 ("*Renaud-Bray*"; application for leave to appeal dismissed in [2017] S.C.C.A. No. 280 (QL)).

156 *Renaud-Bray* involved a certification application by ASEPS before the Commission des relations du travail (CRT; now named the Tribunal administratif du travail (TAT)) for a bargaining unit made up of nine employees at a Renaud-Bray bookstore in Victoriaville. The SEPB had the certification for all Renaud-Bray stores in Quebec, including in Victoriaville, but the employees were not satisfied with the representation it offered, as they were included in a single bargaining unit and had the impression that the SEPB did not consider their concerns, due to the small number of employees compared to all the other stores concentrated in the metropolitan Montreal area.

157 The CRT viewed the ASEPS' certification application as a request to split a bargaining unit and dismissed the application, finding that there were insufficient grounds to justify reversing the presumption in favour of maintaining an existing bargaining unit. At trial, the Superior Court of Quebec allowed the application for judicial review and certified ASEPS as the bargaining agent for the unit of employees in Victoriaville. The Court of Appeal of Quebec, in a majority ruling, allowed the appeal in part, finding unreasonable the CRT's decision to consider the certification application as a request to split (the burden of proof being much higher in the latter case) but returned the case to the TAT to reassess the certification application.

158 The Court of Appeal of Quebec reached a split decision. Justice Gagnon, in dissent, would have restored the CRT's decision and refused the certification of ASEPS. According to the judge, the choice of representation upheld by the SCC in *MPAO* does not necessarily mean the choice of a specific bargaining agent.

159 Justice Mainville, writing for the majority, found that the concept of choice requires that employees be consulted about who will represent them. It was clear to him that the unit made up of the nine employees had the right to determine its representation.

160 In his reasoning, Justice Mainville relied on the decision in *MPAO*, as had the trial judge. He cited the Supreme Court's conclusion at paragraph 104 of his decision, in that "[translation] ... the *Charter* guarantee of freedom of association protects the existence of a meaningful collective bargaining process that provides employees with a freedom of choice and an independence sufficient to enable them to determine and defend their collective interests."

161 Justice Mainville conceded that freedom of choice does not mean that every association can be recognized; he recognized that the labour relations model "... imposes restrictions on individual rights to pursue collective goals" (*MPAO*, at para. 98).

162 The argument in *Renaud-Bray* is that an analysis based on the criteria for division constitutes substantial

interference in the freedom of employees to join the association of their choice. Justice Mainville brings up that the will of the employees is fundamental to the certification process, which the AMPMQ insists on in its arguments.

163 The AMPMQ emphasizes that in *MPAO*, the Supreme Court stated that employees' freedom of choice is inherent in the nature and purpose of collective bargaining (at paragraph 39 of the AMPMQ's arguments). It cites paragraph 86 of *MPAO* to list the following components of freedom of choice:

> *[86] Hallmarks of employee choice in this context include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations.*

164 The AMPMQ asserts that freedom of association is such that the government cannot substantially interfere with employees' freedom to choose their exclusive bargaining agent, citing paragraph 98 of the decision, the first part of which reads as follows:

> *[98] The respondent argues that this view of s. 2(d) would require an employer, even a government employer, to recognize and bargain with every association chosen by employees, whatever the size. In our view, this result does not follow. Freedom of association requires, among other things, that no government process can substantially interfere with the autonomy of employees in creating or joining associations of their own choosing, even if in so doing they displace an existing association....*

165 The AMPMQ recognizes that there can be limitations on the freedom to choose in a certification system; however, there are restrictions on those limitations, as indicated in the Court of Appeal of Quebec's decision in*Syndicat des juristes du secteur municipal (CSQ) c. Alliance des professionnels et professionnelles de la Ville de Québec*, 2017 QCCA 736, issued on the same day as *Renaud-Bray*, from which the AMPMQ cites the following passage:

> [Translation]
>
> *[81] In Renaud-Bray, I stated that limitations on employees' freedom of choice of the bargaining units to which they belong are inevitable in a Wagner Act labour relations regime. That being the case, if limitations on the right to freedom of association are inevitable under such a regime, the nature and the scope of those limitations must limit the employees' freedom of association only to a justified and proportionate level that allows the labour relations regime to function adequately. A limitation on the right to freedom of association that does not meet that criterion is immediately suspect from a constitutional perspective.*

166 In support of its arguments, the AMPMQ cites the fact that other administrative tribunals, in the spirt of *MPAO*, follow suit in highlighting the importance of employees' choice of a bargaining agent. In particular, it cites *Unifor v. Enbridge Pipelines Inc.*, 2018 CIRB 871.

167 In that decision, the CIRB certified Unifor for a bargaining unit consisting of 17 people assigned to pipeline maintenance for the St. Lawrence region. The employer asserted that the unit appropriate for bargaining was made up of 62 people, including employees responsible for the maintenance of two other pipelines in the Eastern region. The CIRB found that the unit of 17 people was appropriate for bargaining, despite the employer's operational preferences. (Comment from the Board: curiously, this decision refers to freedom of association within the meaning of *MPAO*, but at the same time, the CIRB dismisses the objections of Belleville employees, who were in the minority and who disagreed with the definition of the bargaining unit, on the grounds that the employees were not part of a certification application.)

168 The AMPMQ also cites the decision in *Syndicat des inspecteurs du RTM - CSN et Unifor*, 2018 QCTAT 3310, in which the issue was the certification of employees in the context of transforming the Réseau de transport métropolitain, noting the following passage:

> [Translation]
>
> *[87] That said, with due respect, the Supreme Court's statement* [the model using a designated bargaining agent (see, for example, the *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5) offers another example of a scheme that could be acceptable] *must not be seen as authorization to infinitely mix things up*

> *without the right to associate being brought into question. It is very possible that a contextual analysis of a bargaining regime in which the bargaining agent is designated could lead to a conclusion that freedom of choice and independence with respect to the employer are enough to respect the requirements of the right to associate. This does not mean that freedom to choose the bargaining agent is not protected by the right to associate. The exercise of choosing a bargaining agent will be measured by a contextual analysis of the existing process.*

169 The AMPMQ submits that "C" Division members constitute a distinct and homogenous group that has expressed its wish to associate with the AMPMQ. It also claims that "C" Division is a distinct group that has administrative and functional particularities. Notably, "C" Division is distinct because it does not include a contract policing component, unlike the rest of the country (other than Ontario). "C" Division is also distinct due to its linguistic reality.

170 "C" Division is also distinct, again according to the AMPMQ, due to its more demanding nature in terms of labour law, as Mr. Delisle and Mr. Dupuis testified. "C" Division was the only one to vote against the SRRP in 1974. Mr. Delisle led the fight in the 1990s to recognize the right of RCMP members to unionize, a right that was finally recognized in *MPAO*.

171 Finally, The AMPMQ submits that "C" Division has distinct demands, particularly about the number of vacant positions in Quebec, the recognition of specific expertise at "C" Division, and the defence of French within the RCMP.

2. If there is an infringement, is it justifiable under s. 1 of the *Charter*?

172 The AMPMQ submits that there is an infringement that cannot be justified under s. 1 of the *Charter*. It reiterates the analysis set out in *R. v. Oakes*, *[1986] 1 S.C.R. 103*.

173 Under the first section of the *Charter*, a right or freedom guaranteed under it can be limited only by a rule of law that can be demonstrably justified in a free and democratic society. *Oakes* sets out two criteria to apply: the purpose of the restriction must be related to a substantial and pressing concern, and the restriction must be reasonable. Reasonableness is measured using three criteria: the restriction must have a rational connection to the intended purpose, it must interfere with the freedom or right in question as little as possible, and there must be proportionality between the effects of the limiting measure and the desired objective, such that the benefits outweigh the deleterious effect. According to the AMPMQ, s. 238.14 of the *Act* fails that analysis.

174 First, there is no substantial and pressing objective. The Attorney General of Canada referred to the benefit of efficiency in having a single bargaining unit. It could have made the same arguments had the Board retained the discretion to determine the appropriate bargaining unit. The importance of the objective can be doubted, as the legislator took more than two years to enact it (from *MPAO* in January 2015 to the enactment of the bill on June 19, 2017). Instead, it seems that the objective of the legislator, which is confused with the employer, was to avoid having a separate unit represented by the AMPMQ, with which the employer has long had a conflictual relationship.

175 If as it claims, the government's objective is to foster better labour relations, then there is no logical relationship between that objective and the action taken, as it only increases the tensions between the francophone and anglophone groups by imposing a single unit and a single bargaining agent. Denying a right of association is not consistent with labour peace; it is much to the contrary. The AMPMQ referred to the words of Justice Cory, who dissented in *Delisle v. Canada (Deputy Attorney General)*, *[1999] 2 S.C.R. 989*, and wrote that although it can be assumed that precluding RCMP members from unionizing will prevent labour strife, the opposite conclusion is just as reasonable.

176 Imposing a single bargaining unit is not a minimal interference with freedom of association. The employer could have raised its point of view before the Board if it was convinced that its solution was preferable. By

legislating, the legislator deprived "C" Division members of the possibility of creating the association of their choice to bargain collectively, which is the very essence of the right protected by s. 2(d).

177 In *B.C. Health Services*, the Supreme Court referred to the lack of consultation as a factor that can be considered in studying minimal interference (at paragraph 157). In the case at hand, the affected parties were not consulted, i.e., the three associations that were successful in *MPAO*. The government simply relied on a survey by experts in non-unionized workplaces and a bogus consultation conducted by an employer representative.

178 The interference is not minimal as it deprives "C" Division members of the possibility of truly determining their collective objectives; they are flooded by a strong majority outside Quebec. A national association that is majority anglophone cannot consider the linguistic, cultural, and functional particularities of "C" Division.

179 Finally, the prejudicial effects of s. 238.14 greatly outweigh its benefits. It tramples "C" Division's labour relations interests. No consideration is given to its linguistic reality, the fact that it has no contract policing component, unlike the rest of the country, or its members' desire to be represented by the AMPMQ, as is clearly seen in the certification application.

180 The factors reiterated in *Delisle* that would lead the Board to uphold the legislator's choice do not apply in this case. The AMPMQ cites the following passage from *Delisle*:

> *127. ... four contextual factors which would favour a more deferential approach at one or more stages of the s. 1 inquiry, namely: (1) the role of the legislature in striking a balance between the interests of competing groups, as distinct from the situation where the legislature is the "singular antagonist" of the individual whose Charter freedoms have been infringed; (2) the vulnerability of the group that the legislature seeks to protect, and that group's subjective fears and apprehension of harm; (3) the inability to measure scientifically a particular harm in question or the efficaciousness of a remedy; and (4) the low social value of the activity suppressed by the legislation.*

181 The AMPMQ concludes that s. 238.14 constitutes a total, and therefore substantial, interference with "C" Division members' constitutional right to collective bargaining and, as such, interference with freedom of association guaranteed under s. 2(d) of the *Charter*.

B. For the Treasury Board and the Attorney General of Canada

182 The employer, the Treasury Board, and the intervenor, the Attorney General of Canada, made joint submissions through the same counsel. Their interests do not diverge.

183 According to the employer, the issues are as follows: (1) Does s. 238.14 of the *Act* substantially interfere with the right of RCMP regular and reserve members to a meaningful collective bargaining process within the meaning of s. 2(d) of the *Charter*? (2) If so, is it a reasonable limitation established by a rule of law and demonstrably justified in a free and democratic society, within the meaning of s. 1 of the *Charter*?

184 The employer argues that the answer to the first question must be "no". Section 2(d) of the *Charter* protects the right to freedom of association. In the labour relations context, this provision protects the right to a meaningful collective bargaining process. The *Charter* does not protect a particular labour relations model or a specific outcome (see *MPAO*, at paras. 67, 93, 98, 137, and 193; *Fraser*, at paras. 42 and 45 to 47; and *Meredith v. Canada (Attorney General)*,2015 SCC 2 at paras. 24 and 25). Employees have the right to a meaningful collective bargaining process, not associations. Section 2(d) does not impose a process in which every association will obtain the recognition that it seeks (see *MPAO*, at paras. 67 and 68; and *Meredith*, at paras. 24 and 25).

185 To determine if there was interference in the employees' right to a meaningful collective bargaining process, one must examine whether the mechanism substantially disrupts the balance of power between employees and employer necessary for the meaningful pursuit of workplace goals. Employees need only enough of a degree of freedom of choice and independence to allow them to identify their collective goals and how to achieve them. The

analysis is contextual and varies with the industry culture and workplace in question (see *MPAO*, at paras. 67, 71, 72, 93, 137, and 140; and *Meredith*, at paras. 24 and 25).

186 The employer cited examples of the features of the degree of choice and independence mentioned in *MPAO*, including the ability to form and join a new bargaining agent, to dissolve an existing bargaining agent, to set and change the bargaining agent's internal governance structure, and to set and change collective goals related to work (see *MPAO*, at paras. 81 to 89, 92, 95, and 97 to 99).

187 According to the Supreme Court in *MPAO*, s. 2(d) of the *Charter* gives the legislator ample leeway to devise a collective bargaining regime that satisfies the RCMP's special requirements (see *MPAO*, at paras. 137 and 140).

188 The employer referred to the following examples in which the courts have determined that collective bargaining regimes other than the Wagner model can satisfy s. 2(d) of the *Charter* by guaranteeing employees an acceptable degree of freedom of choice and independence to allow for meaningful collective bargaining: a separate regime for agricultural workers that provides the right to form and join an association, to participate in its activities, to assemble, to make representations to their employers on their terms and conditions of employment, which it must consider in good faith, and the right to exercise those rights without fear of interference or retaliation (see *Fraser*); a model identifying the bargaining unit (see *Québec (Procureur général) c. Confédération des syndicats nationaux*, *2011 QCCA 1247* at para. 94; application for leave to appeal dismissed in *[2011] S.C.C.A. No. 424* (QL)); a model designating the bargaining agent (see *School Boards Collective Bargaining Act*, 2014, *S.O. 2014, c. 5*; and *MPAO*, at para. 95); a model based on majority and exclusivity (such as the Wagner model) that imposes restrictions on the rights of individuals to achieve common goals (see *MPAO*, at paras. 92, 94, and 98); a law prohibiting or limiting pay raises for a set period (see *Meredith*, at paras. 48 and 49; *Canada (Attorney General) v. Canadian Union of Public Employees, Local 675, 2016 QCCA 163* at para. 100 (application for leave to appeal dismissed in *[2016] S.C.C.A. 117* (QL); and *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, *2016 BCCA 156* at paras. 92 and 93).

189 The employer also cited examples in which the courts found substantial interference with the right to a meaningful collective bargaining process, including a model identifying a bargaining agent influenced by management (see *MPAO*), a model limiting the right to strike without providing a meaningful mechanism for resolving disputes (see *Saskatchewan Federation of Labour v. Saskatchewan*, *2015 SCC 4*), and a law invalidating collective agreement provisions and precluding any meaningful collective bargaining on certain important issues (see *B.C. Health Services*).

190 The employer submits that the *Act* gives regular members and reservists a meaningful collective bargaining process. We will come back to this in our analysis.

191 In that the employees' wishes would be a determining factor in resolving a dispute about the bargaining unit under a Wagner model, the employer argued that in this case, the desire of the majority of members is to have a single, national bargaining unit, as expressed in the survey of them. According to the employer, this would improve the members' bargaining power and would allow it to bargain with a bargaining agent that best represents the employees who are its members.

192 Alternatively, in response to the second question, the employer submits that even if s. 238.14 of the *Act* imposes a limitation under s. 2(d) of the *Charter*, the requirement of a single, national bargaining unit is a reasonable limitation demonstrably justified in a free and democratic society, in accordance with s. 1 of the *Charter*.

193 The employer cites the steps of the analysis in *Oakes*. It argues that the main objective of the requirement of a single, national bargaining unit is to ensure stability and coherence in the RCMP's unique and national operations. This includes the following objectives: instituting uniform labour conditions on a national scale, ensuring the transfer of members to meet operational needs, and minimizing the risk of labour strife. These pressing and substantial needs are related to the public's protection and the safety, as the RCMP is the only force that provides security, protection, and law enforcement services at the municipal, provincial, federal, and international levels.

194 As for the assessment of the proportionality of the means chosen to achieve the objective, the employer first suggests that there is a rational link between the requirement of a single, national unit and the main objective of ensuring stability and coherence in the RCMP on a national scale. This link is also present in the objectives of uniform labour conditions, the transfer of members, and the minimization of the risk of labour strife.

195 To establish the rational link, there simply needs to be a reasonable inference based on logic and common sense that the means adopted by the government will help achieve the objective in question (see *MPAO*, at para. 143).

196 The employer argues that the requirement of a single, national bargaining unit eliminates the risk of splitting bargaining units, which would result in differences in working conditions. Given that the RCMP's operations require that its members be mobile, uniform working conditions favour a smooth transition for members from region to region.

197 The employer submits that the interference is minimal and that requiring a single, national bargaining unit falls within the range of reasonable alternatives. This requirement corresponds to the community of interest of all members, as they receive the same training, perform the same duties, have the same pay and benefits, and can be transferred anywhere in the country.

198 The employer notes that at this stage of the analysis, the courts must defer to a certain extent to the legislator and not intervene simply because they can imagine a more appropriate and less-detrimental remedy to the problem.

199 As for the final element of the analysis, the employer argues that the measure has beneficial effects. It reiterates that a single, national unit improves the members' bargaining power and minimizes the risk of labour strife caused by different working conditions that according to it, would jeopardize the stability and coherence of its operations.

200 The employer asserts that the measure is tempered, as members can still form and join an association or group of associations and exercise all the rights set out in the *Act*. It argues that since the specific demands of Quebec members, as applicable, can be addressed through collective bargaining, the requirement of a single, national unit does not leave them without a collective voice to determine their collective goals and how to meet them. According to the employer, there is no empirical evidence to the contrary.

201 The employer submits that the requirement of a single, national unit has a limited impact on the choice of a small group of employees who prefer a provincial unit.

C. For the NPF

202 The NPF states that in *B.C. Health Services*, the Supreme Court described the right to collective bargaining under s. 2(d) of the *Charter* as a right to a process, not to a particular model and not to an outcome. The Court stated at paragraph 91 that to be constitutionally impermissible, an interference must be so substantial "... that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer."

203 The NPF submits that in *MPAO*, the Supreme Court established that the test to determine a breach of s. 2(d) of the *Charter* is substantial interference with "... the possibility of having meaningful collective negotiations on workplace matters" (*MPAO*, at para. 68). Using this test, the NPF finds that s. 238.14 does not violate s. 2(d) of the *Charter*. Alternatively, if the Board finds that s. 238.14 violates s. 2(d) of the *Charter*, it is saved by s. 1 of the *Charter*.

204 In *MPAO*, the Supreme Court declared that the purpose of s. 2(d) of the *Charter* is to improve the power

imbalance between employees and employers. It stated that the two essential elements of a meaningful collective bargaining process are choice and independence. It added that choice and independence are limited in the context of collective bargaining. On choice, the Court stated, "In our view, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association" (*MPAO*, at para. 83).

205 The NPF stated that the notion of "choice" as an element of meaningful collective bargaining does not extend to the choice of bargaining unit or even the choice of bargaining agent. In its view, choice means that the employees' representatives must be accountable to the employees, to ensure that the association works to realize the goals for which the employees joined. The NPF submits that a single, national bargaining unit has a myriad of protections for discrete groups within the larger unit.

206 The NPF submits that freedom of association is about correcting power imbalances. Requiring a single, national bargaining unit does not violate s. 2(d) of the *Charter* because it actually enhances bargaining power for RCMP members and reservists. A legislated single, national bargaining unit promotes freedom of association and facilitates the exercise of members' and reservists' constitutionally protected right to collective bargaining.

207 The NPF states that the case law recognizes that sector-based and legislated bargaining units conform with s. 2(d) of the *Charter*. Labour boards and courts, both before and after the *MPAO* decision, have determined that legislation or policies setting bargaining unit size and composition do not violate s. 2(d).

208 In addition, in *MPAO*, the Supreme Court found that the "designated bargaining model", in which the bargaining agent is determined by legislation and not by employee choice, can be constitutionally permissible as long as the freedom of choice of workplace goals is retained, along with sufficient independence from the employer (*MPAO*, at para. 95). Likewise, a majoritarian model of labour relations can be constitutionally permissible (*MPAO*, at para. 94).

209 Furthermore, s. 238.14 does not violate s. 2(d) of the *Charter* because it establishes the normal practice for police and public-sector workplaces such as the RCMP.

210 The NPF also submits that labour boards, including the FPSLREB and its predecessors, have consistently preferred larger bargaining units for both federal and provincial public-sector employees.

211 A legislated single, national bargaining unit is consistent with international legal norms. The International Labour Organization (ILO)'s 2018 report on freedom of association states that legislative determination of the appropriate bargaining unit is acceptable. The ILO has also stated that minority unions in a majoritarian system retain certain rights other than collective bargaining. The NPF submits that s. 238.14 of the *Act* does not limit RCMP members from forming and joining organizations of their choice, in addition to a certified bargaining agent, and these union organizations have the right to represent the members in workplace issues not covered by the collective agreement.

212 The NPF addresses the Quebec Court of Appeal's decision in *Renaud-Bray*, which the AMPMQ cited. The NPF submits that the FPSLREB, as a federal tribunal, is not bound by the Quebec Court of Appeal's decision. It states that the Court's focus was not on the *Charter* but instead on the finding that the decision maker relied solely on a presumption without adequately examining the facts of the case. The NPF further states that the Board declined to follow the Quebec Court of Appeal in a recent decision about determining the bargaining unit of certain RCMP civilian members (see *CUPE v. Treasury Board*, *2017 FPSLREB 36*).

213 The NPF acknowledges the evidence on the negative treatment of the AMPMQ's leadership by RCMP management and finds it inexcusable. However, the NPF does not believe that this evidence proves that Quebec members and reservists need their own bargaining unit.

214 The NPF notes that AMPMQ representatives appeared before both Senate and House of Commons

committees on the bills that included s. 238.14 and that it did not raise concerns about s. 238.14. The NPF adds that the AMPMQ errs when it contends that membership in it is proof of a preference for a bargaining unit only for Quebec.

215 The NPF rejects the AMPMQ's contention that a Quebec bargaining unit is required because Quebec is a clearly distinct workplace on the basis of language, federal policing, and travel reimbursement claims. The NPF declares that the alleged differences are irrelevant to the application.

216 As an alternative argument, the NPF submits that if the Board finds that s. 238.14 violates s. 2(d) of the *Charter*, then the provision is justified by s. 1 of the *Charter* under the *Oakes* test: there is a pressing and substantial objective, and the means by which it is attained are proportionate; that is, rationally connected to the objective, causing minimal impairment, and remaining balanced.

217 The NPF agrees with the employer that s. 238.14 has a pressing objective (to protect the public interest in stable labour relations for RCMP members) and that the single, national bargaining unit is rationally connected to the objective.

218 The NPF states that the salutary effects of the single, national bargaining unit are significant. For example, a single, national unit protects members when they transfer, and it ensures that the bargaining agent will have to reflect on a diversity of views and backgrounds. A single, national bargaining unit will protect the linguistic rights of all francophone members, not only those stationed in Quebec.

219 In contrast, the deleterious effects are modest because members can choose to be represented by other employee organizations in matters not related to the collective agreement. In addition, members are protected because the single, national unit has a duty to fairly represent all its members, and they have the right to decertify and replace a bargaining agent.

IV. Analysis

220 This section reviews the merits of the motion for a declaration that the impugned provision is inoperative on constitutional grounds, but we will first set out our reasons for dismissing the report and expert testimony presented by the AMPMQ.

A. Dismissal of the expert's report and testimony

1. Content of the report

221 The AMPMQ sent an expert report to the parties and to the Board before the hearing; its intent was to have the expert testify at the hearing. The employer indicated before the hearing that it planned to object to the filing of the report. We heard the employer's objection and the AMPMQ's response at the hearing. The NPF supported the employer's position.

222 The report is entitled "[translation] Appropriate Bargaining Units in the Federal Public Sector". The author is Professor Michel Coutu, a professor of labour law and sociology of law at the Université de Montréal's School of Industrial Relations. He claims to be a specialist in the sociology of law, which he distinguishes from normative law and defines as follows: "[translation] the objective of the sociology of law is to compare legal phenomena to other social, economic, political, religious and cultural facts, etc." Further in his introduction, he writes that an expert in the sociology of law refers to the law, regulations, and jurisprudence, not "[translation]... to argue in favour of a given interpretation, but simply to provide an accurate image of the state of law (in the broad sense of the term) to illustrate its sociological characteristics".

223 Professor Coutu explains his mandate as follows:

[Translation]

1. *From a sociological and historical standpoint, study the emergence of certification units in the federal and provincial public sectors (as applicable), highlighting the policy and administrative choices that led to their breakdown, the conflict factors in that area (e.g. attempts to certify the Syndicat des contrôleurs aériens du Québec), and the functional dynamic guiding the orientation of the Federal Public Sector Labour Relations Board [sic].*

2. *From the same standpoint, with respect to RCMP members in "C" Division: trace the history of the Association des membres de la police montée du Québec (AMPMQ), examine its attempts to unionize officers in Quebec and, more broadly, its activities to represent and defend its members, notably with respect to the RCMP's Representative Program; identify the specific topics of claims/bargaining that differentiate the AMPMQ from other voluntary RCMP member organizations, such as the National Police Federation (NPF); examine the difficulties of accepting the particularities of RCMP members in Quebec (as applicable); show how the amendment requiring a single cross-Canada bargaining structure penalizes AMPMQ members and substantially interferes with a meaningful bargaining process based on the wishes of the members in question.*

3. *Based on international labour law (ILO, Council of Europe) and comparative law, essentially in a perspective of the sociology of labour law, examine the degree to which international law and national rights prevail in certain federal states (such as Belgium, Switzerland, and Germany) or multinational states (such as the United Kingdom), allowing for a segmented representation of members of the federal police or its equivalent. Specify the possible consequences on the desirable bargaining structure in the RCMP's case.*

224 Following an introduction (section 1) on Professor Coutu's expertise in the sociology of law and his mandate, the report has four main sections and closes with a general summary.

225 Section 2 is entitled "[translation] The emergence of bargaining units in the federal public sector: a socio-historic point of view". Essentially, the author presents a brief history of s. 57 of the *Act* and then illustrates the possible interpretation of the definition of appropriate units using two opposite decisions. The first is one in which the Board as it then was, the Public Service Staff Relations Board (PSSRB), refused to split the bargaining unit made up of air traffic controllers to create a bargaining unit specific to Quebec (see *Quebec Air Traffic Controllers Union and Canada (Treasury Board) (Air Traffic Control Group - Technical Category)*, PSSRB File No. 143-02-164 (19780926), *[1978] C.P.S.S.R.B. No. 9* (QL)). The second is a decision of the Canada Labour Relations Board (now the CIRB) that allowed spliting the bargaining unit for production employees to create a separate unit in Quebec for the French Services Division (*Syndicat des employés de production du Québec v. Canadian Broadcasting Corporation, Ottawa (Ont.)*, CLRB File No. 555-445 (19770617), *[1977] 2 Can. LRBR 481* (QL)). In the analysis of these two decisions, the author highlights the different factors that can play a role in deciding if a national unit should be maintained or, on the other hand, if it is best to create regional units, particularly given linguistic and cultural considerations. He distinguishes between the functional approach (which the PSSRB seems to favour, according to Professor Coutu), which considers how the bargaining unit functions in terms of work units and classification, and the voluntary approach, which considers the employees' wishes to join one group over another (which the PSSRB does not seem to consider, again according to Professor Coutu).

226 Section 3 contains a description of the RCMP as an argument in favour of a separate bargaining unit for Quebec. One of the important arguments is language. Professor Coutu emphasizes the fact that the policing services offered by the RCMP in Quebec are entirely federal and not partly contractual, as they are in other provinces, except Ontario. He notes the nature of federal policing work (border protection, national security, and large investigations into narcotics trafficking and organized crime). He also gives a history of the representation of RCMP members, noting that members of "C" Division have long advocated for the union model instead of internal representation controlled by the employer and declared unconstitutional by the Supreme Court of Canada in *MPAO*.

227 Section 4 deals with the status of police unionization in certain European countries. Section 5 discusses instruments in international labour law "[translation] ... that, directly or by an interpretation of competent control

organizations, guarantee freedom of association, including the right to form unions appropriate for collective bargaining".

228 The summary consists of a series of conclusions that advocate not only for the creation of a separate unit for "C" Division but also for the AMPMQ's certification. Conclusion 17 summarizes the analysis as follows:

[Translation]

> *From an industrial relations perspective, both the functional and voluntary approaches thus converge, in our view, on favouring the creation of a distinct bargaining unit for the members of "C" Division, with the AMPMQ being recognized as the bargaining agent.*

2. The employer's objection

229 The employer objected to the filing of the report and to the expert's testimony on the following grounds: the content of the report is not relevant to the constitutional issue to be decided, the report is essentially a legal opinion, the expertise is not necessary, and the report lacks objectivity and impartiality.

230 As a starting point for expert evidence, the employer cites *R. v. Mohan*, [1994] 2 S.C.R. 9, in which the Supreme Court of Canada expands on the necessary, relevant, and reliable nature of expert evidence. The Court lists the criteria for admission as follows (at paragraph 17):

...

a. *relevance;*

b. *necessity in assisting the trier of fact;*

c. *the absence of any exclusionary rule;*

d. *a properly qualified expert.*

...

231 According to the employer, the report is not relevant because it deals primarily with an issue that is not before the Board, which is the appropriate bargaining unit. This exceeds the analysis that the Board can conduct if it finds unconstitutional the legislative amendment that strips it of the power to determine the appropriate bargaining unit. The constitutional issue is not to determine the appropriate unit but to determine whether imposing a pan-Canadian unit is a substantial interference with collective bargaining, in light of decisions by the Supreme Court on the protection afforded by s. 2(d) of the *Charter*.

232 The employer asserts that the report is essentially a legal opinion, with a very specific conclusion on what constitutes the best bargaining unit for "C" Division. It lacks objectivity and impartiality in that the conclusion that the AMPMQ is best able to represent members of "C" Division is clearly partisan and is based on an interpretation of the facts that is not objective but biased.

233 Finally, the employer's view is that the expertise is not needed because it does not contribute anything to Board's knowledge. The Board has extensive experience in determining bargaining units and does not need an expert in its area of expertise. The employer cites the following passage from *Mohan*:

***21** In* R. v. Abbey, *supra, Dickson J., as he then was, stated, at p. 42:*

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their

> own conclusions without help, then the opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.).
>
> *22 This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in R. v. Abbey, supra. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature....*
>
> *23 As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process. As stated by Lawton L.J. in R. v. Turner, [1975] Q.B. 834, at p. 841, and approved by Lord Wilberforce in Director of Public Prosecutions v. Jordan, [1977] A.C. 699, at p. 718:*
>
> > "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

234 The employer does not question Professor Coutu's expertise in labour law but rather objects to the expert evidence based on the first two criteria: the evidence is not relevant, and it is not necessary. Moreover, it could distort the fact-finding process by imposing a partial view of labour relations within the RCMP and a conclusion in favour of his client.

3. The NPF's position

235 The NPF acknowledges that before an administrative tribunal, the rules governing admissibility of evidence are more flexible and that a constitutional issue is different from a civil or criminal law issue. That said, the NPF largely supports the employer's observations and adds the following comments.

236 In *Boily v. Canada*, 2017 FC 102, the Federal Court was asked to rule on the decision by a prothonotary to strike an entire expert report. The Court upheld the decision because the expert provided legal findings on issues that were before the Court itself, which is inadmissible. Legal analysis cannot be part of expert evidence. Legal expert evidence on the issue to be decided is inadmissible.

237 The NPF offers some examples from the expert that gave an opinion on the substantive issue, thereby exceeding his role. At page 58 of the report, Professor Coutu wrote: "[translation] Simply put, the obligation to form a union for a given industry or profession solely at the national level (rather than regional, if that is the free choice of employees) *is not consistent with the principles of freedom of association*" [emphasis in the original]. At page 61, in the conclusions, he writes: "[translation] *The fundamental change of paradigm in constitutional labour law,* particularly following the Supreme Court of Canada's rulings in 2007 and 2015, would in all logic favour the voluntary approach (criteria of employees' free choice) even more than before" [emphasis in the original]. This position can be adopted, but the opposite is also possible. That is the issue that the Board must decide.

4. The AMPMQ's reply

238 The AMPMQ responds to these arguments by asserting that in interpreting the charters (the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of human rights and freedoms*), the rules of admissibility of evidence must be applied with considerable flexibility. It is important that the courts have a factual basis for establishing a social, economic, and cultural context.

239 In *MacKay v. Manitoba*, *[1989] 2 S.C.R. 357*, the Supreme Court emphasized the importance of a factual context in making a decision based on the *Charter* (Canadian). It must be shown that rights have been infringed by means of actual and not hypothetical examples. In particular, the AMPMQ cites the following sentence (at page 361): "Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts."

240 The AMPMQ adds that administrative tribunals are masters of their proceedings and, as such, have more flexibility than courts of law. The AMPMQ submits that procedural fairness argues in favour of allowing the expert report. On this point, it refers to *Canada Post Corporation*, *2012 CIRB 638*, in which the CIRB ruled that when in doubt about the relevance of an expert report, it is better to accept it, even if it is set aside at the analysis stage, than to deprive the tribunal of evidence that could be relevant.

241 That case involved the union's objection to the employer filing an expert report. As in this case, the objection was essentially related to the relevance and necessity of the expert evidence. The issue was the notion of a true employer in opening Canada Post counters in certain pharmacies. The expert report dealt with the notion of franchises and concessions under business law. According to the union, this notion was not relevant to the issue, and the report was not necessary, given the CIRB's expertise. It concluded that it would admit part of the expert report. It justified its decision based on relevance, as follows:

> *41 With respect to the relevance of the expert report, the Board acknowledges that it does not have ex officio knowledge of the business rules applicable to franchises and concessions. In the instant matter, the Board must determine the true employer of the employees covered by the application for certification filed by the union. The different employers in this case have indicated that they adopted a business model specific to the franchise. The Board's concern is to proceed as efficiently as possible in seeking out the truth and it therefore considers it useful to obtain expert evidence on a specific element that will help it gain a better understanding of the contractual relationship between the different parties to the matter.*

242 The AMPMQ claims that Professor Coutu's expertise is necessary and relevant "[translation] to provide a socio-historic portrait" of the determination of certification units and of the international situation. The AMPMQ notes in particular that the report establishes "the future impact of the impugned legislation" within the meaning of *MacKay* by indicating the prejudicial impact of a national bargaining unit on the AMPMQ and its members. Finally, the AMPMQ submits that the report is not a legal opinion and that it does not dictate a specific outcome to the Board.

5. The Board's decision

243 We have considered the decisions that the parties cited, in our decision. We retain the following principles:

- The expertise must be useful in reaching a decision. As expressed in *Mohan*, the expertise must not only be useful but also necessary. In *Abbey*, the Supreme Court of Canada stated that the evidence must be necessary to allow the trier of facts to understand the issues, given their technical nature.
- "... [T]he criteria of relevance and necessity are applied strictly, on occasion, to exclude the expert evidence as to an ultimate issue" (see *Mohan*).
- The constitutional context must be considered (see *MacKay v. Manitoba*).
- The expert opinion must be impartial, independent, and unbiased(see *White Burgess Langille Inman v. Abbott and Haliburton Co.*, *[2015] 2 S.C.R. 182*, *2015 SCC 23*, at para. 32).

a) Relevance and necessity

244 In fact, the analysis that the professor claims is sociological far more closely resembles a legal argument than a sociological text, despite the introduction referring to the sociology of law. Professor Coutu's distinction between the functional approach and the voluntary approach for determining appropriate bargaining units is very interesting, but it is a legal argument that the parties can present and that the Board can decide. Professor Coutu states that it

would be best to consider a separate bargaining unit in Quebec for historical, cultural, and linguistic reasons and because, in his view, the voluntary approach reflects the basis of the Supreme Court of Canada's analysis more in its development of collective bargaining law under s. 2(d) of the *Charter*.

245 These conclusions are problematic in two ways. First, they do not stem from expertise specific to the expert. The Board has the tools needed, in terms of knowledge and experience, to determine appropriate bargaining units. More importantly, the report goes beyond the stage at which the Board would decide on the appropriate bargaining units. This decision deals with the constitutionality of a provision that strips the Board of any leeway in determining a bargaining unit. The issue is to determine whether that is a substantial interference with the right of RCMP members to bargain with respect to their working conditions. However, although the report goes beyond the stage of determination, it presents a conclusion that settles the constitutionality issue, claiming that the freedom of association of members of "C" Division can be guaranteed only by granting them a separate bargaining unit.

246 Moreover, in its mandate, the report claims to answer the question that is before the Board, as shown in the following passage from the mandate: "[translation] ... show how the amendment requiring a single cross-Canada bargaining structure penalizes AMPMQ members and interferes with a meaningful bargaining process based on the wishes of the members in question." It is clear from jurisprudence that the expert report must not attempt to answer the legal question that is before the tribunal.

b) The constitutional context

247 In *MacKay*, the Supreme Court of Canada states that"[t]he presentation of facts is ... essential to a proper consideration of *Charter* issues". In that respect, the AMPMQ cited the CIRB's decision in *Canada Post Corporation*, in which it agreed that in a constitutional context, it had greater leeway.

248 In that decision, the CIRB chose to retain part of an expert report. It set aside the elements that fell under its jurisdiction and retained the elements of expertise that were outside its expertise -- namely, in that case, business law, and specifically how franchises and concessions operate, to better understand their impact on the organization of work at Canada Post. It is appropriate to cite as follows the reason that the CIRB retained only the part of the report that explained the business operations of franchises and concessions (see *Canada Post Corporation*, at para. 46):

> *46 Furthermore, the last three sections of the expert report are in fact a legal analysis of the issue to be decided by the Board, that is, the identity of the true employer of the employees covered by the certification application filed by the union.*

249 Thus, it is possible to take parts of the report without accepting it entirely. Similarly, in *La Presse Ltée c. Poulin*, 2012 QCCA 2030, the Court of Appeal of Quebec found inadmissible parts of an expert report that expressed a legal opinion and allowed the parts to be filed that dealt more with facts, even legal facts.

250 We carefully reviewed the report to determine if, like the CIRB or the Court of Appeal of Quebec in the decisions cited earlier, we could retain at least a part of the report. We reached the following conclusions. The report offers no expertise that we do not already have on the issue of bargaining units based on Canadian jurisprudence. The history of the AMPMQ and the unionization of the RCMP focus entirely on Quebec, to conclude that only a Quebec bargaining unit would be acceptable. However, in reviewing substantial interference with the right of RCMP members to collective bargaining, the Board must consider not only the context of "C" Division but also the RCMP's overall context. That is particularly true since one of the Professor Coutu's main arguments in favour of the specific unit for Quebec is language. However, this aspect is not limited solely to Quebec, as most francophone members work outside Quebec.

c) An impartial, independent, and unbiased opinion

251 In *White Burgess*, the Supreme Court of Canada emphasized that the expert must offer the trier of facts an impartial, independent, and unbiased opinion. It wrote as follows:

> *[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 Alta. L. Rev. 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.*

252 We have serious reservations about the impartiality of the expert report presented by the AMPMQ. At the outset, Professor Coutu states that his mandate is in part "[translation] ... how the amendment requiring a single cross-Canada bargaining structure penalizes AMPMQ members and substantially interferes with a meaningful bargaining process based on the wishes of the members in question."

253 Professor Coutu devotes most of the report to a legal analysis of administrative tribunal decisions, which he uses to illustrate two approaches to determining the appropriate bargaining unit. He then applies his analysis to what he has described as the RCMP context and concludes as follows: "[translation] From an industrial relations perspective, both the functional and the voluntary approaches thus converge, in our view, on favouring the creation of a distinct bargaining unit for the members of 'C' Division in the RCMP, with the AMPMQ being recognized as the bargaining agent."

254 The evidence reveals that on several key issues, the report does not set out a balanced analysis. For example:

* The report concludes that Division "C" has its own linguistic concerns. Yet Professor Coutu omits the percentage of francophone members who work outside Quebec (70%, according to the employer's figures, which were not challenged).
* He notes the nature of federal policing (border protection, national security, and major investigations of drug trafficking and organized crime) without stating that this type of work necessarily involves communicating in English, given Quebec's neighbouring jurisdictions.

255 Although Professor Coutu recognizes that police are excluded from the international convention he relies on, he concludes that in international law, a legislated national bargaining agent "[translation] ... is not consistent with the principles of freedom of association", if employees wish regional representation.

256 The international law aspect is of very limited use. How a union operates in Europe differs too much from the Wagner model to be applicable in the context of RCMP bargaining units. The principles of unionization recognized by international treaties are now upheld by the Supreme Court of Canada, and we note the exception for police unions. That said, the specific issue of a single bargaining unit is not clarified by the international debate, again due to the exception for police unions. Finally, the summary is a plea in favour of a separate unit for Quebec. An eventual decision is anticipated, and a legal conclusion is drawn, which has no place in an expert report.

257 We agree with the AMPMQ that the Board must have as complete a factual portrait as possible to reach a constitutional decision that is supported. That said, the facts presented in the expert report cannot be accepted for their truth, as Professor Coutu is not a direct witness of the situation at the RCMP. On this point, we received testimony from three AMPMQ witnesses who were on the front lines of efforts and steps to allow the unionization of RCMP members. Their testimony was certainly an important contribution to this decision. The report cannot contribute anything more to the factual portrait. We note that the report does not present any factual data about the RCMP as a whole.

258 In summary, the Board concludes as follows:

- The report is not relevant. Its focus is on the determination of the appropriate bargaining unit for the RCMP and the certification of the AMPMQ as bargaining agent for Division "C", questions that are not before the Board.
- It is not necessary. It is primarily a legal argument leading to conclusions in favour of the AMPMQ's position. The facts mentioned in it either are already within the Board's knowledge or were well canvassed in the testimonies at the hearing.
- The Board has recognized the constitutional context and has determined that no part of the report is admissible.

* The report is neither impartial nor objective.

259 For all these reasons, the Board did not accept the report or Professor Coutu's testimony.

B. Motion for a declaration that s. 238.14 is inoperative on constitutional grounds

1. Issues

260 Technically, the NPF's and AMPMQ's certification applications are subject to the transitional provisions of the *Act to amend the PSLRA*, specifically s. 63(1)(a), but that section is in effect the same as the impugned provision, which orders the Board to recognize only a single bargaining unit. Therefore, for the purposes of this analysis, we will deal with s. 238.14, which was not in effect when the AMPMQ and the NPF filed their certification applications but is today, as indicated in the Board's decision declaring the appropriate single, national bargaining unit (see *National Police Federation v. Treasury Board of Canada*, 2017 FPSLREB 34). Therefore, we will answer the following two questions:

- Does s. 238.14 of the *Act* infringe the freedom of association guaranteed under s. 2(d) of the *Charter*?
- If there is an infringement, is it justifiable under s. 1 of the *Charter*?

a. Does s. 238.14 of the Act infringe the freedom of association guaranteed under s. 2(d) of the *Charter*?

261 The leading case for the purposes of our analysis is *MPAO* from the Supreme Court of Canada, which found that the labour relations scheme of RCMP members was not consistent with the freedom of association protected under s. 2(d) of the *Charter*. The importance of that decision is that it defines the boundaries of freedom of association in a labour relations context. The Court found that s. 2(d) guarantees employees' right to associate to collectively pursue workplace goals and that the right to a true collective bargaining process is a necessary element of that right (*MPAO*, at para. 71).

262 In *B.C Health Services*, the Supreme Court stated that legislative interference with freedom of association must be substantial to be found to violate s. 2(d) of the *Charter*. It stated as follows:

> *92 To constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. ... The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.*

263 It must now be determined whether one of the provisions of the regime created by the legislator in response to *MPAO* is itself contrary to the freedom of association. That is, does s. 238.14, which imposes a single, national bargaining unit, infringe s. 2(d) of the *Charter* in that it constitutes a substantial interference with a meaningful collective bargaining process?

i. A meaningful collective bargaining process

264 It is important in this analysis to not lose sight of the context of the RCMP's collective bargaining regime. In s. 238.05 of the *Act*, the legislator set out as follows the reality that the Board must consider when dealing with issues related to the RCMP:

> ***238.05*** *In administering this Act and in exercising the powers and performing the duties and functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, with regulations made under it or with decisions made in respect of a matter coming before the Board, the Board must, in matters concerning RCMP members and reservists, take into account the unique role of the Royal Canadian Mounted Police as a police organization in protecting public safety and national security and its need to deploy its members and reservists as it sees fit.*

265 In *MPAO*, the Supreme Court stated at paragraph 81 that "... a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them." The AMPMQ is not challenging the independent aspect of the new scheme. Therefore, our analysis will focus on the degree of choice.

266 We must define what the Supreme Court means by "degree of choice" in *MPAO*. After stating that degree of choice is important, the Court nonetheless limited its scope, as follows:

> *[83] But choice and independence are not absolute: they are limited by the context of collective bargaining. In our view, the degree of choice required by the Charter for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. In the same vein, the degree of independence required by the Charter for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members.*

267 Therefore, the issue is whether the impugned provision interferes with the degree of choice.

ii. Degree of choice

268 The Board notes that the collective bargaining process under the *Act* protects freedom of choice for employees who are RCMP regular members and reservists by several provisions that are not impacted by the impugned provision. In *MPAO*, the Supreme Court sets out that "[h]allmarks of employee choice ... include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations" (at paragraph 86). The Board finds that these hallmarks are met by the *Act*.

269 Section 5 protects the right of every employee to join the employee organization of his or her choice. However, it does not give a right to every employee organization to obtain certification as a bargaining agent.

270 Employees may choose to replace their bargaining agent under s. 83.

271 Furthermore, nothing in the *Act*, including the impugned provision, would prevent employees from setting or changing their collective workplace goals.

272 Freedom of choice also includes accountability, as stated as follows by the Supreme Court in *MPAO*, at para. 87:

> *[87] Accountability to the members of the association plays an important role in assessing whether employee choice is present to a sufficient degree in any given labour relations scheme. Employees choose representatives on the assumption that their voice will be conveyed to the employer by the people they choose (A. Bogg and K. Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2012), 33 Comp. Lab. L. & Pol'y J. 379, at p. 405). A scheme that holds representatives accountable to the employees who chose them ensures that the association works towards the purposes for which the employees joined together. Accountability allows employees to gain control over the selection*

of the issues that are put forward to the employer, and the agreements concluded on their behalf as a result of the process of collective bargaining.

273 The *Act* provides for accountability of the bargaining agent to the employees of the bargaining unit. Employees dissatisfied by the representation of the bargaining agent can file a complaint with the Board under s. 187 of the *Act*. They may also file a complaint against the bargaining agent under s. 188 for unfair labour practices. And finally, they have the ability to seek the revocation of the certification of their bargaining agent under s. 238.17 of the *Act*.

274 The Board finds that as long as employees are able to "have effective input into the selection of the collective goals", the mechanism that allows such input respects the degree of choice. The AMPMQ's main argument is in fact that as a minority group within an entity that cannot truly represent their interests, the members in "C" Division will have no voice in the selection of collective goals.

275 The AMPMQ cites *Renaud-Bray* in support of its claim. The AMPMQ retains the following idea from that decision, in the words of Justice Mainville: "[translation] the will of the employees is fundamental to the certification process". That is certain, but that principle does not resolve the issue before us, i.e., whether imposing a single bargaining unit interferes with freedom of association. Specifically, the issue is whether legislation that imposes a single, national bargaining unit deprives members and reservists of the right to meaningfully associate in the pursuit of collective workplace goals (see paragraph 67 of *MPAO*). That is, does it remove from employees the degree of choice sufficient to enable them to determine and realize their collective interests?

276 The impugned provision mandating a single, national bargaining unit would prevent employees from being able to have AMPMQ as the bargaining agent, as the AMPMQ has applied to represent only those members in "C" Division. However, Justice Mainville recognizes that the Supreme Court did not impose an obligation to recognize every association. He cites paragraph 98 of *MPAO*, as follows:

> *[98] The respondent argues that this view of s. 2(d) would require an employer, even a government employer, to recognize and bargain with every association chosen by employees, whatever the size. In our view, this result does not follow. Freedom of association requires, among other things, that no government process can substantially interfere with the autonomy of employees in creating or joining associations of their own choosing, even if in so doing they displace an existing association. It also requires that the employer consider employees' representations in good faith, and engage in meaningful discussion with them. But s. 2(d) does not require a process whereby every association will ultimately gain the recognition it seeks (see M. Coutu et al., Droit des rapports collectifs du travail au Québec (2nd ed. 2013), vol. 1, Le Régime général, at para. 98). As we said, s. 2(d) can also accommodate a model based on majoritarianism and exclusivity (such as the Wagner Act model) that imposes restrictions on individual rights to pursue collective goals.*

277 Moreover, the facts in *Renaud-Bray* are very different. The issue in that case was to decide how a given unit would be represented and whether the analysis of the administrative tribunal was to split the unit or certify a bargaining agent. We must decide whether the single unit allows members in "C" Division to exercise their freedom of association as defined by the Supreme Court. It is also appropriate to cite the following passage from *Renaud-Bray*:

> [Translation]
>
> *127. As noted by the Court in Québec (Procureur général) v. Confédération des syndicats nationaux (CSN), the Wagner Act model includes arbitration or a compromise that can be binding on a minority of employees: this is the case for those who would have wanted to join another unit appropriate for bargaining, and those who did not join the majority association or did not vote for it. In a sense, the individual freedom of association of those employees is infringed by the compromise on which the Wagner Act model is based. However, it would be wrong to conclude from all this that there is therefore an unjustified infringement of the right to freedom of association set out in the Canadian Charter.*

iii. Legislative limits on choice

278 The post-*MPAO* administrative decisions cited by the AMPMQ reiterate the ambiguity of the decision with respect to the scope of choice that employees have about their bargaining agent. The TAT's decision in the certification of employees working for the Réseau de transport métropolitainaptly states it when referring to "[translation] a contextual analysis of the existing process" that could allow for the conclusion that designating the bargaining agent nonetheless respects the freedom of choice that flows from freedom of association (see *Syndicat des inspecteurs du RTM -- CSN et Unifor*, 2018 QCTAT 3310 at para. 87).

279 There may be constitutional legislative limits on choice. In *MPAO*, the Supreme Court gave examples of legislative limits to the freedom of association that were constitutionally permissible. For example, it found that the Wagner model of labour relations had sufficient choice for employees. It stated as follows:

> *[94] The Wagner Act model of labour relations in force in most private sector and many public sector workplaces offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. That model permits a sufficiently large sector of employees to choose to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of "bargaining units" and the processes of certification and decertification -- all under the supervision of an independent labour relations board -- ensure that an employer deals with the association most representative of its employees: G.W. Adams, Canadian Labour Law (2nd ed. (loose-leaf)), at paras. 2.3800 to 2.4030; D.D. Carter et al., Labour Law in Canada (5th ed. 2002), at pp. 286-87; P. Verge, G. Trudeau and G. Vallée, Le droit du travail par ses sources (2006), at pp. 41-42.*

280 The Court also found that certain designated bargaining models do not necessarily violate s. 2(d) of the *Charter*, citing as an example the Ontario legislation providing for the designation of the bargaining agent for a legislated bargaining unit:

> *[95] The Wagner Act model, however, is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining. The designated bargaining model (see, e.g., School Boards Collective Bargaining Act, 2014, S.O. 2014, c. 5) offers another example of a model that may be acceptable. Although the employees' bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. This is but one example; other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.*

281 The same idea is restated as follows at paragraph 97 of *MPAO*:

> *... Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2(d) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.*

282 Legislative limits in policing and other public sectors are common. For example, in Ontario and Alberta, police bargaining units are established by legislation (see *Ontario Provincial Police Collective Bargaining Act*, 2006, SO 2006, c 35, Sch B, s 2(1); *Police Services Act*, RSO 1990, c P-15, s 118; and *Police Officers Collective Bargaining Act*, RSA 2000, c P-18, s 1(c)). Alberta legislation designates a single bargaining unit for Crown employees (see *Public Service Employee Relations Act*, RSA 2000, c P-43, s. 10). In Quebec, legislation requires a single all-employee bargaining group for the Sûreté du Québec (see *Act respecting the Syndical Plan of the Sûreté du Québec*, CQLR c R-14, s. 2). Likewise, broad-based bargaining units are also common and have not been found unconstitutional (see *Québec (Procureur général) c. Confédération des syndicats nationaux*, 2011 QCCA 1247).

283 What, then, is meant by "... Parliament must not substantially interfere with the right of RCMP members to a meaningful process of collective bargaining ..."?

284 A meaningful process of collective bargaining is the ability to pursue collective interests without employer

interference. One of the characteristics of such a meaningful collective bargaining process is the presence of adequate protections to prevent substantial interference, as stated by the Supreme Court of Canada in *MPAO* as follows at paragraph 80:

> *... the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective negotiations.*

285 This right is protected under the *Act* by the following provisions.

286 The bargaining unit composed of RCMP members and reservists is entitled to arbitration as a dispute resolution process (s. 238.18). The employer must bargain in good faith (s. 106). The employer cannot interfere in the formation or administration of the employee organization, and employees are protected in their associative rights against all reprisals by the employer (s. 186).

iv. Substantial interference

287 The AMPMQ submits that there is substantial interference with a meaningful process because creating a single bargaining unit fails to consider "C" Division's distinct interests. However, based on the evidence, the Board is not at all convinced that "C" Division's interests differ from the collective interests of all RCMP members and reservists. On the contrary, the Board believes that the AMPMQ has failed to show distinct interests for members and reservists of "C" Division.

288 The AMPMQ relies on several characteristics of "C" Division to support this argument: language, structural organization, and a different union culture. We will address each one in turn.

v. Language

289 The language difference is a significant argument. The province of Quebec is the only province in Canada in which the official language is French and the language of work is majority French. However, several factors come into play against this.

290 The AMPMQ cited the Supreme Court in *MPAO*, at para. 6, which noted the fact that the AMPMQ "... represents the majority of members of 'C' Division ...". The AMPMQ did not add in its arguments the rest of the sentence, "... as well as French-speaking members across Canada." In its arguments before us, the AMPMQ does not claim to represent French-speaking members, only members in "C" Division. However, according to the undisputed figures from the employer, 70% of members who report being francophone work outside Quebec. If the French fact must be defended in the labour relations context, it must be defended throughout the organization; having a single bargaining unit does not interfere with that representation; it is quite the contrary.

291 French is unquestionably the language of work at most detachments in Quebec. However, according to the evidence, it is also the language of work in certain detachments in Ontario and New Brunswick. Moreover, given the federal policing duties performed in "C" Division, it is essential that members working in that division be bilingual. The Board accepts the employer's logical explanation: given its mandate, federal policing must necessarily maintain close ties with neighbouring English-speaking jurisdictions in the fight against organized crime, terrorism, narcotics trafficking, and in border control. Therefore, knowledge of English is essential to carrying out the duties of members and reservists working in "C" Division, whose mandate is exclusively federal policing. Accordingly, we find that language is not a characteristic that distinguishes "C" Division from other RCMP regular members and reservists.

vi. Structural organization

292 The AMPMQ submits that given its mandate of federal policing, the interests of "C" Division will not be adequately defended as part of a bargaining unit in which the large majority of members perform their duties under contracts with the provinces, territories, and municipalities to offer local front-line policing services.

293 The AMPMQ did not explain how the situation in "C" Division differs from that of "O" Division in Ontario, which is also dedicated entirely to federal policing. The AMPMQ tried to highlight "C" Division's specific expertise, but that evidence was convincingly contradicted by the employer's witnesses. There is no specific expertise in Quebec concerning bankruptcy, counterfeiting, or the organization of major events; those realities are also present in Ontario and in other Canadian provinces. The Board finds that its work and organization do not set "C" Division apart from the rest of the RCMP.

vii. Different union culture

294 The AMPMQ presented evidence of the traditional militancy of "C" Division, incarnated by the AMPMQ, which differs from the attitude of members in the rest of the country. The Board accepts that evidence but finds that it is not a determining factor in the issue of the constitutionality of s. 238.14. The AMPMQ has fought for its members; that is undeniable. However, it must also be recognized that the victory before the Supreme Court was the work of three associations.

295 It must be noted that the makeup of "C" Division is not static. The evidence shows an annual change (arrivals and departures) of between 7% and 10%. The mobility of members is a condition that applies everywhere, is part of the terms and conditions of employment, and shows the commitment that recruits must have to accept transfers based on the RCMP's operational needs. This mobility of members makes it difficult to assess the wishes of the members of "C" Division. The AMPMQ has not established that at present, "C" Division has a different culture from the regular members and reservists in the rest of Canada.

296 Moreover, the Board is struck by the remarkable number of similarities among all RCMP Divisions, including "C" Division. For example, regular members are part of one occupational group, have the same pay and benefits regime, receive the same training on recruitment in the same location, wear the same uniforms, and have the same deployment obligations.

297 Given the similarities and the absence of distinctions, the Board finds that the AMPMQ has not established that "C" Division has characteristics that distinguish it from the other RCMP Divisions.

298 Finally, the workplace goals of "C" Division members are the same as the goals of the other members. This was confirmed in the Parliamentary committee proceedings, at which the AMPMQ made representations on the legislation with respect to working conditions. Significantly, at that time, it did not raise the single bargaining unit as an issue.

299 We believe that access to meaningful collective bargaining for regular members and reservists, including those from "C" Division, is not substantially impaired by s. 238.14. We have seen that freedom of choice is not absolute; employees do not necessarily have a say on the constitution of the bargaining unit they will belong to. They do have a say in who will represent them, here, by means of a vote. We do not find this situation contrary to freedom of association in the context of labour relations, according to the Supreme Court's decisions.

300 We note from *MPAO* that the degree of choice can be exercised within a unit defined by the law. The evidence presented at the hearing does not satisfy us that members of "C" Division could not exercise their degree of choice with respect to freedom of association guaranteed by the *Charter*; they can vote, and they can have their demands heard by their representatives.

301 The AMPMQ argues on behalf of the members of "C" Division that their minority situation within a national bargaining unit will prevent them from having meaningful representation. This minority situation does not in itself interfere with collective bargaining; in fact, it is a characteristic of the Wagner model, applicable to all bargaining agents certified under the *Act*, which gives exclusive representation to the organization that represents the majority of members. Majority rule is not deemed to constitute substantial interference with the exercise of the right protected under s. 2(d) of the *Charter*.

302 We conclude that s. 238.14 does not constitute substantial interference with collective bargaining and thus does not infringe the freedom of association guaranteed under s. 2(d) of the *Charter*.

b. Ifthere is interference with the freedom of association guaranteed under s. 2(d) of the *Charter*, is it justifiable under s. 1 of the *Charter*?

303 We have found that s. 238.14 does not interfere with the protection guaranteed by s. 2(d) of the *Charter*. However, if we are wrong, and if imposing a national bargaining unit does not respect the parameters of freedom of association, we are of the view that that infringement can be justified under s. 1 of the *Charter*.

304 In *MPAO*, the Supreme Court set out the main points of an analysis of s. 1 of the *Charter*, particularly in the context of the RCMP, as follows:

> *[139] Section 1 of the Charter permits Parliament to enact laws that limit Charter rights if it establishes that the limits are reasonable and demonstrably justified in a free and democratic society. This requires that the objective of the measure be pressing and substantial, and that the means by which the objective is furthered be proportionate, i.e. that the means are rationally connected to the law's objective, minimally impair the s. 2(d) right, and are proportionate in effect (R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; Health Services, at paras. 137-139). The onus rests on the party seeking to uphold the limitation of the Charter right, and the burden of proof is a preponderance of probabilities (RJR-MacDonald Inc. v. Canada (Attorney General), 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at paras. 137-38 ("RJR-MacDonald (1995)")....*
>
> *[140] We have already seen that s. 2(d) gives Parliament much leeway in devising a scheme of collective bargaining that satisfies the special demands of the RCMP. Beyond this, s. 1 provides additional room to tailor a labour relations regime to achieve pressing and substantial objectives, provided it can show that these are justified.*

305 The Board is of the view that cohesion within the RCMP is a substantial and pressing objective. The members of the organization are part of a whole; they are often deployed outside their assigned areas, and mobility is encouraged and necessary for RCMP operations, as highlighted by s. 238.05, as set out earlier. The fact that members can be posted anywhere in Canada as a condition of their employment is an important argument to justify a single unit.

306 Once it is determined that it is important to standardize working conditions across the country, the logical result is that there is a rational link between the government's objectives and the designation of a national bargaining unit for the RCMP. The employer took care to demonstrate in its evidence that this does not mean that bargaining cannot provide for occasional targeted arrangements to consider regional realities, if needed. However, it seems preferable to ensure cohesion, to have a single bargaining framework.

307 The Board finds that the interference with freedom of association is minimal. In *MPAO*, the Supreme Court states that when determining whether interference is minimal, "The government is not required to pursue the least drastic means of achieving its objective, but it must adopt a measure that falls within a range of reasonable alternatives" (at paragraph 149). The Supreme Court quotes from paragraph 160 of *RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199*, as follows:

> *The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement:* [references omitted]. *On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.*

308 In *B.C. Health Services*, at para. 157, the Supreme Court developed the analysis further, as follows:

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

309 The Board received in evidence a document titled "A new labour relations regime for the Royal Canadian Mounted Police". It came from consultations carried out by the government "to obtain the views of the members on some of the options available to them".The consultations included a survey, town-hall meetings, videoconferences, and teleconferences.

310 On the issue of the appropriate collective bargaining unit, the government sought the members' opinions on two possible options: a single, national unit appropriate for bargaining collectively, or several units that could be created along regional or provincial lines. The majority of members who answered the survey preferred a single, national unit. This was also true for the members of "C" Division who answered the survey.

311 The Board finds that the legislator considered the two possible options. It took into account the results of the consultations with RCMP members. The determination of a single, national bargaining unit is a reasonable measure to achieve the goal of consistency within the RCMP. Moreover, the regime created by the *Act* allows members to choose their bargaining agent and to advise their representatives of their interests in bargaining. It must be noted that even if the Board had kept its discretion, the determination of the appropriate bargaining unit would not be up to the members or the bargaining agents.

312 Finally, we are of the view that the benefits outweigh the drawbacks. Members of "C" Division are deprived of the possibility of arguing before the Board in favour of their own bargaining unit, but they are members of a bargaining unit with common interests in which the bargaining agent can better face the employer, having the strength of numbers and the prerogative of representing all members. The single unit avoids conflicts between regions.

313 Thus, the Board considers the measure reasonable and acceptable and proportional to the stated objective of cohesion to ensure a truly national labour regime in the context of a police force characterized by, among other things, the mobility of its members.

V. Conclusion

314 In light of the evidence at the hearing, the Board is not satisfied that "C" Division constitutes a group that is so distinct that its interests cannot be represented by a national bargaining unit. The work of members in "C" Division is exactly the same as that of members in "O" Division. Federal policing services are offered in every division. Moreover, the mobility of members is such that it is not unreasonable to ensure uniform working conditions as part of collective bargaining. Finally, the language argument does not stand up in light of the reality of the RCMP: over 70% of francophones work outside Quebec.

315 It is hard not to see the struggle by the AMPMQ to be recognized as the representative of "C" Division as historic, which must be given due respect. Were it not for the AMPMQ's efforts, along with those of the MPAO and the British Columbia Mounted Police Professional Association, the RCMP's regular members and reservists would not now enjoy the right to collective bargaining that the Supreme Court of Canada has recognized. However, this historic struggle does not lead to s. 238.14 being declared unconstitutional.

316 The current *Act* gives regular members and reservists the possibility of coming together, without employer interference, to argue their demands through collective bargaining. They will have the opportunity to be actively involved in the choice of collective goals, as part of a "... scheme that holds representatives accountable to the

employees who chose them ..." (*MPAO*, at para. 87). That is what s. 2(d) of the *Charter* protects, according to the Supreme Court's interpretation in *MPAO*.

317 Consequently, the request to declare s. 238.14 inoperative on constitutional grounds is denied. The AMPMQ's certification application is dismissed. The Board will proceed with the NPF's certification application that was suspended by the 2018 Order.

318 For all of the above reasons, the Board makes the following order:

VI. Order

319 The motion for a declaration that s. 238.14 of the *Federal Public Sector Labour Relations Act* is inoperative as being inconsistent with the Constitution is dismissed.

320 The AMPMQ's certification application is dismissed.

321 The stay that the Board ordered on April 17, 2018, in *National Police Federation v. Treasury Board of Canada*, *2018 FPSLREB 31*, is lifted. The vote held from November 21 to December 20, 2018, in the NPF's certification application will now be tallied.

July 11, 2019.

Catherine Ebbs, Steven B. Katkin, and Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

---

End of Document

Canadian Assn. of Crown Counsel (Re)

Alberta Labour Relations Board Reports

Alberta Labour Relations Board

Panel: William J. Johnson, Q.C., Chair; Jacqueline Lacasse, Member; Brygeda Renke, Member

Decision: November 19, 2019.

Board Files Nos.: CR-05359, GE-07785

[2019] A.L.R.B.D. No. 111 | 42 C.L.R.B.R. (3d) 57

IN THE MATTER OF the Public Service Employee Relations Act: Alberta Crown Attorneys' Association and Damian Rogers, Breena Smith, Dallas Sopko, Rosalind Greenwood, James Pickard, Matthew Block, Applicants, and Government of Alberta, Ministry of Justice and Solicitor General and The Alberta Union of Provincial Employees, Respondents, and Canadian Association of Crown Counsel, Intervenor

(141 paras.)

Appearances

For the Alberta Crown Attorneys' Association: Kristan A. McLeod (Counsel).

For the Respondent Government of Alberta: Kevin S. Feth, Q.C. (Counsel), Jason Kully (Counsel).

For The Alberta Union of Provincial Employees: Patrick Nugent, Adam Cembrowski (Counsel).

For the Canadian Association of Crown Counsel: Paul Cavalluzzo (Counsel).

TABLE OF CONTENTS

Introduction	para [1]
Background	para [11]
Statutory Background	p

para [11]

Certification Application para [13]

ACAA's Response to the Labour Relations Board Officer's Report para [20]

Crown Response to the Labour Relations Board Officer's Report para [22]

AUPE's Response to the Certification Application para [28]

The Hearing para [29]

Evidentiary Rulings para [34]

Agreed Statement of Facts para

[43]

Evidence para

[44]

James Pickard para

[45]

Dallas Sopko para

[63]

Breena Smith para

[65]

Damian Rogers para

[71]

Eric Tolppanen para

[74]

Dr. Sheila Campbell para [80]

Charter Arguments by the Parties para [84]

ACAA's Argument para [84]

CACC's Argument para [88]

AUPE's Argument para [90]

Crown's Argument para [92]

ACAA's Response Argument para

[96]

Decision para

[98]

Prosecutorial Independence and the PSERA Statutory Regime para

[101]

CACC's General Argument concerning Single Bargaining Unit para

[116]

Alternative Findings para

[120]

Conclusion para

[135]

REASONS FOR DECISION

INTRODUCTION

1 In support of an application for certification, the Alberta Crown Attorneys' Association ("ACAA"), on its own behalf and on behalf of six named Crown Prosecutors, assert sections 10, 13, 16(2) and 74 of *Public Service Employee Relations Act* ("*PSERA*") breach section 2(d) of the *Charter*.

2 On April 30, 2018, ACAA applied to be the certified bargaining agent for a unit of employees of the Government of Alberta ("the Crown") described as:

> *All members of the legal profession employed in their professional capacity in positions within the Alberta Crown Prosecution Service, except articling students.*

3 At the same time, recognizing the certification application faced statutory bars under *PSERA*, ACAA brought an application under the *Charter*. Among the remedies sought in the *Charter* application are a declaration that ss. 10, 13, 16(2), and 74 of *PSERA*, when applied to the ACAA's members and the individual Applicants, breach s. 2(d) of the *Charter* and thus do not bar the application for certification; and the processing of the ACAA's application for certification.

4 The crux of the ACAA's *Charter* argument is that prosecutorial independence requires Crown Prosecutors not be in a bargaining unit with other employees. As *PSERA* prevents Crown Prosecutors from choosing a bargaining agent for a bargaining unit of only Crown Prosecutors, ACAA argues it prevents the meaningful exercise of their freedom of association.

5 Pursuant to *PSERA*, the Alberta Union of Provincial Employees ("AUPE") is the statutorily deemed certified bargaining agent for the statutorily defined bargaining unit of "the employees of the Crown in the right of Alberta". As such, AUPE is an affected party for both the *Charter* application and the certification application.

6 The Canadian Association of Crown Counsel ("CACC") was granted Intervenor status for the *Charter* application.

7 The certification application resulted in the issuance of a Board Officer's Report. It found various sections of *PSERA* made the bargaining unit applied for inappropriate, and recommended dismissal of the certification application. Objections were filed to the Board Officer's Report by ACAA, the Crown and AUPE. The ACAA's objections essentially mirror its *Charter* application, while the Crown and AUPE submit there are further statutory bars to the application unaddressed by the Report.

8 The Board has proceeded to address the *Charter* issues set out in the *Charter* application, framed as objections to the Board Officer's Report recommending dismissal of the certification application. The Board must determine whether the *PSERA* sections that bar the certification application are unconstitutional when applied to Crown Prosecutors, in which case the Board could disregard those sections for the purpose of that application.

9 Having reviewed the evidence and arguments, the Board (Johnson, Lacasse, Renke) dismisses the *Charter* application and the certification application.

10 The Board's reasons follow.

BACKGROUND

Statutory Background

11 The relevant provisions of *PSERA* are:

1 In this Act

(e) "Board" means the Labour Relations Board

...

(f) "certified bargaining agent" means a trade union certified by the Board as a bargaining agent;

...

(l) "employee" means an employee of an employer, but does not include a person who is

...

(iii) a member of a profession during the period that the person is excluded from a bargaining unit or any other unit for collective bargaining pursuant to this Act;

3(1) All the provisions of the Labour Relations Code relating

(a) to the powers, privileges, immunities and jurisdictions of the Labour Relations Board, its Chair, vice-chairs, members and officers,

(b) to hearings procedure,

(c) to enforcement of orders, and

(d) to judicial review,

if those matters are not provided for specifically in the Act, apply and have effect as if those provisions formed part of this Act.

10 The employees of the Crown in right of Alberta constitute a single bargaining unit.

13(1) Those persons who are members of or training to become members of

(e) the legal profession,

and who practice their profession as a condition of employment, shall not be included in a bargaining unit or any other unit for collective bargaining unless the Board directs that the members of the profession be included in the unit pursuant to subsection (2).

(2) The Board may direct that members or persons training to become members of a profession referred to in subsection (1) be included in a bargaining unit or any other unit for collective bargaining if

(a) it is satisfied that the majority of the persons employed by an employer who are members or persons training to become members of the profession wish to be included in the unit, and

(b) it has allowed affected employers, bargaining agents and any other person or organization interested in the matter and whom the Board agrees to hear to present any facts or arguments they feel are relevant.

16(1) A trade union may apply to the Board to be certified as the bargaining agent for the employees in a unit that the trade union considers appropriate for collective bargaining, and in that case Division 5 of Part 2 of the Labour Relations Code applies subject to subsection (2).

(2) In an application for certification under the Part where the employer is the Crown in right of Alberta, the unit must be the single bargaining unit constituted under section 10.

74(2) The Alberta Union of Provincial Employees is deemed to be the certified bargaining agent of each unit of employees on behalf of which it is, on September 23, 1977, a party to an agreement under the Public Service Act, RSA 1970 c298, or The Crown Agencies Employee Relations Act, RSA 1970 c79.

12 Relevant sections of the *Charter* state:

2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.

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

Certification Application

13 Pursuant to section 16 of *PSERA*, the general certification provisions of the *Labour Relations Code*, RSA 2000, c. L-1 (the "*Code*"), apply to certification applications filed under *PSERA*. This is subject to any unique provisions of *PSERA* impacting the application, such as sections dealing with bargaining unit appropriateness

14 In accordance with its normal practice under the *Code*, the Board conducted an investigation and completed a Board Officer's Report concerning whether ACAA's certification application should proceed to a representation vote. Under the *Code* the Board may conduct a representation vote if the unit applied for, or a reasonably similar unit, is

an appropriate unit for collective bargaining and the application is supported by at least 40% of the employees in the unit applied for. The Board notes that, as the case involves members of the legal profession, section 13(2) of *PSERA* would require the Board to address further considerations before members of the legal profession could be included in the unit applied for.

15 The Board Officer's Report was issued on May 22, 2018. It provided the following summary description of the operations of the employer Crown:

> The Employer employs over 27,000 employees to deliver programs and services which are provided to Albertans by a number of ministries as listed in the table below.

Government of Alberta Ministries and Departments		
• Advanced Education • Agriculture and Forestry • Children's Services • Communications and Public Engagement • Community and Social Services • Culture and Tourism • Economic Development and Trade	• Education • Energy • Environment and Parks • Executive Council • Health • Indigenous Relations • Infrastructure • Justice and Solicitor General • Labour	• Municipal Affairs • Public Service Commission • Seniors and Housing • Service Alberta • Status of Women • Transportation • Treasury Board and Finance

The ministry affected by the application is the Ministry of Justice and Solicitor General ("Alberta Justice"). Alberta Justice is responsible for the administration or management of criminal justice within the province, for the appointment of provincial court judges and justices of the peace, and for property and civil law within the province.

The table below summarizes the number of persons who are members of the legal profession employed at Alberta Justice on the date of application.

Number of persons employed in the legal profession by Justice and Solicitor General	
Division	Persons Employed
Alberta Crown Prosecution Services	357
Alberta Human Rights Commissions	4
Deputy Minister's Office	1
Justice Services	5
Legal Services	246
Public Security	1
Resolution & Court Admin Service	54
Total	**668**

The persons affected by the application are lawyers ("Crown Prosecutors") employed by the Employer within the Alberta Crown Prosecution Service in the Ministry of Justice and Solicitor General.

Crown Prosecutors are responsible for prosecuting persons charged with Criminal Code, Youth Criminal Justice Act, and provincial statute offences. While promoting the public interest in achieving justice, prosecutors are required to exercise their significant discretionary prosecutorial powers fairly.

Crown Prosecutors are typically involved in determining appropriate charges, discussions with defence counsel, preparing witnesses for court, examination and cross-examination of witnesses and presenting arguments respecting conviction and sentence. In addition, Crown Prosecutors may be involved in developing criminal law policy for the province and supporting criminal law consultation with other levels of government.

The Alberta Crown Prosecution Service is geographically divided into three areas -- Edmonton Prosecutions, Calgary Prosecutions, and Regional Prosecutions. The Executive Director and Chief Crown Prosecutor of Regional Prosecutions oversees 12 Crown Offices in Alberta including: Calgary Rural and Regional Response Office, Edmonton Rural and Regional Response Office; Fort McMurray; Fort Saskatchewan; Grande Prairie; Hinton, Lethbridge; Medicine Hat; Peace River, Red Deer; St. Paul, and Wetaskiwin.

The Edmonton, Calgary and Regional Prosecutions Offices have responsibility for the prosecution of Criminal Code, Youth Criminal Justice Act and provincial statute offences.

The Employer is party to a certified bargaining relationship with The Alberta Union of Provincial Employees covering a bargaining unit comprising: All employees. Approximately 25,000 Crown employees are included in AUPE's bargaining unit and covered by a collective agreement which expired on March 31, 2017.

16 The Board Officer's Report recommended amending the name of the employer applied for to "Crown in the right of Alberta", which is an employer governed under *PSERA*. It concluded the ACAA was a trade union as defined by *PSERA* and the application was timely. The Board Officer assessed which employees would be excluded from the proposed bargaining unit (as performing managerial functions, for example), and concluded there were 305 persons performing work in the proposed unit on the date of application.

17 The application for certification was supported by petition evidence. The petition wording was:

CERTIFICATION - EMPLOYEE PETITION

We the undersigned employees of (name of company):

> Alberta Justice and Solicitor General, Alberta Crown Prosecution Service have freely signed this petition in support of an application for certification as my bargaining agent by (name of union): Alberta Crown Attorneys Association
>
> WE HAVE EACH SIGNED THIS PETITION FREELY AND WITHOUT PRESSURE

18 The Board Officer found that, of the 305 persons employed on the date of application in the bargaining unit applied for, at least 40% indicated timely support for the ACAA's certification application. In a normal certification application, this level of support would result in a representation vote being held.

19 In response to the requirement in section 35(1)(a) of the *Code* that the unit applied for be "an appropriate unit for collective bargaining," the Board Officer's Report stated:

> Section 16(2) of *PSERA* requires that, in an application for certification where the employer is the Crown in right of Alberta, the unit must be the single bargaining unit constituted under section 10 of PSERA, which is an all employee unit.
>
> Section 16(1) of *PSERA* reads:
>
> ***Certification of Bargaining Agents***
>
> ***Certification***
>
> *16(1) A trade union may apply to the Board to be certified as the bargaining agent for the employees in a unit that the trade union considers appropriate for collective bargaining, and in that case Division 5 of Part 2 of the Labour Relations Code applies, subject to subsection (2).*
>
> *(2) In an application for certification under this Part where the employer is the Crown in right of Alberta, the unit must be the single bargaining unit constituted under section 10.*
>
> ...
>
> Section 10 of *PSERA* reads.
>
> ***Crown employees***
>
> *10 The employees of the Crown in right of Alberta constitute a single bargaining unit.*
>
> Pursuant to s. 74(2) of *PSERA*, The Alberta Union of Provincial Employees is deemed to be the certified bargaining agent for a unit described as: "*All employees*"
>
> Based on the foregoing, I recommend the Board find the proposed bargaining unit is not appropriate for collective bargaining because it is not the "all employees" unit constituted under section 10 of *PSERA*. Consequently, I recommend the Board dismiss the certification application.

ACAA's Response to the Board Officer's Report

20 As set out above, the ACAA objects that sections 10, 13, 16(2) and 74 of *PSERA*, upon which the recommendation to dismiss is based, breach section 2(d) of the *Charter*. ACAA asks that its certification application proceed to a representation vote.

21 ACAA also raised objections concerning certain exclusions from the proposed bargaining unit in the Board Officer's Report.

Crown Response to the Board Officer's Report

22 The Crown submits there are five bars to the certification application.

23 Firstly, it submits the applied for bargaining unit is contrary to section 10 and 16(2) of *PSERA*, which state the

employees of the Crown constitute a single bargaining unit and a certification application where the employer is the Crown must be for that single bargaining unit.

24 Secondly, it submits section 1(l) of *PSERA* excludes from the definition of employee "a member of a profession during the period that the person is excluded from a bargaining unit or any other unit for collective bargaining pursuant to this Act". Section 13(1)(e) of *PSERA* excludes persons from being included in a bargaining unit who "are members of or are training to become members of ... the legal profession". The Crown states ACAA cannot be certified for the proposed unit as the persons in that unit are not "employees". The Crown also argues the Board has no ability to hold a representation vote, as there are no employees and it would be inappropriate for the Board to deem Crown Prosecutors to be employees for the purpose of holding such a vote.

25 Thirdly, as it argues the Crown Prosecutors are not employees, the Crown submits ACAA has not provided evidence of the necessary 40% support of employees.

26 Fourth, as it argues the Crown Prosecutors are not employees, it submits ACAA cannot be a trade union because a trade union must have as one of its objects "...the regulation of relations between employers and employees."

27 Fifth, it argues that section 13(2)(a) of *PSERA* should be interpreted to require the Board be satisfied that a majority of all lawyers employed by the employer -- in this case, all lawyers employed by the Crown, civil and criminal -- wish to be included "in the bargaining unit" before the Board can direct that lawyers may be part of a bargaining unit pursuant to s. 13(2)(b). That is, the Crown argues section 13(2)(a) prevents the fragmentation of the legal profession (and by extension the other named professions) into separate bargaining units. In addition, if all lawyers (civil and Crown Prosecutors) are included in a bargaining unit, the number of employees in such unit is 668 and not the 305 Crown Prosecutors. As such, ACAA's application lacks the necessary 40% support for the Board to order a representation vote.

AUPE's Response to the Board Officer's Report

28 AUPE submits pursuant to sections 10 and 74(2) of *PSERA*, there can only be single statutory defined bargaining unit consisting of "the employees of the Crown in the right of Alberta" and AUPE is the statutory deemed certified bargaining agent for that unit. It agrees with the Crown that for Crown Prosecutors to be represented by a bargaining agent, pursuant to section 13(2) of *PSERA*, the application to be added to the all employee unit must be supported by the majority of the lawyers employed by the Crown, civil and criminal, and the only bargaining agent permitted is AUPE.

THE HEARING

29 ACAA called as witnesses five Crown Prosecutors and one expert witness. The five Crown Prosecutor witnesses were James Pickard, Dallas Sopko, Matthew Block, Breena Smith and Damian Rogers. In addition, Dr. Sheila Campbell provided expert evidence.

30 The Crown called the Assistant Deputy Minister of Crown Prosecution Services -- Eric Tolppanen.

31 No evidence was called by AUPE. CACC's participation was limited to argument.

32 The hearing of evidence occurred on four days in December 2018. The argument consisted of written submissions followed by oral argument on February 22, 2019.

33 All witnesses were credible and gave their evidence in a respectful manner.

Evidentiary Rulings

34 The Crown objected to the evidence of Dr. Campbell on the basis that:

- it asserted Dr. Campbell's scholarly background was insufficient to provide an expert opinion to the topics to which she was to testify;
- the Crown questioned the relevancy of Dr. Campbell's evidence;
- the Crown asserted Dr. Campbell relied on hearsay evidence.

35 Dr. Campbell had been asked to provide expert evidence on four points:

1. An assessment of the unique position of crown prosecutors among their professional peers.
2. An assessment of the unique position of crown prosecutors among civil servants.
3. An assessment of the importance of collective bargaining for employed lawyers.
4. An assessment of the restrictions preventing Alberta prosecutors from the ability to democratically select their own independent bargaining agent and to engage in a process of meaningful collective bargaining with their employer.

36 The Board ruled it would accept Dr. Campbell's evidence on points one and two, but not on points three and four. The Board was of the opinion the items in points three and four of Dr. Campbell's evidence were either self-evident and/or were in substance questions of law for the Board. The Board was of the opinion that evidence on points three and four would be of no assistance to the Board in its analysis. On topics one and two, the Board had not yet heard the final argument on the *Charter* issues and wanted to have such evidence available should it determine that it may be of value in the analysis.

37 The Crown also objected to portions of the evidence of the Crown Prosecutor witnesses on the basis of relevancy and hearsay. The Board admitted the evidence with the intention of determining its utilization after argument on the merits.

38 The Board is mindful of its role as a fact-finder in an application raising *Charter* issues, and references the Supreme Court of Canada's comments in *Cuddy Chick Ltd. v. OLRB and UFCW, Local 175*, [1991] 2 SCR 15, where the Supreme Court of Canada stated at pages 16, 17 and 18:

> In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. Therefore, while Board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues. The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance.
>
> ... At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(b) of the *Labour Relations Act.*

39 In addition, section 14(5)(a) of the *Code* states:

> *14(5) The Board*
>
> *(a) may accept any oral or written evidence that it, in its discretion, considers proper, whether admissible in a court of law or not, and*
>
> ...

40 In *Hamilton v. Alberta Labour Relations Board*, [1993] Alta. L.R.B.R. 515, 12 Alta. L.R. (3d) 388 (Q.B.), the Alberta Court of Queen's Bench stated at pages 9 and 10:

> Counsel for the applicant acknowledged in his letter to the Board dated January 6, 1993, making application for reconsideration that "clearly the admission of rebuttal evidence is in the discretion of the Board. However, that decision must be exercised in a reasonable manner and it is submitted that it was not in this particular case." S. 13(5)(b) quoted above from the Code says that the Board is not bound by the law of evidence applicable to judicial proceedings. Thus, the Board is permitted to range beyond the restraints imposed in a court of law so as to adopt a more informal or flexible approach to its fact finding mission in order to permit the Board to exercise the powers given to it pursuant to the Code. The Board's primary duty in acting as a buffer between employers and employees is to act fairly and to be perceived at all times as acting fairly.
>
> I am persuaded that this instance the Board has misconstrued the way in which the Code instructs it concerning the application of the rules of evidence. Rather than having been liberated from the common law rules of evidence as provided in s. 13(5)(b) of the Code, the Board has purported to apply its discretion so as to use common law rules of evidence to exclude evidence which limits its ability to consider the facts presented by both sides. In doing so the Board has failed to take into account its mandate to be able to look beyond the evidence which is restricted in judicial proceedings and the Board became enmeshed in the very rules of evidence from which it has been freed by s. 13(5)(b) of the Code. Rather than having placed itself in the position of hearing all of the evidence, its adherence to rules of evidence leaves the impression that it has not acted fairly. The Asbell Panel's refusal to permit the applicant to call rebuttal evidence in this case was patently unreasonable. The Board did not have to be right in the exercise of its discretion to accept any evidence which it considered proper but the Board must be right in its understanding of the Code which tells it what evidence it may consider. The Vice Chairman's statement that "The effect of s. 13(5) is to confer upon the Board a discretion to use common law rules of evidence" discloses that the Board proceeded on the wrong footing in reconsidering the applicant's request to call rebuttal evidence.
>
> [Old section 13(5) is similar to current section 14(5) of the *Code*]

41 In permitting the evidence objected to by the Crown, the Board was of the view it should attempt to not restrict the parties in their ultimate arguments, and as such concluded it was best to accept the evidence in order to create a cogent record for the superior courts if the Board's decision is judicially reviewed. In permitting the evidence it did, the Board was not ruling it would rely on that evidence in making its decision but merely that that evidence would be available for consideration in its analysis subsequent to argument.

42 Having completed its rulings, the Board advises that none of the evidence objected to (Dr. Campbell's evidence, the hearsay evidence, or the evidence permitted despite objections on relevancy) was determinative in the Board's analysis.

Agreed Statement of Facts

43 The parties are commended for providing the Board with 205 paragraphs of an Agreed Statement of Facts with 65 exhibits. The Agreed Statement of Facts is essential for an understanding the positions of the parties and it is reproduced in its entirety here, minus references to the exhibits:

1. The ACAA was incorporated under the *Societies Act* on April 29, 1971. As of April 27, 2018, it had 293 members, each of whom is employed by the Government of Alberta as a lawyer within the Alberta Crown Prosecution Service (the "Prosecution Service" or "ACPS"). Those employed as Executive Directors, and the Assistant Deputy Minister of the Prosecution Service (the "Assistant Deputy Minister"), are excluded from membership. Although the numbers fluctuate, approximately 343 lawyers are eligible to be members of the ACAA. Accordingly, approximately 85% of Alberta's Crown Prosecutors are members of the ACAA.
2. In its early years, the ACAA's role was largely confined to organizing conferences and social gatherings. In the mid-1980s, the ACAA began advocating for Crown Prosecutors and by the late 1980s and subsequently, it was advocating for better wages and working conditions.

3. At a May 1989 meeting, a vote of the ACAA's membership authorized the Executive to seek recognition of the ACAA as "a separate and distinct unit for collective bargaining..." Also at issue at that time was a government policy that interfered with the ability of Prosecutors to make public statements.

4. In June 1989, the Assistant Deputy Minister wrote to the ACAA President to advise that the Department was not able to make any changes to the collective bargaining process in the Province and addressed public statements by Crown Prosecutors, staffing and working conditions and several other topics.

5. In September 1989, the membership of the ACAA determined that they no longer wished to pursue certification as a collective bargaining unit (Minutes of ACAA Red Deer Meeting, September 15, 1989.

6. In April 1990, the ACAA provided a brief to the Public Service Commissioner of Alberta regarding the role of Crown Prosecutors and salary and benefit concerns of the Association.

7. In October 1990, the ACAA and Crown Prosecutors gave notice of their intention to commence a workplace action campaign over concerns regarding heavy caseloads, staff shortages and low salaries. Elements of the action were to include:

   (a) scheduling of trial preparation meetings with sex assault victims and other witnesses in all sexual assault cases;

   (b) scheduling of two preparation days per five days of trial on major cases such as murder, manslaughter, robbery and kidnapping;

   (c) strict compliance with departmental guidelines on disposition agreements;

   (d) realistic scheduling of trial loads;

   (e) no offers of assistance to prosecutors and judges in other courtrooms unless ordered by the court; and

   (f) no waivers of preliminary inquiry for reasons of expediency

8. In the early 1990s, the ACAA continued to advocate for better working conditions for Crown Prosecutors. On some occasions, the ACAA Executive was able to meet with the Public Service Commissioner or the Assistant Deputy Minister. (Minutes of two ACAA meetings, May 15, 1991 and January 12, 1991.

9. By the mid-1990s, the ACAA's stated view was that:

   (a) The Prosecution Service was in a crisis;

   (b) Alberta Prosecutors were among the lowest paid Crowns west of Newfoundland;

   (c) senior Crowns were leaving in droves; and

   (d) it was hard to hire due to low salaries and working conditions.

10. On February 21, 1997, Neil McCrank, the Deputy Minister of Justice and Deputy Attorney General, made several commitments to Crown Prosecutors as a result of communications with the ACAA, in which he had been requested to sign a memorandum of understanding with the ACAA. These commitments concerned issues such as preparation time, reimbursement of professional fees, discipline process, and continuing education, and were outlined in a Memorandum sent to all Crown Prosecutors.

11. In 1997, the Province announced 18 prosecutor positions to be filled across the province. The ACAA continued to assert that prosecutors' salaries were not competitive with those elsewhere (D. Slade, "Provincial prosecutors...", Edmonton Journal, February 14, 1997: M. Gold, "18 Crown prosecutors...", Edmonton Journal, February 12, 1997: "G. Kent, "Prosecutors quitting...", Edmonton Journal, April 14, 2001.

12. During this time, the President of the ACAA and its Executive launched a public relations campaign, and the majority of the ACAA voted for a mandate to launch a workplace action campaign. (Four articles from February to September 1997.

13. In mid-1997, Alberta Justice received a report by consultants Price Waterhouse, which concluded that Alberta Crown Prosecutors were paid up to 40 percent less than prosecutors in other provinces. (H. Plischke, "Report sounds alarm...", Edmonton Journal, June 26, 1997.

14. In late 1997, the Government granted salary increases of approximately 20% across the board to Crown Prosecutors.

15. Between 1997 and 2006, the ACAA advanced concerns to the Government regarding salaries and workload.

16. In the late 2000s, the ACAA advocated on behalf of the membership to improve the rules for reclassification and pay/salary tables.

17. On May 1, 2007, the ACAA provided a detailed report to the Minister of Justice regarding difficulties within the Prosecution Service. It was the ACAA's position that prosecutors were inadequately compensated and faced adverse working conditions.

18. The Minister of Justice responded to the ACAA on June 7, 2007, stating that discussions were underway regarding compensation increases for Crown Prosecutors, that a business plan needed to be submitted and that Alberta Justice would also undertake a short-term resource review.

19. In the summer of 2007, at the request of the Assistant Deputy Minister, the Chief Crown Prosecutor of Calgary Prosecutions undertook a review of the Prosecution Service's capacity with the assistance of a private consulting firm, Sierra Systems. The resource review they produced provided much of the evidence which formed the basis of submissions made later that summer to the Treasury Board. The review concluded that the Prosecution Service was significantly understaffed and concluded that an additional 83 full-time equivalent (FTE) positions for prosecutors were required across the Prosecution Service. A portion of the Sierra Systems report which the ACAA was provided.

20. On July 3, 2007, the Deputy Premier and Minister of Justice requested a budget increase from the Treasury Board to address legal officer compensation, and for additional staff resources in the criminal justice division. The request to Treasury Board relating to Crown Prosecutor positions was for 58 additional prosecutor FTEs to be funded over two fiscal years.

21. On July 31, 2007, the Deputy Minister advised the ACAA that he could not share the details of the Treasury Board proposal but stated that it contained substantial salary and resource increases. The Deputy Minister stated that a partnership between the department and the ACAA was highly desirable and remained the best route to address compensation and workload issues.

22. During 2007, the Assistant Deputy Minister of the Prosecution Service created a salary grid with clear lockstep provisions and policies to eliminate salary discrepancies.

23. In 2011, a resolution was passed at a Special Meeting of the ACAA's membership providing that the ACAA "be given the mandate to pursue a VRA [Voluntary Recognition Agreement] with the Province of Alberta recognizing all prosecutors in the province with the right to negotiate on their behalf." The vote was carried by a recorded vote of 118 in favour, 5 opposed and 1 abstention.

24. In a meeting on February 12, 2016, the ACAA raised the issue of voluntary recognition with the Assistant Deputy Minister of the Alberta Crown Prosecution Service. In response, the Assistant Deputy Minister cited the Deputy Minister's view that legal barriers prevented the bargaining relationship sought by the ACAA.

25. In a letter dated November 22, 2016, the ACAA's President wrote to the Minister of Justice and Solicitor General. He asked the Government to recognize the ACAA as the exclusive bargaining agent for lawyers employed with the Prosecution Service. He asked the Minister to appoint a

representative or group of representatives to begin negotiations within 30 days of the letter. He stated that the ACAA wished "to be treated as a partner in the making of decisions about our working conditions and our salaries and benefits."

26. Beginning on January 23, 2017, the ACAA sent letters to multiple justice system stakeholders, including mayors, community leaders, police, and victim advocate groups. More than 50 letters were sent to municipalities and several were sent to victim advocate groups.

27. The Minister of Justice responded to the ACAA's November 22, 2016 letter on January 30, 2017. She stated that Government representatives would meet with the ACAA to discuss the challenges facing the Prosecution Service, but that the Government would not be appointing a representative to discuss voluntary recognition of the ACAA as an exclusive bargaining agent at that time. The ACAA was invited to contact the Deputy Minister to arrange a meeting.

28. On February 17, 2017, the Executive of the ACAA met with the Deputy Minister and the Assistant Deputy Minister to discuss the ACAA's concerns regarding what the ACAA characterized as a resourcing crisis, the role of the ACAA and the Government in addressing the perceived crisis, the hiring freeze, and future meetings.

29. On February 27, 2017, in response to the Minister of Justice's letter of January 30, 2017 inviting the ACAA to arrange a discussion, the President of the ACAA inquired about scheduling a meeting with the Minister of Justice, the Deputy Minister, and the Assistant Deputy Minister to discuss the challenges being faced by the Prosecution Service.

30. On March 1, 2017, the ACAA held a press conference regarding its concerns about the resourcing of the prosecution service and released a media statement and backgrounder regarding these concerns.

31. On March 9, 2017, the Government announced plans to restore funding for 35 Crown Prosecutor positions which it had left vacant due to a hiring freeze. As well, the Government noted that it was currently recruiting prosecutors to 15 additional positions. The 15 additional positions were for the Crown Bail Office and were to perform work which had previously been performed by police officers (the change was necessary due to a court decision which had found that police officers were not permitted under the *Criminal Code* to act on behalf of the Attorney General at bail hearings).

32. On March 10, 2017, the Executive of the ACAA met with the Minister of Justice, the Deputy Minister, and the Assistant Deputy Minister. During the meeting, the parties discussed the ACAA's March 1, 2017 press conference and the Minister's March 9, 2017 announcement.

33. On May 19, 2017, the President of the ACAA wrote to the Minister of Justice about staffing issues for court clerks in the Criminal Division of the Provincial Court.

34. On June 7, 2017, the President of the ACAA met with the Minister of Justice and the Deputy Minister, at the ACAA's request, to discuss the ACAA's concerns regarding statements made by the Minister relating to the detention of a complainant during the trial of Lance Blanchard. The meeting followed a June 6, 2017 letter by the ACAA to the Minister, which criticized the content of the Minister's statement to the media and criticized the decision to speak to the media at all, given that the prosecution of Lance Blanchard had not--at that time--been concluded.

35. On June 29, 2017, the ACAA Executive met with the Deputy Minister and the Assistant Deputy Minister in follow-up to the previous June 7, 2017 meeting.

36. In a letter dated August 21, 2017, the Minister of Justice informed the ACAA of funding commitments related to Justice and Solicitor General.

37. In 2017, the ACAA's members gave the ACAA the mandate to become certified as the bargaining agent for all Crown Prosecutors employed by the Government of Alberta. At the Annual General

Meeting on October 18, 2017, 204 ACAA members voted on a resolution which authorized the ACAA to seek such certification. All 204 votes were cast in favour of the resolution.

38. On January 2, 2018, counsel for the ACAA wrote to Premier Notley, the Minister of Finance, the Minister of Labour, and the Minister of Justice and Solicitor General. Counsel asked the Government to work with the ACAA to negotiate a framework agreement and a timeline for their members to begin bargaining. The letter also indicated that, as an alternative, the ACAA would seek certification from the Alberta Labour Relations Board.

39. Government representatives met with the ACAA for approximately one hour on March 22, 2018. Present were the Deputy Minister of Justice and Deputy Solicitor General; the Public Service Commissioner; the Assistant Deputy Minister of Labour and Employment Practice with the Public Service Commission; ACAA President James Pickard; ACAA Treasurer Damian Rogers; and legal counsel for both parties. Counsel for the Government stated:

    (a) The Government's rationale for maintaining a single bargaining unit for Government employees, including concerns about fragmentation if the existing statutory model was varied;

    (b) The Government's support for statutorily designated bargaining agents in various sectors;

    (c) The Government's view that consultation with AUPE, professional employees, and the balance of the public service would be required before considering changes; and

    (d) The Government's desire to maintain dialogue with the ACAA about issues concerning Crown Prosecutors.

Following that, there was a discussion of salary anomalies and the Deputy Minister said the Government was prepared to explore what might be done to address salary anomalies.

40. The ACAA filed its Charter and Certification applications on April 30, 2018.

Communications Between the ACAA and the Employer

41. Representatives of the ACAA have engaged with Employer officials to discuss workplace issues.

42. The Assistant Deputy Minister has met on an informal basis with the President of the ACAA to discuss a variety of workplace concerns raised by the ACAA President on behalf of Crown Prosecutors.

43. The Assistant Deputy Minister and the ACAA President speak on the phone and exchange emails regarding workplace issues. The Assistant Deputy Minister provides updates to the President on the progress made to address the issues discussed.

44. Discussions, either in person or by telephone, between the Assistant Deputy Minister and the ACAA President occurred on:

(a) July 16, 2015;

(b) November 13, 2015;

(c) February 12, 2016;

(d) September 29, 2016;

(e) October 24, 2016;

(f) February 17, 2017;

(g) June 29, 2017;

(h) August 16, 2017;

    (i) October 3, 2017 (this meeting addressed the issue of Crown Prosecutors working in the Bail Office on statutory holidays); and

(j) May 4, 2018.

45. Since approximately September 2017, ACAA representatives have been invited to all Prosecution Service Executive Leadership Meetings, which are held twice monthly. If an ACAA representative does not attend, the minutes of the meeting are shared with the ACAA. An ACAA representative attended the following meetings:

(a) November 14, 2017;

(b) December 1, 2017;

(c) December 12, 2017;

(d) February 20, 2018;

(e) May 11, 2018; and

(f) May 29, 2018.

46. Topics discussed at the Prosecution Service Executive Leadership Meetings include:

(a) Prosecution Service staffing, including Crown Prosecutors and support staff;

(b) Salary anomalies and freezes;

(c) Essential Services within the Prosecution Service;

(d) Crown Prosecutor reclassification;

(e) Budgets;

(f) Prosecution policies;

(g) Education budgets for Crown Prosecutors;

(h) Mental health and wellness recourses;

(i) Workforce planning, including caseload and allocation of Crown Prosecutor time; and

(j) Vacation management.

47. The Assistant Deputy Minister provided the ACAA President with the Prosecution Service 2015/16 Annual Report and the 2016/17 Annual Report for review and comment prior to release to the Prosecution Service. The ACAA President requested a meeting to discuss the ACAA with the Assistant Deputy Minister after the provision of the 2015/16 Annual Report and the Assistant Deputy Minister agreed to this request.

48. The Assistant Deputy Minister has provided the ACAA President information regarding Crown Prosecutor departures, hiring, and FTE positions. For example:

(a) A "FTES, Warm Bodies, and Vacancy Discount Chart" was shared with the ACAA President on October 28, 2016;

(b) Periodically, the Justice and Solicitor General Executive Team will receive a "Movement Report" outlining commencements, transfers, and departures. The June 2017 report was shared with the ACAA President on July 11, 2017;

(c) The results of a Prosecution Service employee engagement survey and a FTE report were provided to the ACAA President on October 2, 2017; and

(d) On October 12, 2017, documents tracking the staffing level of the Prosecution Service were shared with the ACAA President and the Assistant Deputy Minister offered to meet with the ACAA President to discuss.

49. On August 31, 2017, the Assistant Deputy Minister sent the ACAA President the 2017-2020 Alberta Crown Prosecution Service Operational Map prior to it being shared with the Prosecution Service.

50. Immediately prior to the Fall 2016 ACPS Conference, the Assistant Deputy Minister had sent an email to prosecutors on October 11, 2016 where he advised that triage measures were to take effect immediately.

51. The Assistant Deputy Minister advised Crown Prosecutors at the Fall 2016 ACPS Conference that a formal Triage Protocol was being developed. The Assistant Deputy Minister had previously advised the ACAA Executive that a Triage Protocol was being drafted.

52. After the Conference and the October 11, 2016 implementation of triage measures, the Protocol was provided to the ACAA at the same time as it was sent to prosecutors. The Protocol is still in place and being implemented.

53. Two comprehensive reports regarding triage statistics were shared with the ACAA President on July 20, 2017 and December 19, 2017. The Assistant Deputy Minister offered to meet with the ACAA President to discuss.

54. Information is also shared with the ACAA about the number of *Jordan* cases in Alberta and the status of all *Jordan* applications. Information was provided weekly from June 8, 2017 to October 12, 2017, and information is now provided bi-weekly.

55. All prosecutors, including the ACAA Executive, have access to the Data Portal maintained by the Prosecution Service. The Data Portal contains statistical and other data relating to the operations of the Prosecution Service, including the workload of Crown Prosecutors and prosecution offices.

Crown Prosecutors' Terms and Conditions of Employment

56. There are currently 403 Crown Prosecutor positions within the Prosecution Service.

57. As of September 1, 2018, 351 Crown Prosecutors were actively employed by the Government.

58. The courts operate 245 days a year.

59. For the purpose of their salary, Crown Prosecutors and other Government-employed lawyers are subject to the same compensation model. Lawyers are classified as "Legal Officers" ("LO"). Their classification changes based on their assessed years of related experience.

60. There are five levels of LO ranging from 1 to 5. Within each level of LO there are four sub-levels ranging from A to D.

61. Lawyers progress through the LO1 to LO3 levels and sub-levels primarily based on years of experience. A lawyer will generally move from LO1 to LO2 and then to LO3 after attaining the necessary years of experience. A lawyer typically moves through each sub-level within an LO level prior to moving to the next LO level; however, a lawyer can seek early entry into the LO3 classification.

62. LO4 and LO5 classifications are not based on years of experience and are awarded following re-classification applications or upon taking on administrative and supervisory responsibilities. The number of LO4 and LO5 positions available is limited by the Employer and LO5 appointments are made for a limited-term basis only (usually three years).

63. The 2014 pay plan (which is described further below) provided that Government-employed lawyers would receive in-range salary adjustments of 3% per year (for LO2s and up) or 8% per year (for LO1s only), until they reached the top of the salary range for their classification. Due to the salary freeze imposed by the Government in 2016 and extended in 2017, Government-employed lawyers have not been receiving these in-range adjustments since April 1, 2015. The Government has continued to recognize reclassifications, such as from LO1 to LO2.

64. All lawyers employed by the Government are governed by the same salary structure.

65. Crown Prosecutor salaries currently range from $81,565 to $191,582 depending on the lawyers' LO classification, assessed years of related experience and the impacts of the salary freeze.

66. Crown Prosecutors work out of multiple offices in Edmonton and Calgary, and from eleven offices outside of those two cities (Fort McMurray Regional Crown Office, Fort Saskatchewan Regional Crown Office, Grande Prairie Regional Crown Office, Hinton Regional Crown Office, Lethbridge Regional Crown Office, Medicine Hat Regional Crown Office, Peace River Regional Crown Office, Red Deer Regional Crown Office, St. Paul Regional Crown Office, Slave Lake Regional Crown Office, Wetaskiwin Regional Crown Office).

67. Crown Prosecutors report to Executive Directors within the Prosecution Service and are often supervised by Regional Chief Crown Prosecutors or Assistant Chief Crown Prosecutors.

68. Most non-lawyer staff working for the Prosecution Service work with Prosecutors as legal assistants and in other roles which support Prosecutors' work. These non-lawyer staff are represented by AUPE.

69. Crown Prosecutors are salaried. Those classified as an LO2 or higher are considered to be managers. Crown Prosecutors receive a "vacation supplement" (also referred to as a "management supplement") of five days of leave per year as compensation for the extra hours worked without compensation. The pay plan for non-lawyer Prosecution Service employees represented by AUPE is outlined in the AUPE Collective Agreement and includes overtime pay.

70. Many Crown Prosecutors routinely work evenings and weekends. In contrast, most non- lawyer staff in the Prosecution Service who are represented by AUPE have a 36.25 hour work week with weekday and daytime hours.

71. Crown Prosecutors may participate in the "Earned Days Off" (EDO) program. This program provides Prosecutors with one earned day off per month. This is in recognition of an extra 20 minutes worked per day beyond the standard 7.5 hours each day. EDOs may only be booked with one month's notice, are granted when operational requirements permit and are not ordinarily permitted to be carried over from month-to-month. Many Crown Prosecutors take few of their allotted EDOs due to caseloads and staffing.

72. As set out further below, Legal Officers, including Crown Prosecutors, participate in a different benefit plan than do employees represented by AUPE. Although the benefits are similar, the cost-sharing arrangements differ. Also, most Legal Officers (Legal Officers 2 and higher) participate in a different pension plan than employees represented by AUPE.

73. Crown Prosecutors are subject to the Discipline Appeal Process found in the *Public Service Employment Regulation*. In addition to these procedures, Crown Prosecutors may make use of the "Crown Prosecutor Discipline Procedure".

74. Pursuant to the Crown Prosecutor Discipline Procedure, in any disciplinary proceedings where the Assistant Deputy Minister is considering serious disciplinary action against a Crown Prosecutor the Crown Prosecutor may have the President of the ACAA present at any meeting where such disciplinary action is being discussed. The President of the ACAA may make submissions on behalf of the Crown Prosecutor to the Assistant Deputy Minister. Where the Crown Prosecutor has been given notice of serious disciplinary action by the Assistant Deputy Minister the Crown Prosecutor may ask for that action to be reviewed by the Deputy Minister. If this review occurs, the President of the ACAA may also make oral or written submissions on behalf of the Crown Prosecutor to the Deputy Minister.

75. Crown Prosecutors have a role which has been defined and emphasized in jurisprudence.

76. Crown Prosecutors have a considerable level of prosecutorial independence and discretion in their work and in the decisions they are charged with making. They do, nevertheless, remain ultimately

accountable to the Attorney General and are subject to many employment policies, guidelines and protocols that provide them with direction and guidance with respect to their exercise of discretion. Many of these are included in the Crown Prosecutors' Manual, which is publicly available on the website of Alberta Justice and Solicitor General.

77. Crown Prosecutors are also subject to the Code of Conduct for Crown Prosecutors which states:

While not directly accountable to the Legislature or the public, Crown prosecutors are accountable to the Attorney General. Of Crown prosecutors in Ontario, it has been said:

> *Crown counsel in Ontario are responsible ultimately to the Attorney-General, who is responsible to the Legislature... The Ministry of the Attorney-General exercises careful supervision of prosecutions for which it is responsible.*

The accountability of the Criminal Justice Division's Crown prosecutors is no different.

To be clear, Crown prosecutors who exercise their discretion in a principled manner and who, when faced with difficult decisions, consult with supervisors and colleagues will be supported in their decision-making.

78. All lawyers employed by the Government, including Crown Prosecutors, are subject to ethical obligations. Lawyers are officers of the court, and subject to a Code of Conduct enforced by the Law Society of Alberta, a Code of Conduct and Ethics for the Public Service of Alberta, and the Oath of Office pursuant to s. 20 of the *Public Service Act*. They are bound by their professional obligations to undertake their work in a professional and ethical manner.

79. Every individual working within the Ministry of Justice and Solicitor General is subject to the Justice and Solicitor General Supplemental Code of Conduct, made pursuant to s. 23 (2) of the Public Service Act.

80. Portions of the Law Society of Alberta's Code of Conduct apply only to lawyers acting as prosecutors, specifically:

(a) Commentary 3 to Rule 5.1-1; and

(b) Rule 5.1-4 and the commentaries thereto

81. The Justice and Solicitor General Articling Program for students-at-law is run jointly by the Prosecution Service and the Legal Services Division (in which many civil lawyers for the Government are employed). Students are hired by a committee comprised of lawyers from both divisions. One lawyer from each of the ACPS and the Legal Services Division jointly administer the program.

82. In four Canadian jurisdictions, Crown Prosecutors are members of a bargaining unit which is separate from all other government employees:

(a) the British Columbia Crown Counsel Association represents only Crown Prosecutors in British Columbia and collectively bargains through that association (recognition is contained in British Columbia's *Crown Counsel Act*). Government civil lawyers in British Columbia have an association which does not collectively bargain;

(b) the Ontario Crown Attorneys' Association represents only Crown Prosecutors in Ontario. Government civil lawyers in Ontario have their own association: The Association of Law Officers of the Crown. For collective bargaining purposes, the two Associations are represented by a council comprised of the two Associations;

(c) the Nova Scotia Crown Attorneys' Association represents only Crown Prosecutors in Nova Scotia and has a collective agreement. Government civil lawyers in Nova Scotia do not have an active association and do not collectively bargain; and

(d) the New Brunswick Crown Prosecutors' Association represents only Crown Prosecutors in New Brunswick and has a collective agreement. Government civil lawyers in New Brunswick

are represented by the New Brunswick Crown Counsel Association, which has a separate collective agreement.

83. In two Canadian jurisdictions, Crown Prosecutors and civil lawyers are represented by the same association:

    (a) In Manitoba, the Manitoba Association of Crown Attorneys serves as the certified bargaining agent under the *Labour Relations Act* for Manitoba Crown Attorneys. The bargaining unit represented by the Manitoba Association of Crown Attorneys includes lawyers employed in six branches of Manitoba Justice: Manitoba Prosecutions Service; Civil Legal Services; Constitutional Law Branch; Family Law Branch; Office of Legislative Counsel; and Office of the Public Trustee.

    (b) Federally, the Association of Justice Counsel serves as the certified bargaining agent under the *Public Service Labour Relations Act* for approximately 2,600 Federal Crown Lawyers, including approximately 500 crown prosecutors. The bargaining unit represented by the Association of Justice Counsel includes lawyers employed by the Government of Canada who work for the Department of Justice, the Public Prosecution Service of Canada, and lawyers who provide in-house legal services for various federal agencies, tribunals and courts.

84. Like in Alberta, neither Crown prosecutors nor government civil lawyers in the provinces of Saskatchewan, Newfoundland and Labrador, and Prince Edward Island collectively bargain with their employers. However:

    (a) in Saskatchewan, there are separate voluntary associations for prosecutors and government civil lawyers;

    (b) in Newfoundland and Labrador, there is a voluntary association for prosecutors and no such association for government civil lawyers; and

    (c) in Prince Edward Island, neither prosecutors or civil lawyers have an association.

Salaries

85. Crown Prosecutors in Alberta, like all other non-unionized employees of the Government, have been subject to numerous salary freezes over the years.

86. In October 2009, salaries of Alberta's opted-out, excluded and management employees, which includes Crown Prosecutors, were frozen. In April 2011, this salary freeze came to an end, in that in-range movement (incremental yearly pay increases based upon seniority) recommenced; however, the salary anomalies created during the freeze were not addressed. That is, Prosecutors hired during the salary freeze continued to earn more than their counterparts with the same years of legal experience who had been hired before the freeze.

87. In a memorandum dated November 23, 2011, the Deputy Minister of Justice and the Deputy Attorney General stated that salary increments which had been withheld as a result of the 2009 salary freeze would not be reinstated. As a result, all affected employees had "lost a one year increment in perpetuity". The memorandum also stated that a process was put in place to refine the current pay plan and to have it ready for implementation on April 1, 2012, in conjunction with the scheduled 4% salary increase.

88. In a memorandum dated March 20, 2012, the Assistant Deputy Minister informed all legal officers that they would be receiving a 4% general salary increase effective April 1, 2012. The legal officers were also informed that work had been undertaken to review and revise the way compensation was administered and that the approval process would occur through March 2012.

89. Between November 2011 and March 2013, Crown Prosecutors were repeatedly told that a new pay plan for Legal Officers, including Crown Prosecutors, was being developed. On April 2, 2013,

the ACAA's President wrote to the Assistant Deputy Minister and asked him to include the ACAA in the development of this new pay plan.

90. On May 30, 2013, the ACAA and the Alberta Justice Civil Lawyers' Association wrote to the Deputy Minister of Justice. This letter resulted in an invitation for both associations' Presidents to meet with the Deputy Minister and several Assistant Deputy Ministers on July 5, 2013 for one hour. Neither association was invited to provide input on the new pay plan.

91. On June 4, 2013, the Deputy Minister of Justice sent a memorandum advising that in-range movement subsequent to April 1, 2013 would be delayed until the new pay plan was created.

92. In a letter dated January 14, 2014, the ACAA wrote to the Minister of Justice and Solicitor General regarding its members' salary concerns, repeated salary freezes and salary anomalies.

93. On February 28, 2014, the new pay plan was released to Prosecutors. The documents accompanying it referred to an effort which had been made to obtain Legal Officers' input on the plan: a November 2011 focus group session which was said to have involved 19 Legal Officers. The purpose of the focus group was to receive input from the Legal Officers about current issues and concerns with regard to the pay plan in place and the characteristics of a revised pay plan that would be important to Legal Officers. The ACAA was not consulted.

94. In May 2014, Premier Hancock wrote a memorandum to opted out, excluded and management employees, which includes Crown Prosecutors, advising that the terms for the AUPE settlement, if ratified by AUPE members, would be extended to non-unionized employees. This meant Crown Prosecutors could expect to receive:

(a) a $1,850 lump sum wage payment;

(b) a 2% wage increase for 2014-2015;

(c) a 2.25% wage increase for 2015-2016; and

(d) a 2.5% wage increase for 2016-2017.

95. Following ratification by AUPE members, Crown Prosecutors received the lump sum payment of $1,850 and their salaries were adjusted by 2% retroactive to April 1, 2014.

96. On January 30, 2015, the ACAA's President wrote to Premier Prentice regarding Crown Prosecutors' salaries, stating that the ACAA's members expected the Government to honour its commitment to implement a 2.25% salary adjustment on April 1, 2015, and a further 2.5% adjustment on April 1, 2016.

97. In the letter in response dated February 13, 2015, the Deputy Minister Corporate Human Resources and Public Service Commissioner acknowledged the ACAA's salary concerns and stated that no decisions had been made regarding how to address the province's deficit.

98. On March 19, 2015, the ACAA's President responded to the Deputy Minister Corporate Human Resources. She stated that the ACAA was disappointed that there was no offer to consult with the ACAA regarding decisions affecting its members' pay and benefits. She noted that the Premier had said publicly that he wanted Alberta public sector workers to come to the table to talk about how to address the Government's projected deficits. She stated that the ACAA was willing to engage in this dialogue and asked if the Government was prepared to meet with the ACAA.

99. The Deputy Minister Corporate Human Resources responded in a letter dated April 9, 2015. She stated that a working group had been established to develop a new approach to public sector bargaining and that if the ACAA's members had suggestions as to how to reduce costs and increase efficiencies they should bring those suggestions to their executive teams. She concluded by stating that she was unable to meet with the ACAA.

100. On April 14, 2015, the ACAA's President wrote to the Acting Assistant Deputy Minister regarding the delay in implementing a promised 2.25% across-the-board increase and in-range movement.

The ACAA made several further inquiries about this issue, including to the Deputy Attorney General (and Acting Deputy Minister of Justice) on April 28, 2015 and to the Deputy Minister and Public Service Commissioner on May 1, 2015.

101. On June 17, 2015, the Public Service Commissioner wrote directly to opted out, excluded and management employees, including Crown Prosecutors, to say that the across-the-board increases for 2015/2016 were being processed retroactively to April 1, 2015.

102. On June 29, 2015, the ACAA's President wrote to the Minister of Justice and Attorney General regarding the issues of reclassification and in-range movement. This letter was copied to the Public Service Commissioner who responded to say that in-range adjustments for Legal Officers would proceed. In an email on June 30, 2015, Crown Prosecutors were directly told that in-range adjustments had been reinstated.

103. The implementation of the April 1, 2015 across-the-board increase resulted in a 2.25% increase at each step of the salary grid used to set salaries for newly hired Crown Prosecutors.

104. On October 22, 2015, Suzanne Kendall, who was then Director of the Policy Unit of the Alberta Crown Prosecution Service, and also a past-President of the ACAA, emailed the Deputy Minister of Justice and the Deputy Solicitor General. Ms. Kendall asserted that the Government's salary classification system does not reflect the work Crown Prosecutors do or their knowledge and skills. She also asked if there would be any opportunity to examine the relationship the Government has with Crown Prosecutors.

105. In an email on November 20, 2015, the Deputy Minister responded to Ms. Kendall's email. He said that there were statutory barriers to changing the relationship between Crown Prosecutors and the Government from a collective bargaining perspective. However, he said there could be productive discussions with representatives of Crown Prosecutors, such as the ACAA. With respect to salaries, he said that reclassifying Crown Prosecutors could result in them losing some benefits in the reclassification process and that he would need to be reasonably confident that Crown Prosecutors were prepared to take that risk before he would consider reclassification.

106. On January 13, 2016, a new salary freeze was announced by the Government, without prior notification or discussion with the ACAA. The 2.5% increase planned for non-unionized government employees on April 1, 2016 was cancelled and grid movement for all management, opted out and excluded and exempt public service employees, including Crown Prosecutors, was frozen until April 2018.

107. On November 27, 2017, Crown Prosecutors were notified that the salary freeze for all management, opted out, and excluded and exempt public service employees was being extended to September 2019. There was no consultation with the ACAA. The ACAA's Executive learned of the freeze during a conference call with the Assistant Deputy Minister. The conference call was scheduled to begin at 4 pm. The announcement of the extension of the freeze to all employees of Justice and Solicitor General was emailed at 4:01 p.m.

108. Since November 2017, the Government has negotiated salary freezes with groups of unionized employees.

109. In January 2018, Alberta Health Services, the health authority that delivers medical care on behalf of the Government, and the United Nurses of Alberta ratified a collective agreement that provided nurses with a 0% salary increase in 2017-18, a 0% salary increase in 2018-29, and a wage re-opener in 2019-20 with any wage increase to take effect in 2019.

110. In August 2018, the Government and AUPE agreed to a tentative collective agreement that provided unionized public service employees with a 0% salary increase in 2017-18, a 0% salary increase in 2018-29, and a wage re-opener in 2019-20 with any wage increase to take effect in 2019. This agreement was ratified in October 2018.

111. Both the 2009-2011 and 2015-2019 salary freezes include a bar on in-range salary movement. Crown Prosecutors hired during these freezes were placed on the salary grid based on experience, resulting in new hires being paid more than those with the same years of legal experience who were employed with the Prosecution Service throughout the freeze.

112. The Employer has not adjusted Crown Prosecutors' compensation to eliminate the salary inequities created by lateral hiring and reclassifications during the salary freeze.

113. There is a Government policy which permits salary adjustments for managers, opted out and excluded employees where there is an "inequitable salary relationship between peer employees".

114. During the March 22, 2018 meeting with the Public Service Commissioner and others referred to earlier, the ACAA raised the issue of salary anomalies and was advised that the ACAA could submit a brief regarding this issue to the Deputy Minister of Justice. A brief was submitted by the ACAA to the Deputy Minister on April 10, 2018.

115. After the brief was submitted, a review of all Legal Officer salaries, including Legal Officers within the Prosecution Service, was conducted with the assistance of compensation experts within the Public Service Commission, comparing salaries of existing employees with new hires since the salary freeze came into effect on April 1, 2016.

116. Since making this submission, members of the ACAA Executive have communicated about issues relating to salary anomalies with the Executive Director of Human Resources responsible for the Ministry of Justice and Solicitor General. A conference call to assist the Executive Director in understanding the submissions occurred on April 19, 2018. An in-person meeting between the Executive Director, the ACAA's President and another ACAA Executive Member occurred on June 20, 2018. Following the June 20, 2018 meeting, the ACAA sent a follow-up letter to the Executive Director.

117. The Executive Director responded to the ACAA by email on July 17, 2018.

118. Further email exchanges between the ACAA and the Executive Director occurred up to August 2018.

119. The Government has not, to date, communicated either a rejection or acceptance of the ACAA's request to remedy these salary anomalies. The Government is assessing the implications of salary adjustments in light of fiscal restrictions under which it is operating.

Safety and Security

120. Crown Prosecutors may experience threats to their physical and mental safety. The Employer's initial training for Crown Prosecutors does not include routine training on vicarious trauma or responding to angry and/or potentially violent accused persons or witnesses, though some online and voluntary training addressing these subjects has been created.

121. Some of Alberta's courthouses are not equipped with security screening and most do not have safe retreat areas for Crown Prosecutors.

122. The ACAA raised several security concerns in an August 2, 2018 letter to the Minister of Justice and Solicitor General, the Deputy Minister and Assistant Deputy Minister.

123. Several examples of safety/security issues encountered by Crown Prosecutors are provided below.

124. During James Pickard's articling year in 2003, his initial orientation to the Edmonton Crown Prosecutors' Office was cancelled because a Crown Prosecutor was being held hostage in the reception area of the office. There have been changes to security practices since that event.

125. In May 2018, a Crown Prosecutor was threatened and assaulted outside the Edmonton courthouse by a witness who was affiliated with someone the Prosecutor was prosecuting. Criminal charges have been laid. The prosecutor has seen her assaulter at the courthouse on at least one occasion.

126. For the last five years, Crown Prosecutor A.B. has endured lewd and public comments made about her. In 2012, several lewd voicemails were left about her on another Prosecutor's phone and between the summer of 2014 and October of 2018, there have been seven instances in which lewd explicit graffiti about her has appeared in downtown Edmonton across from her workplace. Multiple different persons have been charged with criminal charges, including criminal harassment, relating to these multiple separate incidents. A.B. has found these incidents upsetting and worries about the conduct escalating.

127. Crown Prosecutor C.D., who works in the Internet Child Exploitation Unit ("ICE"), deals with disturbing content daily. During this year, she conducted a long trial of a violent serial rapist, read numerous cases involving the sexual assault of children and viewed a video of a toddler being raped by an adult male. She has experienced nightmares, intrusive thoughts, an aversion to touch and difficulties emotionally connecting with others, including her children. When C.D. began working as a Prosecutor, there was no training or even a warning about how she might be impacted by the things she was required to view. While she has attended ACPS conference presentations about vicarious trauma, she has found that these presentations offer no solutions other than "self-care" and no useful resources.

128. Prosecutors in ICE are supposed to have yearly psychological assessments. Through the Employer's employee assistance program, C.D. was referred to a therapist. C.D. did not find these sessions helpful to her. She retained a therapist privately.

129. At the 2017 Alberta Crown Prosecutor Conference (an annual Crown education conference paid for by the Prosecution Service) there was a presentation on vicarious trauma. This presentation was followed by a Peer Support Program panel discussion which identified resources that are available to Crown Prosecutors who may be experiencing vicarious trauma or PTSD on the job.

130. Crown Prosecutor E.F. had disturbing interactions with an accused he was prosecuting. The accused:

(a) Sent E.F. 58 emails in one week

(b) Asked for E.F.'s home address

(c) Emailed E.F. before Court and asked "where the fuck are you hiding"

(d) Called E.F. the "Clown Prosecutor"

(e) Filed an application in Provincial Court in which she asked to be able to call E.F. "Daugghy Dawg". When the application was heard in Court she said to E.F., "Ah, Daugghy Dawg. You're here. Good. You should know that I am suing you for a million dollars. Oh, and by the way ... you have a small dick ... 7 cm"

(f) Told E.F., "It's not over Daugghy Dawg" after she was found guilty

(g) Maintains a Facebook page in which she says disparaging things about E.F.

131. E.F. found this behavior threatening and had concerns for his safety, and that of his spouse, given that the accused was seeking E.F.'s home address.

132. Several Crown Prosecutors have been targeted by the website www.trustchristorgotohellorg. The author of this website has been prosecuted by some of the named Crown Prosecutors for stalking his wife and assaulting her and her children. One of the Crown Prosecutors targeted continues to have security concerns to this day. In court, the author of this website said to her: "you are a cunt, will die and go to hell. You deserve to die, and I will remember you."

133. Crown Prosecutor G.H. primarily prosecutes high risk and dangerous offenders and those accused of violent offences against vulnerable victims such as intimate partners, children, and sex trade workers. After two years of prosecuting one particularly violent and aggressive individual who had

a pattern of attacking vulnerable women, G.H. was concerned for her safety and began having nightmares about the accused breaking into her home.

134. G.H. has been yelled at by accused persons and on one occasion four Sheriffs had to drag an accused away from her. On another occasion, unhappy complainants followed her back to her office where an Assistant Chief Crown Prosecutor intervened on her behalf.

135. G.H.'s mental health has been significantly affected by her prosecution of a high number of sexual assault offences, child sexual assault offences, domestic violence offences, human trafficking offences, and homicides. She is haunted by disturbing images from the files she has had to handle. Dealing with offences again children and sexual offences has impacted her relationships with her spouse and children. While the Employer offered some mental health supports, she accessed them on her own time.

136. Crown Prosecutor I.J., who also prosecutes in rural courthouses, has had family members of complainants tell her that they are going to kill witnesses or the accused. There are no call buttons in many of the courtrooms and no call buttons in the Prosecutors' courthouse offices in case of emergencies.

137. Crown Prosecutor K.L. began working as a Crown Prosecutor in 2006 and transferred to the Edmonton Prosecutions Office in 2014. She has prosecuted homicides, infanticides, masked armed robberies, complicated frauds, impaired driving causing death, extortion, kidnapping, sex trade prosecutions, and serious assaults including incest and historical sexual assaults. She experienced a high level of stress as a result of her workload. By early 2016, K.L. was experiencing strong depressive symptoms. She met with a counsellor who said K.L. was displaying symptoms of vicarious trauma. K.L.'s Chief Crown moved K.L. to the docket unit so she could have a break but there was still a high volume of files, no scheduled breaks for lunch, court would go until 6 or 7 pm, and there would be pressure on her to prepare a file for bail or sentencing while in Court. K.L.'s doctor put her on stress leave and she was treated for PTSD for five to six months. Her stress leave was converted to disability leave. Around May 2017, K.L. was cleared to return to work but she resigned instead.

138. Crown Prosecutor Matthew Block was given no special safety training when he started working as a Crown Prosecutor. When he was in Medicine Hat, he would regularly go inside the lawyers' lounge (which was inside the courthouse perimeter but was not locked). On an unknown number of occasions, he found knives and other sharp items in this space. A witness on a file he was prosecuting once created a shiv out of materials he found in the Calgary Courthouse and communicated plans to kill himself or the accused in Court.

139. In many rural Courthouses, the Crown Prosecutor's courthouse office has no secondary method of escape. People convicted of serious and violent criminal offences have confronted Crown Prosecutor Dallas Sopko in these offices about his position in relation to their current charges. To get from the courthouse office to the courtroom, Mr. Sopko must navigate through public areas where accused persons and their family and friends wait for court to convene. He has been approached by accused persons' angry family members. Judges and judicial clerks have their own separate entrance into the courtrooms.

140. On August 18, 2015, when Mr. Sopko was prosecuting an accused with a significant violent history, during court proceedings, the accused slit his own throat with part of a razor blade. Mr. Sopko assisted the Sheriff in subduing the accused so that he would not injure others and Mr. Sopko used the Sheriff's radio to signal for help. Police Officers and Sheriffs arrived and were able to subdue the accused and save his life. Months later, Mr. Sopko prosecuted the same accused in the same courtroom. There had been no change to the security measures in place.

141. On some occasions, the Employer has implemented solutions.

142. In 2007, the Assistant Deputy Minister created a position for, and hired, a Security Manager for the ACPS (then known as the Criminal Justice Division).

143. In 2012, the Assistant Deputy Minister created a position for, and hired, a full-time Witness and Security Program Officer whose responsibilities also include assisting with Crown Prosecutor security concerns.

144. In approximately 2014, the Deputy Minister conducted a management review and moved the Security Manager from the Prosecution Service division to a position within Corporate Security Services to provide security for the entire Justice and Solicitor department, while still being responsible for Crown Prosecutor matters.

145. In 2017, the Assistant Deputy Minister returned the Security Manager position to the Prosecution Service on a full time capacity.

146. In the spring of 2018, the Prosecution Service filled the Security Program Officer position, which provides additional resources and assistance to the Security Manager.

147. The Prosecution Service is the only division within Justice and Solicitor General with its own security practitioner.

148. The Security Manager is responsible for all Crown Prosecutor security matters and deals with operational concerns raised by Crown Prosecutors. Other divisions within the department rely on the Corporate Security Services team.

149. The current Security Manager within the Prosecution Service is Carrie Coburn. Ms. Coburn has served as the Security Manager since June 2017. Prior to becoming the Manager, she served as a Security Officer from May 2012 to June 2017.

150. When a security incident is reported to the Security Manager, she follows up on the incident to investigate and to respond and assist in order to mitigate or eliminate the security concern.

151. The response to a reported concern will vary depending on the concern raised. A response to a physical or structural concern is different than a concern over a particular individual. A response to a concern reported by a Crown Prosecutor may include:

(a) A threat assessment of an individual;

(b) Communication with the Sheriffs Branch to make them aware of a concern and to request additional security or an escort for a Prosecutor;

(c) Distributing information to the Prosecution Service regarding identified concerns and providing awareness and mitigation strategies;

(d) Address suppression for Crown Prosecutors which involves the process of withholding or removing address information to protect identities, privacy, and personal information;

(e) Providing Crown Prosecutors with a panic button for their phone/person or providing a temporary alarm system; and

(f) Liaising with police services to investigate any possible threat.

152. Between January 1, 2018 and October 31, 2018, the Security Manager was contacted by Crown Prosecutors on 185 occasions. The majority of the contacts were to obtain precautionary information, which she provided. Of the 185 communications, six reported incidents resulted in criminal charges against individuals due to employment-related complaints reported by a Crown Prosecutor. Two individuals were charged with assault, one individual was charged with mischief for intimidation, and three were charged with uttering threats or criminal harassment.

153. In recent years, Crown Office Site Security visits have been conducted by the Security Manager to audit physical security, research office practices, identify security concerns and provide recommendations. During these visits individual Crown Prosecutors were spoken to and consulted.

154. The Security Manager works with the Sheriffs Branch and Resolution and Court Administration Services to identify concerns at courthouses and advance mitigation strategies.

155. The Assistant Deputy Minister has visited all of the Crown Prosecutor offices to discuss issues and concerns with Crown Prosecutors. When informed of issues regarding courtroom security or other health and safety concerns, the information was forwarded to the appropriate parties.

156. The Security Manager has worked closely with the Sheriffs Branch to create a Courtroom Security Request Protocol which allows Crown Prosecutors to request additional security. The Security Manager created a Security Practice Protocol which is distributed to the Prosecution Service and advises what can be done to minimize security risks. This document is routinely updated to reflect changes in security.

157. The Security Manager and other Employer representatives also provide Crown Prosecutors with:

(a) Routine messaging on risks and risk avoidance through time sensitive bulletins and lunch box presentations

(b) Voluntary flagging of Crown Prosecutor addresses that provides notice to emergency services that the location is related to a Crown Prosecutor;

(c) Flagging of individuals involved in intimidating or threatening justice officials on the JOIN database so as to provide advance notice to Crown Prosecutors;

(d) Security initiation and orientation for new hires to provide information on the security resources available; and

(e) Workplace e-learning courses on workplace violence and security.

158. In addition, In 2014-2015, Avril Inglis was seconded as Project Counsel to the Strategic Business Services Branch (SBSB) of ACPS. One of her primary tasks was to conduct a Data Analysis Project by visiting ACPS trial offices and many courthouses in Alberta. In doing so, she spoke to many prosecutors who provided input that was used, in conjunction with Ms. Inglis' own observations, to produce a Report. The Report covers issues such as security, infrastructure, workload, travel, information technology access, among others. Ms. Inglis was appointed to the Court of Queen's Bench in 2016 so she did not finalize her Report, however she was in the final stages of finalizing her report (the "Inglis Report") when she was appointed.

159. The ACAA first requested a copy of the Inglis Report on November 18, 2016. The ACAA was advised later that the Report could not be provided as there was confidential material in the Report that could not be included. The ACAA asked that the confidential material be removed so it could receive a copy. Subsequent requests were again made on July 19, 2018, September 14, 2018 and October 26, 2018 and a follow-up email was sent on November 7, 2018. The Inglis Report was provided to the ACAA with conditions on November 9, 2018.

160. Crown Prosecutors who are members of the Organized Crime Unit of Specialized Prosecutions are subject to a security audit for themselves and their homes. The cost of a home security system and the monthly monitoring fees are also covered by the Employer.

161. In a few cases, Crown Prosecutors -- who are not members of the Organized Crime Unit of Specialized Prosecutions -- but that have prosecuted particularly dangerous individuals, have also had home security systems and security monitoring put in place at the Employer's expense.

162. Crown Prosecutors, like all employees of the Government, are eligible to participate in health, medical and dental programs offered by the Employer and are eligible for leaves due to illness or disability. Like all employees of the Government, Crown Prosecutors have access to the Employee and Family Assistance Program ("EFAP") offered by the Employer's service provider. These services are confidential and free of charge, and include professional counselling and advice on stress, mental health, grief and loss, crisis situations, workplace challenges and many other issues. While EFAP counsellors are geared towards short-term stabilization and do not deal with more complex issues like vicarious trauma, they can refer individuals to more specialized resources as appropriate.

163. The EFAP provides a Trauma Assist program to help individuals affected by post-traumatic stress by providing confidential access to specialized care, including a referral to a PTSD-trained therapist. An Alberta Crown Prosecutor was given the opportunity to participate in an "Insider Series" session with Trauma Assist counsellors to educate them about what Crown Prosecutors do and the challenges associated with their work.

164. All Justice and Solicitor General employees, including Crown Prosecutors, have access to the Justice and Solicitor General Peer Support Program which was started in July 2017. After its implementation, information about this program was provided to prosecutors at the 2017 Fall Education Conference. A follow-up email sent to all employees of the ACPS announcing this program was then sent by ADM Eric Tolppanen on December 15, 2017. The email also attached a brochure from Shepell which provided information about the "Impact of a Court Case".

165. The Peer Support Program provides confidential mental health support to any staff member who requires it. The Peer Support Program supplements the EFAP counselling services and can be accessed 24 hours a day, 7 days a week.

166. The Employer also has a health and safety management system, the Government of Alberta Occupational Health and Safety Program, which provides training on how to respond to threats to physical and mental safety in the workplace.

167. In response to changes to the *Occupational Health and Safety Act*, a Workplace Health and Safety Committees has been formed at the Calgary Prosecutions Office. Currently, other committees have not been formed at other offices. This committee brings supervisors and workers together to identify health and safety related concerns in the workplace.

168. The Employer is working with the Canadian Mental Health Association, Occupational Health & Safety, and other stakeholders on a mental health strategy for within the Alberta Crown Prosecution Service.

169. The Employer is currently having discussions with The Mental Health Commission of Canada to develop an adapted version of their Road to Mental Readiness (R2MR) or The Working Mind resilience-based courses.

170. The Employer is also currently reviewing the Manitoba Prosecution Service model that involves having two psychologists employed full-time to provide therapeutic support to their staff and how it might be adapted for use in Alberta.

The Alberta Union of Provincial Employees ("AUPE")

171. AUPE represents more than 90,000 employees under approximately 140 collective agreements in the province of Alberta.

172. AUPE is currently recognized, in legislation whose application to the applicants is challenged in this proceeding, as the exclusive bargaining agent for bargaining unit employees of the Crown in Right of Alberta to whom the *Public Service Employee Relations Act*, R.S.A. 2000 c. P-43 ("PSERA") applies (the "Crown bargaining unit"). There are approximately 24,000 AUPE members in the Crown bargaining unit.

173. AUPE has been the exclusive bargaining agent for bargaining unit employees in the Crown bargaining unit since approximately 1976.

174. AUPE also represents approximately 13,000 other employees under PSERA. These employees are employed by various public employers, such as non-academic staff at various post-secondary educational institutions.

175. At the time the application in this matter was brought, AUPE and the Crown in Right of Alberta were party to a collective agreement with a term from July 6, 2014 to March 31, 2017. This

agreement continued in force pursuant to section 24.1 of PSERA and Article 47.01 of the collective agreement itself. A copy of the 2014-2017 Crown bargaining unit collective agreement is attached.

176. AUPE has a multi-level structure, and is comprised of Locals, Chapters, and Area Councils. Locals, and the Chapters that collectively make up some Locals, act to represent the different employee units for which AUPE bargains, and to facilitate the collective bargaining and contract administration of AUPE. Attached is a copy of the AUPE Constitution.

177. AUPE is governed by the Provincial Executive, which consists of the President, six Vice-Presidents, an Executive Secretary-Treasurer (collectively, the "Officers") and Local representatives.

178. The Officers are elected by delegates at AUPE's annual convention.

179. Local representatives who sit on the Provincial Executive are elected by their respective Locals.

180. Convention delegates are either delegates by right, which are the Provincial Executive and Local Chairs, or delegates by election.

181. Locals without Chapters and Chapters elect delegates to attend the Convention and vote on their behalf.

182. The number of delegates elected by a Local without Chapters or by a Chapter is based on the size of the Local or Chapter.

183. Locals without Chapters are able to elect one delegate to attend the Convention for the first 100 hundred Local members or portion thereof, and an additional delegate for every 100 additional members or portion thereof.

184. Chapters are able to elect one delegate to attend the Convention for the first 100 hundred Chapter members or portion thereof, and an additional delegate for every 100 additional members or portion thereof.

185. Locals without Chapters are administered by a Local Executive, who are elected by that Local's members.

186. Locals with Chapters are administered by a Local Council, who are elected by that Local's members.

187. Chapters are administered by an Executive Board, who are elected by that Chapter's members.

188. AUPE's bargaining of the Crown bargaining unit collective agreement is conducted by the General Services Bargaining Committee ("GSBC"). The GSBC is comprised of one representative from each local within the bargaining unit, plus the AUPE President. The Local representatives to the GSBC are chosen by the locals.

189. While AUPE negotiates a single Master Agreement between itself and the Crown in Right of Alberta, subsidiary agreements with respect to Locals are also entered into with the Crown in Right of Alberta. These subsidiary agreements allow the working conditions of members of the Local to deviate from the Master Agreement, and to account for differences unique to locations or professions.

190. Eligible AUPE members covered by the Master Agreement participate in benefits plans known as the MyCHOICE Benefits Program, whose benefits are described in this manual: http:// www.psc.alberta.ca/benefits/mychoice/benefit s_ handbook.pdf

191. Crown Prosecutors employed by the Government of Alberta participate in benefit plans known as the 1st Choice Benefits Program, whose benefits are described in this manual: http:// www.psc.alberta.ca/benefits/1stchoice/1s tChoice_ Handbook.pdf

192. The MyChoice Benefits Program includes a long term disability plan, for which premium costs are shared between employer and employees (on a 50-50 cost sharing basis). In contrast, the 1st

Choice Benefits Program has premiums for the long term disability plan paid 100% by the employer.

193. The 1st Choice Benefits Program's Group Life Insurance Plan includes a critical illness insurance lump sum benefit. This corresponding stand-alone benefit is not present in the MyChoice Benefits Program.

194. None of AUPE's Master Agreement or its subsidiary agreements include provisions for:

(a) Parental or maternity leave top-up beyond the medical portion of the leave, which the ACAA has sought from the Employer;

(b) Earned days off, a leave program which ACAA members participate in (but there is provision for various flex time and earned time off); or

(c) Vacation supplement (also known as management supplement), another leave program which ACAA members participate in.

195. Via its structure of Locals and Chapters, AUPE represents a range of workers employed in substantially different roles across the province. As examples:

(a) Local 003 represents individuals employed in Correctional and Regulatory Services, which includes sheriffs, probation officers, peace officers, and correctional officers.

(b) Local 004 represents Government of Alberta employees in the trades and related services, which includes electricians, carpenters, plumbers, and power plant engineering technologists.

(c) Local 006 represents Government of Alberta employees in the social services field, which includes psychologists, child and youth care workers, and nurses.

(d) Local 012 represents Government of Alberta employees working in technical services, which includes librarians, engineers, caretakers, and food inspectors.

196. There are eight Locals of AUPE with members employed directly by the Government of Alberta, who are organized in a group described by AUPE as the Government Services Sector. The membership of these locals are:

(a) Local 001 Administrative and Support Services: Approximately 7,100 members;

(b) Local 002 Administrative and Program Services: Approximately 6,600 members;

(c) Local 003 Correctional and Regulatory Services: Approximately 2,900 members;

(d) Local 004 Trades and Related Services: Approximately 760 members;

(e) Local 005 Natural Resources Conservation: Approximately 1,800 members;

(f) Local 006 Social Services: Approximately 3,300 members;

(g) Local 009 Health and Support Services: Approximately 790 members; and

(h) Local 012 Technical and Field Services: Approximately 1500 members;

197. AUPE represents individuals who are members of various self-regulating professions, including nurses, psychologists (Local 006), biologists (Local 005), forest technologists (Local 005), engineering technologists (Local 012), and social workers (Local 006).

198. Some members of AUPE hold positions that involve the investigation of regulatory and criminal offences, or are otherwise involved in the justice system, including sheriffs, fish and wildlife officers, park rangers, peace officers, and compliance officers.

199. Some of these positions require the individual to be a sworn member under the *Peace Officer Act*.

200. AUPE members who are employed by the Government of Alberta and work in correctional institutions are designated by s 10 of the *Corrections Act* to be peace officers while carrying out their duties.

201. Section 7(4) of the Peace Officer Act requires that peace officers must swear an oath before assuming their duties. The oath states:

I, _____, swear that I will diligently, faithfully and to the best of my ability execute according to law in the office of a peace officer for the _____ and will not, except in the discharge of my duties, disclose to any person any matter or evidence brought before me in this office of a peace officer, so help me God.

202. Similarly, section 20(1) of the Public Service Act requires new Government of Alberta employees to take an oath of office. The oath states:

I, _____, do swear that I will execute according to law and to the best of my ability the duties required of me as an employee in the public service of Alberta and that I will not, without due authorization, disclose or make known any matter or thing which comes to my knowledge by reason of my employment in the public service.

203. The Government of Alberta has a Code of Conduct and Ethics for the Public Service of Alberta (hereinafter "the Code"). The Code applies to all Government of Alberta employees.

204. Article 6 of the Code states "Employees are expected in all regards to conduct their duties with impartiality."

205. Article 7 of the Code states "Employees are required to disclose to their Deputy Head or designate any situation involving them which is a conflict or an apparent conflict of interest.

Witness Evidence

44 The evidence of the Crown Prosecutors and the Assistant Deputy Minister of Crown Prosecutors echoed the Agreed Statement of Facts. Accordingly, such evidence has been provided in a summary form.

James Pickard

45 James Pickard has been the President of the ACAA since 2016 and has been a Crown Prosecutor since 2005.

46 Mr. Pickard chose to become President of ACAA over concerns that:

* the vacancies of unfilled Crown Prosecutor positions was on the increase;
* the impact of the Supreme Court of Canada's 2016 *Jordan* decision was increasing the workload on Crown Prosecutors.

47 Common issues of concern raised by the members of the ACAA are:

* Workload;
* the increasing vacancy rate of unfilled positions; and
* personal sacrifices being made by the Crown Prosecutors.

48 A common issue among the Crown Prosecutors is a concern that a mistake by a Crown Prosecutor can have a substantial impact.

49 The Crown Prosecutor's office budget is primarily dedicated to compensation. Approximately 95% of the budget goes to compensation for Crown Prosecutors.

50 In describing the work of a Crown Prosecutor he broke it down as follows:

* Pre-trial
  - disclosure issues
  - work with witnesses and victims
  - pre-trial interviews
  - prepare witnesses;
* Trial;
* Post-Trial
  - victim impact statements
  - appeals
  - sentencing.

51 He described prosecutorial discretion as a recognized quasi-judicial decision-making process.

52 Mr. Pickard did a review of the Alberta Code of Conduct for Crown Prosecutors.

53 The Alberta Code of Conduct for Crown Prosecutors:

* indicates that Alberta Justice has within it the Criminal Justice Division;
* outlines the governing principles for the role of the Attorney General;
  - the Attorney General is responsible for the administration of justice in Alberta including the prosecution of those alleged to have offended criminal or other statutes;
  - the Attorney General as prosecutor must act independent of partisan concerns;
  - the Attorney General has prosecutorial discretion in relation to the prosecution of alleged offences;
  - in making prosecutorial decisions, the Attorney General is to consider the public's interest;
  - the Attorney General may delegate Attorney General responsibilities to Crown Prosecutors;
* outlines the jurisprudence on prosecutorial independence;
* indicates that Crown Prosecutors as agents of the Attorney General, must exercise their prosecutorial decision making independent of partisan concerns, must exercise prosecutorial discretion in the prosecution of alleged offences and must also be cognizant of the public interest;
* indicates that Crown Prosecutors as agents for the Attorney General do not take instruction on how to proceed except from those in the line of authority leading to the Attorney General.

54 Types of conflicts that Crown Prosecutors may encounter are:

* personal connections;
* personal relationships;
  * with administrative people in the prosecutors' services who are represented by AUPE;
  * with police officers that may be subject to charges and with whom they work frequently at the location they are assigned.

55 Mr. Pickard advised the Executive Director reviews conflicts, and in circumstances such as those above files

have been sent to a different office for prosecution. On cross-examination, he confirmed the Executive Director could prosecute matters, although capacity would be an issue. He further confirmed other prosecutors outside the bargaining unit or prosecutors from outside the province could handle conflict files.

56 He commented that other governments within Canada create separate prosecutorial offices. The Federal Government and the Nova Scotia Government have separate prosecutorial offices.

57 Employees of the Crown who Crown Prosecutors work with on a regular basis include:

* Court Clerks;
* Support Staff;
* Nurses;
* Correction Officers;
* Probation Officers.

58 People in such positions are represented by AUPE and can be witnesses, accused persons subject to prosecution and or investigators on files that the Crown Prosecutors work on.

59 As President of ACAA, Mr. Pickard indicated ACAA has never negotiated pay grades, benefits, security issues, workload issues or preparation time.

60 Mr. Pickard indicated the ACAA has not applied to the Court of Queen's Bench to make an assertion the Crown has not been bargaining in compliance with section 2(d) of the *Charter*.

61 He acknowledged a Crown Prosecutor may prosecute a lawyer who is also a member of the same law society that the Crown Prosecutor is a member of, or a person from the same church as the Crown Prosecutor

62 He indicated that for both the Federal Government and the Manitoba Government, Crown Prosecutors are in a bargaining unit that also contains civil lawyers.

Dallas Sopko

63 Dallas Sopko is a Crown Prosecutor. He outlined some of the security issues in the smaller rural communities that Crown Prosecutors incur:

* some locations have no separate parking location;
    * some locations have common entrances where Crown Prosecutors, the accused and the public may enter;
    * some locations have no screening or perimeter security; and
* some locations have common community washrooms.

64 In describing the workload of Crown Prosecutors he indicated that:

* it is common to triple book a Crown Prosecutor;
    * he estimates that for the year 2017 there were 1100 stays as a result of the *Jordan* decision and of those 1100, 800 were in the rural locations.

Breena Smith

65 Breena Smith became Vice-President of ACAA in 2016 due to concerns with respect to:

* a resource crisis created by an increase in the number of vacant positions;
* a salary freeze;
* a desire to seek formal recognition of the ACAA from the Government of Alberta.

66 She sees the public as the client of the Crown Prosecutors.

67 She advised she frequently interacts with AUPE members when carrying out her functions and, in particular, she interacts with:

* Probation Officers;
* Court Clerks;
* Sheriffs;
* Correctional Officers.

68 She drew the Board's attention to a website release of AUPE which addressed occupational health and safety concerns and stated:

> AUPE PRESIDENT OUTLINES POLICY CHANGE NEEDED NOW TO ENCOURAGE SAFE ALBERTA WORKPLACES;
>
> In addition, he said the following policies could help make Alberta workplaces safer and reduce the costs associated with deaths injuries and rehabilitation.
>
> ...
>
> * More vigorous prosecution of OH&S violations by Crown Prosecutors;
>
> ...
>
> All of these measures would be easy and inexpensive to implement and all would significantly improve workplace safety in Alberta, said Smith.
>
> ...

69 The AUPE website release was provided as an indicia of the potential for a perception of a lack of prosecutorial independence due to the resulting association of Crown Prosecutors with AUPE if the Crown Prosecutors were to be represented by AUPE.

70 On cross-examination she confirmed in relation to conflicts some matters have gone out of province.

Damian Rogers

71 Damian Rogers has been a Crown Prosecutor since 2011.

72 He indicated the Department of Justice has Investigators represented by AUPE with whom Crown Prosecutors interact. The report of the Investigator may or may not be sufficient for a Crown Prosecutor to decide if charges should be laid. As such, there is a possible conflict if a Crown Prosecutor concludes an Investigator's Report is insufficient for charges to be laid.

73 He sees distinguishing features of Crown Prosecutors being:

* they have no client;
* the degree of prosecutorial independence that Crown Prosecutors must exercise;
* the fact the prosecutorial independence decreases the management authority that Crown Prosecutors are subject to.

Eric Tolppanen

74 Eric Tolppanen has been the Assistant Deputy Minster of Crown Prosecutorial Services since 2013 and commenced as a Crown Prosecutor in the 1990's. There was a period of time where he left the Crown Prosecutor's office to work in private practice, but he then returned to the Crown Prosecutor's services. He interprets the role of the ACAA as the representative for Crown Prosecutors to voice concerns about workload, physical security, mental well being, protection of independent discretion and addressing salary anomalies in the application of the wage grid.

75 He interprets the concerns of ACAA as being concerns that are common to his concerns as the Assistant Deputy Minister of Crown Prosecutorial Services.

76 He advised that the Public Service Commissioner sets the wage grid which is probably approved by the Treasury Board. The Crown Prosecutors are subject to the same wage grid that is applied to civil lawyers.

77 He indicated that Crown Prosecutors in working with Investigators have to be prepared to make decisions that may not be consistent with the proposed action of an Investigator.

78 As the Assistant Deputy Minister of Crown Prosecutorial Services, he indicates that he has a defined budget and he has no authority over the salary grid or the level of steps. He advised he does not have authority to negotiate with the ACAA. He understands that the ACAA does want to negotiate collectively.

79 With respect to means of handling conflicts, he discussed sending files to different cities or provinces. In theory, private lawyers could be used as ad hoc prosecutors, and this used to happen.

Dr. Sheila Campbell

80 Dr. Sheila Campbell was called as an expert witness. She was asked to address four topics:

1. The history and development of the law as a profession, including a discussion of the notion of professions and professionalism.
2. The changing character and structure of the legal profession in Canada and the specific context of public sector lawyers in dependent employment.
3. Instruments of regulation and collective representation for professionals and the management of employed lawyers, including their needs as 'knowledge workers' in terms of freedom to exercise discretion in the execution of their duties.
4. The implications of working conditions in public prosecution for protection of the public interest and the rule of law.

81 The Board ruled the first two topics could be addressed by Dr. Campbell but not topics three and four.

82 Dr. Campbell described how Crown Prosecutors have a specific occupational community which she attributes to:

* Crown Prosecutors are dependent employees in contrast to lawyers in private practice;
* Crown Prosecutors do not work with the concept of a "client";
* Crown Prosecutors work in an area that obligates them to exercise prosecutorial discretion independently; and
* Crown Prosecutors are focused on the public interest.

83 While Dr. Campbell was a credible witness, when the Board did its analysis for the decision-making, her evidence was found to be of no assistance to the issues addressed by the Board.

***Charter* Arguments by the Parties**

ACAA's Argument

84 The ACAA submits the sections of *PSERA* constitute a substantial interference with the process of collective bargaining and the capacity of Crown Prosecutors to come together to pursue collective workplace goals in concert. It submits the principle of prosecutorial independence renders the *PSERA* scheme of a single government bargaining unit defective as relates to Crown Prosecutors, while the Crown has also refused to negotiate with them outside of the statutory regime.

85 The ACAA submits the principle of prosecutorial independence obliges Crown Prosecutors to avoid both bias and the appearance of bias. It is a constitutional imperative. Anything that affects the appearance of a prosecutor's independence would jeopardize public confidence in a prosecution. The ACAA submits including Crown Prosecutors in the same bargaining unit as other Crown employees would create a real or perceived conflict, as their employment and collective bargaining interest would align with other members of that bargaining unit. Crown Prosecutors prosecute employees within the bargaining unit, including for work-related criminal misconduct. Crown Prosecutors may be called upon to prosecute unions, including potentially AUPE, for criminal contempt relating to strike activity. Crown Prosecutors have files in which members of the bargaining unit are complainants about work-related or non-work related criminal conduct of others. Some members of a bargaining unit are investigators or witnesses with respect to cases Crown Prosecutors will prosecute.

86 The ACAA further asserts that Crown Prosecutors have not and will not risk their independence by seeking to be part of an all employee unit.

87 ACAA asserts it was forced to apply for certification because the Crown has failed to engage with ACAA in meaningful good faith negotiations on important workplace issues; has explicitly said it will not bargain collectively with ACAA; and has advised that if Crown Prosecutors want to bargain collectively they must join AUPE.

CACC's Argument

88 CACC supports the ACAA's contention that the failure of the extra-statutory associational activities attempted by the ACAA show the Crown Prosecutors have not been able to engage in meaningful process of consultation and discussion. CACC goes further and contends that extra-statutory associational activities would not satisfy section 2(d) in any event, as there cannot be a meaningful association between the Crown and the association without a meaningful dispute resolution mechanism, citing the *Saskatchewan Federation of Labour* decision in support.

89 CACC supports the ACAA's contention that the requirement in *PSERA* that Crown Prosecutors be included in a bargaining unit with all government employees violates section 2(d). CACC expands beyond ACAA's argument that perceived conflict of interest makes their inclusion inappropriate, to contend the placement of the Crown Prosecutors in the larger bargaining unit of approximately 24,000 employees would submerge the interests of the Crown Prosecutors to the extent they would be denied a meaningful collective bargaining process. The Crown Prosecutors have their own community of interest, and inclusion in the larger unit is not appropriate. CACC asserts the Crown Prosecutors have chosen ACAA as their representative, and *PSERA* unconstitutionally denies them the bargaining agent of their choice.

AUPE's Argument

90 AUPE submits the constitutional necessity of employee choice does not create an unfettered right to choose their own bargaining agent. AUPE, as statutory bargaining agent, is independent of the Crown, and *PSERA* contains sufficient elements of choice. There are multiple small groups within its all employee unit -- namely nurses,

plumbers, correctional officers, biologists, librarians and sheriffs to name a few. This is the nature of collective bargaining.

91 In response to the argument that the obligation of prosecutorial independence creates a restriction against Crown Prosecutors being part of an all employee unit, AUPE asserts the Crown Prosecutors are subject to a strong presumption of prosecutorial independence and it will be necessary to have conspicuous evidence of partisan conduct in a particular case for there to be a section 7 *Charter* violation. Crown Prosecutor membership in AUPE's bargaining unit in and of itself is insufficient to compromise prosecutorial independence or the appearance of prosecutorial independence.

Crown's Argument

92 The Crown asserts that nothing about the Crown Prosecutors' circumstance constitutes a substantial interference with their ability to engage in voluntary, good faith collective bargaining, their ability to join together to pursue common goals of negotiating workplace conditions and terms of employment with their employer, or a disruption of the balance of power between employees and employer necessary to ensure the meaningful pursuit of workplace goals.

93 The Crown asserts that independent of *PSERA*, Crown Prosecutors have the right to directly associate collectively and pursue workplace goals by negotiating with the Crown in an extra-statutory collective bargaining process. It asserts the Board does not have jurisdiction to address the content or the adequacy of the content of those extra-statutory association activities. The Crown argues such extra-statutory collective bargaining process would have a meaningful resolution process via recourse to the superior courts for a directive requiring the Crown to engage in good faith collective bargaining, and by the ability to threaten and engage in strike action.

94 The Crown asserts *PSERA's* designated bargaining agent and bargaining unit model does not "substantially" interfere with the meaningful process of collective bargaining. Mandatory inclusion in a statutory designated bargaining unit does not violate section 2 of the *Charter*. If Crown Prosecutors were within AUPE's single unit, they would have sufficient input to address their collective goals.

95 Lastly, the Crown submits prosecutorial independence does not require Crown Prosecutors to bargain independently. Like AUPE, the Crown submits the Crown Prosecutors are subject to a strong presumption that they will exercise their prosecutorial discretion independent of partisan concerns. To the extent a situation arises where there is a real or perceived conflict of interest, the Crown argues such situations can be managed appropriately.

ACAA's Response Argument

96 ACAA responds that this case is not about access to a particular statutory regime, entitlement to a perfect bargaining process, absolute employee choice regarding their bargaining agent or bargaining unit, bad faith, or AUPE's independence and effectiveness as a bargaining agent for a diverse range of employees.

97 The two impediments to Crown Prosecutors fully exercising their freedom to associate are Alberta's repeated refusals to collectively bargain with the ACAA and *PSERA's* statutory, province-wide bargaining unit. The constitutional imperative of prosecutorial independence prevents prosecutors from joining the province-wide, statutory bargaining unit. Canadians' legal and constitutional rights take precedence over the Crown's preference for a province-wide government bargaining unit. Thus, this case is about the Crown's refusal to bargain with the ACAA outside of the statutory regime and the only statutory regime available to Crown Prosecutors being one they cannot access.

DECISION

98 Section 2(d) of the *Charter of Rights and Freedoms* guarantees "freedom of association". In *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, the

Supreme Court held section 2(d) protects the right of employees to associate for the purpose of advancing workplace goals through a meaningful process of collective bargaining. Such right to collective bargaining is a limited right to a general process, which does not guarantee a particular model of labour relations, a specific bargaining method, or a certain substantive or economic outcome. Section 2(d) protects against substantial interference with the associational activity. For government action or inaction to constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

99 In *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, the Supreme Court underlined that no particular type of bargaining, such as the Wagner model, is protected by section 2(d), so long as employees can meaningfully exercise their right to associate without substantial interference by a law or absence of laws. That is, "collective bargaining" in the constitutional sense is not necessarily collective bargaining as commonly understood under current common Canadian labour relations regimes. The Court accepted that a meaningful process includes employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith.

100 In *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, the Supreme Court stressed the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective bargaining. The Court concluded a meaningful process of collective bargaining must provide employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them. Choice and independence are not absolute: they are limited by the context of collective bargaining. The degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. The degree of independence required by the *Charter* for collective bargaining purposes is one that ensures the activities of the association are aligned with the interests of its members.

Prosecutorial Independence and the PSERA statutory regime

101 The ACAA submits that prosecutorial independence obligates Crown Prosecutors to avoid both bias and the appearance of bias. It argues this contextual factor makes it inappropriate for Crown Prosecutors to access collective bargaining through the single bargaining unit regime mandated by *PSERA*, and this exclusion thus bars them from meaningful collective bargaining.

102 Crown Prosecutors have significant prosecutorial discretion as agents of the Attorney General, and are expected to independently exercise inherent criminal law powers on his or her behalf. They exercise discretion in choosing criminal charges, and in deciding whether to proceed with a prosecution or end it. They consider whether to consent to an accused's release into the community, and upon what conditions. They make decisions with significant penal consequences.

103 The Supreme Court has stressed on many occasions that objectivity and independence in making prosecutorial decisions is an important constitutional principle, constitutionally enshrined in section 7 of the *Charter*. While there are numerous cases explaining prosecutorial independence, the comments of the Supreme Court of Canada in *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983 at paras. 23 - 26, provide a useful guideline:

> 23 Our cases on prosecutorial independence tend to discuss this principle in the context of the role of the Attorney General. In *Krieger v. Law Society (Alberta)*, 2002 SCC 65, [2002] 3 S.C.R. 372 (S.C.C.), Iacobucci and Major JJ., writing for the Court, noted that there is a "constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions": para. 30. Charron J. reiterated this point in *Kvello v. Miazga*, 2009 SCC 51, [2009] 3 S.C.R. 339

(S.C.C.), describing the independence of the Attorney General as a "constitutionally entrenched" principle that "requires that the Attorney General act independently of political pressures from government": para. 46. But the logic of these statements clearly extends to Crown prosecutors and other public officials exercising a prosecutorial function. Indeed, both *Krieger* and *Miazga* cited with approval Binnie J.'s reasons (dissenting on another point) in *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), at para. 157, where he remarked that a Crown Attorney's duty "to respect his or her 'Minister of Justice' obligations of objectivity and independence" easily met the criteria for a principle of fundamental justice under s. 7 of the *Charter*.

24 These cases establish that a prosecutor - whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function - has a constitutional obligation to act independently of partisan concerns and other improper motives: see generally L. Sterling and H. Mackay, "Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*" (2003), 20 S.C.L.R. (2d) 169, at p. 170; see also M. Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009), 34 Queen's L.J. 813, at pp. 832-36.

...

26 I conclude that the law recognizes as constitutional the principle that prosecutors must not act for improper purposes, such as purely partisan motives. This principle is a basic tenet of our legal system. It safeguards the rights of the individual and the integrity of the justice system. And it satisfies the criteria for a principle of fundamental justice identified in *R.* v. *Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 (S.C.C.), at para. 113, and *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 (S.C.C.), at para. 8. This principle is, accordingly, a principle of fundamental justice under s. 7 of the *Charter*.

104 ACAA stresses Crown Prosecutors must exercise these discretions independently: independent from their Employer (the Crown), their supervisors, the accused, the complainant, and witnesses. They act independently, subject only to wide and general guidelines as to policy.

105 The Crown recognizes these features in Alberta's Code of Conduct for Prosecutors which states:

> [o]bviously, independent does not mean just the absence of political interference. Rather, it is a very broad concept that requires prosecutorial discretion to be free from improper pressures or influences. Any erosion (or perceived erosion) of a Crown prosecutor's independence is a threat to the proper exercise of prosecutorial discretion and to the fair administration of justice.

106 The Code of Conduct further requires Crown Prosecutors to "[b]e, and appear to be, consistent, objective, impartial and independent, and seek to avoid all conflicts of interest that might undermine his or her independence or that of the Attorney General".

107 In order to access collective bargaining via the *PSERA* statutory regime, Crown Prosecutors would need to belong to a bargaining unit of other employees of the Crown. ACAA asserts the alignment of bargaining interests between Crown Prosecutors and employees of the Crown would create a real or perceived conflict of interest regarding cases Crown Prosecutors may be called on to prosecute. They may be called on to prosecute other Crown employees, including for work-related criminal misconduct. They may be called upon to prosecute unions, including potentially AUPE, for criminal contempt relating to strike activity. They may be called on to prosecute cases where members of the bargaining unit are complainants. And members of the bargaining unit would be investigators or witnesses in cases which Crown Prosecutors would prosecute.

108 The Crown and AUPE argue the constitutional principle of prosecutorial independence does not serve to protect prosecutors, but the interests of the public and accused persons. It suggests there is no connection between the right of the public to have prosecutorial decisions in cases made independent of other interests, and the right of a prosecutor to associate with their prosecutor colleagues to pursue collective bargaining. It argues prosecutorial independence has nothing to do with whether there is a meaningful process of collective bargaining.

109 The Board disagrees with the assertion that prosecutorial independence has nothing to do with whether the *PSERA* regime constitutes a significant interference with the ability of Crown Prosecutors to meaningfully join together to pursue workplace goals. That right needs to be understood in the context of the industry, workplace and employer/employee relationship at issue in the case at hand. The context of the Crown Prosecutors' work, and their obligation to exercise their role consistent with the principle of prosecutorial independence, is clearly a relevant factor when assessing whether a statutory regime negatively impacts that right. To suggest otherwise would divorce the Board's analysis from the practical realities of what Crown Prosecutors do.

110 But the practical reality is also that real conflicts of interest, perceived conflicts of interest, and arguable hypothetical conflicts of interest already can and do arise for Crown Prosecutors.

111 The Crown notes Crown Prosecutors are obligated by their Code of Conduct to ignore external or internal considerations irrelevant to the case before them. These obligations supersede any actual or perceived allegiance they may share with fellow members of another organization. Crown Prosecutors are obliged to comply with this duty regardless of their race, religion, political motivation, professional activities, or employment interests.

112 While recognizing the importance of prosecutorial independence, the Supreme Court in *Cawthorne* stressed that prosecutors are entitled to a strong presumption that their prosecutorial function is exercised impartially. At paragraphs 32-34, the Court stated:

> 32 There is no evidence of any improper prosecutorial conduct in the cases before us. But the respondents say such evidence is unnecessary. In their view, the principle of prosecutorial independence requires both that a prosecutor be independent and that a reasonable person perceive him or her as independent. The Minister, they say, is independent neither in fact nor in appearance. They emphasize that the Minister is a member of Cabinet not bound by the conventions of independence that apply to the Attorney General, and that the Minister's "quasi-judicial" role is incompatible with his control and administration of the Canadian Forces. Accordingly, the respondents argue that the law's conferral on the Minister of authority over appeals in the military justice system violates s. 7 of the *Charter*.
>
> 33 I cannot agree. The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister's membership in Cabinet does not displace that presumption. Indeed, the law presumes that the Attorney General -- also a member of Cabinet -- can and does set aside partisan duties in exercising prosecutorial responsibilities.
>
> 34 It is conceivable that a statute could create a prosecutorial framework that genuinely casts doubt on a prosecutor's independence, for example, by requiring the prosecutor to take partisan or other improper considerations into account in the exercise of prosecutorial discretion. But short of such a statutory regime, and in the absence of "conspicuous evidence" of partisan conduct in a particular case, there is no violation of s. 7 of the Charter.

113 The Board is not convinced a generalized alignment of collective agreement bargaining interests between Crown Prosecutors and other members of a single Crown employee bargaining unit creates any reasonable general perception of bias that would render such a unit constitutionally unworkable. That Crown Prosecutors are grouped with others for the purposes of collective bargaining ought to be no more disqualifying than the notional fact Crown Prosecutors share an employer with other Crown employees: reasonable persons understand there are constitutional norms and ethical obligations by which Crown Prosecutors abide which prevent such considerations from entering into prosecutorial decision-making. The Board heard of circumstances in other jurisdictions where Crown Prosecutors exist in bargaining units with other lawyers: while not the "all employee" unit that exists in Alberta, it means that conflicts, both real and perceived, stemming from bargaining unit inclusion have been managed in those jurisdictions. The Board agrees with the Crown's submission that labour relations isolation is not necessary to ensure the perception of prosecutorial independence.

114 To the extent certain cases do create an apprehension of bias on more substantial grounds than mere

generalized alignment of collective agreement bargaining interests, the Board is convinced the Crown has appropriate mechanisms to manage those conflicts without using the services of the affected Crown Prosecutors. The Board heard evidence that non-bargaining unit Executive Directors could be used, files could be assigned to prosecutors or prosecution services outside of Alberta, or that outside lawyers may be hired as *ad hoc* prosecutors for particular cases.

115 These mechanisms may be cumbersome, and indeed, as the Board expresses below, the idea of a separate Crown Prosecutors bargaining unit may have much to recommend it by avoiding cases where a legitimate conflict of interest issue might arise. Depending on the volume of cases creating such concerns, the Crown may face a significant administrative burden. However, the Board is satisfied that mechanisms do exist, and accordingly the Board cannot say that inclusion of Crown Prosecutors in the all Crown employees unit is unconstitutional due to conflicts of interest.

CACC's General Argument concerning Single Bargaining Unit

116 The Intervenor CACC went further than the Applicants in this case, arguing:

(1) the placement of the Crown Prosecutors in the larger Crown bargaining unit would submerge the interests of the Crown Prosecutors to the extent they would be denied a meaningful collective bargaining process; and

(2) the Crown Prosecutors are entitled to choose their own bargaining agent, and *PSERA* unconstitutionally denies them the bargaining agent of their choice

117 These arguments greatly expand beyond the positions taken by ACAA in its application, and are general arguments applicable to any subset of a single Crown bargaining unit, divorced from the unique circumstances of the Crown Prosecutors. It is clear from the *Mounted Police* case that bargaining agent choice is not absolute, and that constraints upon bargaining agent choice may be constitutionally permissible where it provides employees with the permissible degree of choice and independence. The Board agrees with ACAA's Reply Submissions that determination whether a particular statutory bargaining unit or statutory bargaining agent is constitutional requires a contextual analysis.

118 The Board does not consider it appropriate to consider an intervenor's arguments that extend far beyond the legal position taken by the actual party to the application. The ACAA and its members did not argue the notion of submergence or that a statutory bargaining agent generally would violate the *Charter*. The Applicants in their reply submissions expressly stated "the Applicants are not asserting that the *Charter* guarantees Crown Prosecutors the right to select their own bargaining agent and bargaining unit. The Applicants only assert that *PSERA*, as applied to Crown Prosecutors, is unconstitutional because Prosecutors' legal and constitutional obligations prevent them from joining a province-wide government bargaining unit." Their argument, and most importantly the evidence presented by them, was focussed wholly upon the prosecutorial independence issue. That would leave the Board without a sufficient evidentiary foundation upon which to decide the CACC's arguments, even if it were inclined to do so.

119 The Board has considered and rejected the *Charter* arguments of the Applicants based upon prosecutorial independence. The sections of *PSERA* do not unduly restrict collective bargaining by Crown Prosecutors, who would have access via the mechanisms permitted by *PSERA*. The Applicant's *Charter* application is dismissed.

Alternative Findings

120 In the event the Board is incorrect in finding it is permissible for Crown Prosecutors to be included within a bargaining unit of all Crown employees, the Board considers it appropriate to express certain alternative findings it would have reached in that event on the evidence before it.

121 The Crown argued that, even if Crown Prosecutors cannot appropriately access the *PSERA* regime, this does not violate section 2(d). It argued Crown Prosecutors still have the ability to associate collectively and pursue

workplace goals by negotiating with the Crown in an extra-statutory bargaining process. The Crown argues such extra-statutory bargaining would have a meaningful resolution process via recourse to the superior courts for a directive requiring the Crown to engage in good faith collective bargaining, and by the ability to threaten and engage in strike action.

122 In dealing with this issue, the Board firmly disagrees with the Crown's argument the Board has no jurisdiction to consider the associational activities undertaken to date by the ACAA. The Board has jurisdiction to consider the constitutionality of the various sections of *PSERA* raised in this application, and to determine whether any exclusionary impact of those sections constitutes a breach of section 2(d) of the *Charter*. One of the fundamental questions to be asked whenever an exclusion from the protection of a statutory labour regime is challenged is whether the excluded group remains capable of associating despite the exclusion: *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 1 3 S.C.R. 1016 at para. 39. For this reason, evidence of the efficacy of the associational activities of the ACAA outside of the *PSERA* regime is critical for the Board to consider whether any exclusionary impact of *PSERA* does, or does not, substantially interfere with the ability of Crown Prosecutors to collectively engage in a meaningful process of collective bargaining.

123 The importance of such evidence can be seen from the *obiter* comments of both this Board and the Court of Queen's Bench in *Alberta Union of Provincial Employees v Northern Alberta Institute of Technology*. In that case, the Board struck down a challenge by AUPE to the exclusion of system analysts under *PSERA* on the basis that AUPE had no standing to assert the alleged breach of section 2(d): the right to association belonged to the individual system analysts themselves, and none of those individuals had authorized AUPE to act on their behalf. In *obiter*, the Board held the exclusion did not breach section 2(d).

124 It is essential to quote the entirety of the Board's *obiter* comments to properly reflect that those comments were based upon the evidence brought -- or rather, not brought -- before the Board in that case (*Alberta Union of Provincial Employees v Northern Alberta Institute of Technology*, [2015] Alta. L.R.B.R. LD-027 ("*NAIT ALRB*") at paras. 25-26):

> We agree with NAIT and the Intevenors that, while section 12(1)(f)(ii) excludes the designated groups from the regime of collective bargaining contemplated by *PSERA*, this does not mean the persons in question are prohibited from associating for the purpose of making representations to their employer on working conditions. We do not find the exclusion from *PSERA* constitutes a substantial interference with the ability of the systems analysts to collectively engage their employer in a meaningful way to address their workplace goals. **We have no evidence such representations have been attempted, been denied or been ineffective. We cannot assume they would be. Accordingly, we do not agree the systems analysts have been deprived of their section 2(d) Charter rights.**
>
> Accordingly, the Board determines section 12(1)(f)(ii) of PSERA does not prohibit the systems analysts from making representations to NAIT on working conditions. The provision merely excludes the systems analysts from being part of AUPE's bargaining unit for "collective bargaining". The provision does not constitute a breach of the section 2(d) Charter rights of the systems analysts.
>
> [Emphasis added]

125 Similarly, in the judicial review of that decision, *Alberta Union of Provincial Employees v Northern Alberta Institute of Technology*, 2018 ABQB 236 ("*NAIT QB*"), the Court stated at para. 73:

> There is no evidence that the excluded employees have been precluded from collectively engaging with their employer to achieve work place goals. In point of fact, there is no evidence that they have even tried. In this context, I cannot conclude they have been deprived of their section 2(d) *Charter* rights.

126 Neither *NAIT* decision can be read as endorsing the general proposition that exclusions from *PSERA* are necessarily constitutional because of a hypothetical ability to bargain extra-statutorily. First and foremost, the *ratio* of both decisions was that AUPE had no standing to bring the constitutional challenge. The findings on the constitutionality of the exclusions were, and must be read as, *obiter* comments (see *NAIT ALRB* at para. 17 and *NAIT QB* at para. 52). Secondly, those *obiter* comments were clearly based upon the lack of any evidence in that

case from which the Board could assess whether the statutory exclusion had substantially interfered with the ability of the systems analysts to have collectively engaged in a meaningful process. Put simply, there was no evidence anyone had tried.

127 In this case, the Board has an extensive record upon which to base a finding. Paragraphs 4, 24, 25, 27 and 39 of the Agreed Statement of Facts indicate the Crown Prosecutors and the ACAA have made various efforts to directly enter into some form of bargaining with the Crown independent of *PSERA*. The Crown has consistently refused to engage in any such bargaining. In refusing to do so, the Crown has explicitly referenced that for Crown Prosecutors to engage in bargaining with the Crown, the method is to be pursuant to *PSERA* - via what the Board has found in its primary finding is indeed a mechanism available to the Crown Prosecutors.

128 The Crown argues it has engaged in a number of meetings with the ACAA as the representative of Crown Prosecutors and has committed time to engaging in meaningful dialogue with the ACAA in good faith. The Board does not view those meetings as a meaningful good faith process compliant with the obligations of section 2(d). On some issues, the ACAA has written and received no response. On some occasions, significant changes have been made to wages without notice or attempted dialogue. Where there is no response or no attempted dialogue, the ACAA has no knowledge whether its representations have been considered in good faith.

129 The Crown argues the ACAA cannot prove the Crown has <u>not</u> considered its submissions in good faith. That uncertainty is presumably cold comfort to the members of the ACAA when they assess the efficacy of their organizational efforts. The uncertainty itself is a key issue. The Board is assessing the meaningfulness of a process, not the result. The deficiencies in that process are apparent on the evidence.

130 The Board cannot see how a regime where submissions disappear into the apparatus of government without response, where the extent of the obligations of government are known only to constitutional law lawyers, and where the argued mechanism for enforcement is a constitutional declaration by the superior courts, could possibly constitute a meaningful opportunity to engage collectively concerning workplace conditions and terms of employment with their employer.

131 Accordingly, if the Board is incorrect and the Crown Prosecutors cannot permissibly be part of the AUPE unit, the Board would have found that exclusion, in light of the Crown's actions toward ACAA, interfered with the ability of Crown Prosecutors to collectively engage in a meaningful process of collective bargaining.

132 Parenthetically, the Board suggests that nothing about the Crown's original actions in requiring bargaining to take place pursuant to *PSERA*, nor the ineffectiveness of extra-statutory discussions, is particularly surprising. There is a fundamental difference between the hypothetical *idea* of extra-statutory processes, existing in the submissions of legal counsel, versus the reality of a practical and effective day-to-day labour relations regime where obligations are known and understood by the employer, employees and their association. The position inherent in the Crown's original actions -- that *PSERA* covers the field of bargaining for employees of the Crown -- makes practical and legal sense. Indeed, it gives practical legal effect to the concept of exclusions from labour relations statutes, provided those exclusions pass constitutional muster as a reasonable and justifiable limit in a free and democratic society.

133 In summary, if the Board is incorrect, and indeed the only permissible bargaining unit for Crown Prosecutors is the stand-alone unit barred by various sections of *PSERA*, the record shows those bars constitute a substantial interference with the ability of Crown Prosecutors to collectively engage in a meaningful process of collective bargaining. As such, the Board would have declared sections 10, 13, 16(2) and 74 of *PSERA* to be of no force and effect for the purpose of the certification application to the extent they would prevent a representation vote limited to the unit applied for, and potential certification of the unit applied for.

134 The Board notes it would have rejected the argument of the Crown that the Board has no jurisdiction to accept a certification application or hold a representation vote in this circumstance on the basis there are no "employees". Section 13 of *PSERA* clearly contemplates a process by which persons who are not employees by virtue of the

professional exclusion may nevertheless become employees if the conditions of section 13(2) are met. One of those conditions is a vote, which is, for all intents and purposes, a representation vote. The Board clearly must have jurisdiction to accept a prospective certification application from excluded persons seeking to trigger the section 13(2) process, and to hold a vote to further that process.

CONCLUSION

135 The Board concludes *PSERA* does not violate the section 2(d) *Charter* rights of the Applicants, as Crown Prosecutors have the ability to collectively bargain as part of the all Crown employees unit if the mechanisms of section 13(2) are met. The *Charter* application is dismissed. Having dismissed the *Charter* application, the ACAA's application for certification is also dismissed.

136 The Board wishes to add some final comments concerning labour relations in this sector. There are certainly policy reasons behind the legislative adoption of a single "all employees" unit for Crown employees. "All employee" units are common in bargaining relationships where there are a large number of employees. Appropriate and workable bargaining unit descriptions must balance various competing interests, including issues of fragmentation.

137 That said, this case has identified significant policy arguments why a separate bargaining unit for Crown Prosecutors would make sense. Paragraphs 82, 83 and 84 of the Agreed Statement of Facts show bargaining unit descriptions for Crown Prosecutors and/or lawyers in other Canadian jurisdictions frequently separate Crown Prosecutors and/or lawyers from all other government employees.

138 In Alberta, the *Code* and the *Police Officers Collective Bargaining Act*, RSA 2000, c. P-18, collectively prevent police officers from being in a bargaining unit with other municipal employees (as they are not "employees under the *Code*) and from belonging to a union, but permits police officer to be members of police associations and for police associations to become bargaining agents for police officers. Presumably, it was felt there were good policy reasons for having the police represented by unique police associations in their own bargaining units. Strong and similar considerations might be said to apply to Crown Prosecutors.

139 However, whether or not Crown Prosecutors and the public would *best* be served by a separate Crown Prosecutor bargaining unit is a policy choice for the Legislature, and is not in the purview of the Board's analysis in this case. Whatever bargaining unit structure might be optimal, the Board is satisfied the current structure of *PSERA* is not unconstitutional.

140 In closing, the Board notes the focus of both the Crown and AUPE was that there was not a substantial interference with section 2(d) *Charter* rights of the Applicants. Neither the Crown or AUPE led evidence in support of a justification of a breach pursuant to section 1 of the *Charter* and neither the Crown or AUPE in their closing arguments referenced a section 1 *Charter* justification.

141 Having rejected the *Charter* application, the Board further dismisses ACAA's application for certification on the basis set out in the Board Officer's Report that the bargaining unit applied for is inappropriate.

ISSUED and DATED at the City of Edmonton in the Province of Alberta this 19th day of November 2019 by the Labour Relations Board and signed by its Chair.

William J. Johnson, Q.C., Chair

End of Document

Alberta Crown Attorneys' Assn. v. Alberta

Alberta Judgments

Alberta Court of Queen's Bench

D.A. Sulyma J.

Heard: March 4, 2021.

Judgment: November 29, 2021.

Docket: 1903 25805

Registry: Edmonton

[2021] A.J. No. 1594 | *2021 ABQB 949* | *88 C.L.R.B.R. (3d) 1*

Between Alberta Crown Attorneys' Association, Damian Rogers, Breena Smith, Dallas Sopko, Rosalind Greenwood, James Pickard, and Matthew Block, Applicants, and Government of Alberta, Ministry of Justice and Solicitor General, the Alberta Union of Provincial Employees, and the Alberta Labour Relations Board, Respondents, and Canadian Association of Crown Counsel, Intervenor

(74 paras.)

Case Summary

Labour law — Constitutional issues — Canadian Charter of Rights and Freedoms — Freedom of association — Application by Alberta Crown Attorneys' Association for judicial review of Alberta Labour Relations Board decision refusing its application to be certified as collective bargaining agent for Crown prosecutors dismissed — ACAA argued that designation of Alberta Union of Provincial Employees as Crown prosecutors' bargaining agent violated s. 2(d) of Charter — Public Service Employee Relations Act set out labour relations scheme that allowed collective bargaining to be pursued in meaningful way that satisfied s. 2(d) of Charter — Canadian Charter of Rights and Freedoms, 1982, s. 2(d).

Application by the Alberta Crown Attorneys' Association for judicial review of an Alberta Labour Relations Board decision refusing its application to be certified as the collective bargaining agent for Crown prosecutors. The ACAA argued that the designation of the Alberta Union of Provincial Employees as Crown prosecutors' bargaining agent violated s. 2(d) of the Charter. The Board concluded that it did not.
HELD: Application dismissed.

The Public Service Employee Relations Act set out a labour relations scheme that allowed collective bargaining to be pursued in a meaningful way that satisfied s. 2(d) of the Charter. Nothing in the Act prevented employees from setting or changing their collective workplace goals. The Act ensured that employees were free from employer interference and that the bargaining process was under the control of employees. The Act identified employer acts that were prohibited, including participation or interference in the formation and administration of a union, and required employers to meet and bargain in good faith. Under the Act, the bargaining agent was accountable to its members and had a duty to provide representation to all of them. Limits on the choice of bargaining agent did not violate s. 2(d).

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 2(d)

Crown Counsel Act (BC)

Public Service Employee Relations Act, RSA 2000 c-P-43, s. 10

Wagner Act

Counsel

Kristan McLeod and Vanessa Cosco, for the Applicants.

Terri Susan Zurbrigg, for the Respondent, Alberta Labour Relations Board.

Patrick Nugent and Adam Cembrowski, for Respondent, AUPE.

Jason Kully, For Respondents Government of Alberta and Ministry of Justice and Solicitor General.

Paul Cavalluzzo and Tyler Boggs, for Intervenor CACC.

Memorandum of Decision

D.A. SULYMA J.

1 The Alberta Crown Attorneys' Association (ACAA) wishes to represent Crown Prosecutors for the purpose of collective bargaining with the Province of Alberta ("POA"); however, the *Public Service Employee Relations Act*, RSA 2000 c-P-43 (*PSERA*) requires all Crown employees to collectively bargain as part of a single province-wide bargaining unit represented by the Alberta Union of Provincial Employees (AUPE). This judicial review concerns whether *PSERA* violates Crown Prosecutors' freedom of association as protected in s. 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

2 The ACAA had filed an application with the Alberta Labour Relations Board (the Board) to be certified as the bargaining agent for Crown Prosecutors. Before the Board, the Applicants submitted they cannot collectively bargain through the single province-wide bargaining unit represented by AUPE as to do so would affect the prosecutors' independence, put prosecutors in conflicts of interest and jeopardize the justice system's integrity. The Board denied the application and dismissed the bases of argument. The Board also found that despite some meetings with ACAA members, the POA had refused to collectively bargain with the Association. It is contended that in doing so they have denied prosecutors access to a meaningful process of collective bargaining.

3 Of course, that submission is only relevant if the Court finds s. 2(d) has been breached. It must be noted that Alberta is the only province in Canada that mandates all-in bargaining units; that is, all government employees are to be represented by, in this case, AUPE.

4 In four Canadian jurisdictions, Crown Prosecutors are members of a bargaining unit which is separate from all other government employees:

5 The British Columbia Crown Counsel Association represents only Crown Prosecutors in British Columbia and collectively bargains through that association (recognition is contained in British Columbia's Crown Counsel Act). Government civil lawyers in British Columbia have an association which does not collectively bargain.

6 The Ontario Crown Attorneys' Association represents only Crown Prosecutors in Ontario. Government civil

lawyers in Ontario have their own association: The Association of Law Officers of the Crown. For collective bargaining purposes, the two Associations are represented by a council comprised of the two Associations;

7 The Nova Scotia Crown Attorneys' Association represents only Crown Prosecutors in Nova Scotia and has a collective agreement. Government civil lawyers in Nova Scotia do not have an active association and do not collectively bargain.

8 The New Brunswick Crown Prosecutors' Association represents only Crown Prosecutors in New Brunswick and has a collective agreement. Government civil lawyers in New Brunswick are represented by the New Brunswick Crown Counsel Association, which has a separate collective agreement.

9 The issue here boils down to whether this group of unique government employees must bargain through one province wide bargaining unit. The ACAA is of the view that the Board's finding of no breach of s. 2(d) is incorrect. Although the Board found the government had failed to fully collectively bargain with the Association outside of *PSERA*, it denied the Applicants' *Charter* challenge to *PSERA* and thus denied the ACAA certification application.

10 The Canadian Association of Crown Counsel (CACC) did make an application to have intervenor status before the Board and that was granted.

11 Similarly, on application in the new year of 2021, I granted that body leave to intervene in the judicial review. That association joins with the ACAA application on the basis of the Board having erred.

12 While it is submitted the Board has jurisdiction to consider constitutional questions, which it did here, it cannot issue a general declaration of constitutional invalidity. It does have jurisdiction to declare statutory provisions inoperable with respect to an application before it. That was what was sought and denied here. The POA and the Ministry of Justice and Solicitor General submit that the Board properly found that the designation of AUPE as the Crown Prosecutors' bargaining agent does not contravene s. 2(d) as the freedom of association does not guarantee the level of choice argued by the CACC. They take the position that the impugned section of the *PSERA* does not contravene s. 2(d) of the *Charter*. The AUPE joins in that position and further submits the applications of both the ACAA and CACC have not established what they seek to show; that is, that ACAA's s 2.(d) rights have been breached. They requested the Court dismiss the ACAA's application and uphold the Board's decision.

13 ACAA made the argument before the Board that its members have a constitutional right to a meaningful collective bargaining process. They argue that the constitutional imperative of prosecutorial independence precludes them from bargaining through the province-wide statutory bargaining unit *PSERA* creates and the Province has refused to bargain outside of this statutory regime.

14 They submit that they did not argue that the *Charter* guarantees Crown Prosecutors the right to any bargaining agent of their choice or to unilaterally define the bargaining unit. Nor did they argue as the Board seems to have assumed, that the *Charter* precludes Crown Prosecutors from being in a bargaining unit with any other employees. The only assertion the ACAA made and make is that *PSERA* specifically as applied to Crown Prosecutors is unconstitutional as the prosecutors' legal and constitutional obligations prevent them from joining the province-wide bargaining unit which includes not just regular members of the public but also individuals working within the Justice system, including investigators.

15 Here they refine the argument by asserting the Board's decision is incorrect as it is inconsistent with the principle of prosecutorial independence.

16 CACC makes somewhat different and broader arguments regarding the same issue as I will also address further.

17 To start with, it submits that ACAA members have exercised their freedom of association guaranteed under s.

2(d) of the *Charter* in two key respects: 1) they have identified they were unwilling to engage in a process of collective bargaining that threatened the professional obligation to ensure prosecutorial independence; and 2) in light of the conflicts which would arise from joining the AUPE province-wide bargaining unit among other things they have chosen the ACAA as their bargaining agent.

18 CACC denies that it claims there is an unfettered right to choose one own's bargaining agent. Rather, it was their submission that it is a *Charter* imperative that the ability of an employee to choose his or her own bargaining agent be protected and that it is the choice of bargaining agent that informs the extent to which a group of employees are able to meaningfully pursue their collective interests. It submits that the Applicants' choice of ACAA as their bargaining agent cannot be divorced from their choice to prioritize the protection of their prosecutorial independence and a violation of s. 2(d) should have been found.

19 CACC submits that the facts here satisfy the threshold of substantial interference because it forces the Crown attorneys to be represented by a voice that is unlikely to speak up and challenge the government in the manner of their choosing. This submission raises a matter of proof, in this case, lack of evidence to support this bare statement. CACC argued that where the placement of a subset of employees in a particular bargaining unit is contrary to their identified collective interests and contrary to their unequivocal preference to be represented by a different association it is a constitutional imperative that a violation of s. 2(d) be found.

20 I note that the Board in its decision suggested that it lacked "a sufficient evidentiary foundation" upon which to decide the CACC's arguments even if it "were inclined to do so".

21 Indeed, CACC represents that the possibility that representation by the AUPE may be workable in certain respects but that it is not properly considered at the infringement stage of the analysis. Rather, the focus is on the extent to which the government's actions have infringed the affected individuals' rights.

22 The further argument of the CACC is based on what it calls the "submergence theory". This is a submission drawn from ***York University v UFA***, a decision of the Ontario Labour Relations Board. CACC also refers to ***OPSEU v Ontario (Minister of Education)***, *2016 ONSC 2197* submitting it approves that theory.

23 The parties have relied on the same cases to put forth their positions. It is agreed that legally the issue must be considered in context. As acknowledged by the Board, such is important. The Board observed that the right to freedom of association must be viewed in the context of the particular industry, workplace and employer/employee relationship at issue. I agree with that statement of law.

24 All parties agree the correctness standard of review applies to the constitutional issues raised in this judicial review. This as set out in ***Canada v Vavilov***, *2019 SCC 65*.

25 The submissions of both the POA and AUPE contained a detailed analysis of their position that both the ACAA and the CACC submissions are premised on a misreading of the relevant case law and that during the course of this litigation the CACC appeared to make representations on the ACAA's behalf that had not been made by the ACAA and those points should not be addressed by me. Any submission where the CACC purports to make representations on behalf of ACAA or its members should be disregarded.

26 I agree that at all times of this review, the CACC does not speak for the ACAA. The Respondents submit that particular arguments such as the argument that the ACAA's *Charter* claim is conjunctive and not disjunctive must therefore be disregarded. I agree with the Respondents' position that the claims of the CACC and submissions that broaden the issues before me ought to be disregarded where they go beyond the ACAA's submissions.

27 All parties rely on portions of the Supreme Court of Canada decision in ***Mounted Police Association of Ontario v Canada (Attorney General)*** 2015, SCC 1, but in varying manners. The Respondents POA and AUPE rely on what they submit are the actual findings in the case whereas they submit that the Applicants and Intervenor

pick and choose to rely on non-decisive and non-binding statements in the case, or statements made in context of the Court's review of the history of interpreting the s. 2(d) rights.

28 In my view, the submissions of POA and AUPE that the Applicants and Intervenor have not properly quoted the principles of law that come from the ***Mounted Police*** case are correct. Accordingly, I summarize what I find to be the binding portions, which include definitions and importantly the criteria that define the *Charter* s. 2(d) rights and that govern the issues of degree of choice and scope of the s. 2(d) protection and its principles.

29 I accept the summary of argument in the briefs of the POA and Ministry of Justice and Solicitor General. I will summarize from the brief as I find that the POA briefs properly set out the law in this area.

30 They argue that the CACC extends the concept of degree of choice protected by the *Freedom of Association* and such is not supported by the law in elevating employee choice to the level argued by the CACC would be to significantly overall Canadian labour law. Rather, *Freedom of Association* encompasses a right to a meaningful collective bargaining process and 2 (d) does not impose a process in which every association will obtain the recognition that it seeks.

31 Rather, the test of the right to a meaningful collective bargaining process involves examination of whether the mechanism substantially disrupts the balance of powers between employees and employer necessary for the meaningful pursuit of collective workplace goals. Employees need only enough of a degree of choice and independence to allow them to determine and pursue their collective interests.

32 They argue that the concept of choice was introduced by the Supreme Court in ***Mounted Police*** and the Supreme Court limited its scope, clearly stating choice and independence are not absolute and again, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. Similarly, the Court found the degree of independence required by the *Charter* is one that ensures that the activities of the association are aligned with the interests of its members.

33 The Court stated that hallmarks of employee choice include the ability to form and join new associations, to change representatives, to set and change collective workplace goals and to dissolve existing associations. Accountability plays an important role in assessing employee choice. Choice as guaranteed by 2 (d) means that employees' representatives must be accountable.

34 I also agree that the CACC has made incorrect submissions of law when it submits that "Where the very placement of a subset of employees in a particular bargaining unit is contrary to the identified collective interest and contrary to their unequivocal preference to be represented by a different association it is a constitutional imperative that a violation of s. 2(d) be found." I agree with the Respondents that this is an incorrect statement in law and this argument is essentially one for absolute choice, and a guaranteed outcome regarding a bargaining agent and minority protection. This is incorrect in law and an overstatement of the degree of choice protected by the freedom of association s. 2(d) rights. Many of CACC submissions are bare statements of its position here and not actually taken from any court judgment.

35 The same arguments are made by AUPE. That is, that the ACAA and CACC have not properly addressed the issue of the significance of employee choice and independence under s. 2(d). That it has ignored the majority's statement of a meaningful process of collective bargaining and the essential features of a meaningful process of choice and independence. It submits that the majority in ***Mounted Police*** emphasized that the requirement of choice had more than one dimension and the majority was clear that considerations of employee choice included the ability of employees to choose or change who represented them. The majority also explained choice involved the capacity for employees to set and change their collective workplace goals. As such, even where the employees had a designated bargaining agent so long as the employees could still collectively choose what workplace goals their bargaining agent pursued on their behalf, the employees retained some choice for the purposes of s. 2(d).

Further, that the majority was clearly aware that their discussion of s. 2(d)'s requirements of choice and independence could be misconstrued. Accordingly, the Court repeatedly emphasized the limits of the requirements of compliance with the *Charter* being based on the degrees of independence and choice guaranteed by the labour relations scheme and there is no absolute requirement of either. Second, that choice and independence should not be considered in isolation but must be assessed globally, always with the goal of determining whether the employees are able to associate for the purposes of meaningfully pursing collective workplace goals. The majority also reiterated at least on four occasions that in recognizing s. 2(d) protected aspects of employee choice and independence, s. 2(d) did not entitle individuals to a specific model of labour relations and referred repeatedly to other Supreme Court decisions holding the same. Finally, the majority specifically cited legislation designating bargaining agents for groups of employees as an example of a labour relations model that, despite removing an element of employee choice, could nonetheless be considered constitutionally valid.

36 In that regard, statements in the ACAA brief are incorrect if they are meant to submit that the single Crown bargaining unit mandated by *PSERA* would not meet the requirements of choice and independence set by ***Mounted Police***. AUPE's position is that it is sufficiently independent, and AUPE's members retain sufficient choice over setting workplace goals that s 10 of *PSERA* does not violate s2(d) of the *Charter*.

37 In ***Mounted Police***, the scheme did violate s. 2(d) as the RCMP members could not advance their own interests through the SRRP without interreference by RCMP management. In ***OPSEU v Ontario***, the Court dealt with a new process for collective bargaining of Ontario school boards. Among other things, the legislation required that collective agreements be established in accordance with an agreement that had previously been reached with a particular teachers' union. The government's unilateral imposition on the process was the issue and the case does not stand for the broader proposition that 2 (d) protects smaller, less powerful groups of employees from having their interests submerged by the dominant employee groups of a particular sector, as was argued by CACC.

38 I find ***OPSEU v Ontario***, *2016 ONSC 2197* does not demonstrate the proposition that s. 2(d) protects smaller less powerful groups of employees from having their interests submerged by the dominant employee groups of a particular sector. That case is about a government employer refusing to engage in a meaningful process of collective bargaining by setting predetermined bargaining outcomes and refusing to negotiate on certain topics.

39 Here, the Respondents argue that *PSERA* includes all hallmarks of employee choice as identified by the Supreme Court. They submit that a careful review of the *PSERA* regime is proof that it complies with the enumerated SCC factors. The Court specifically stated that s. 2(d) does not give a right to every employee organization to obtain certification as a bargaining agent or to obtain the recognition it seeks.

40 They state *PSERA* does not impose specific representatives on employees. It merely mandates a single bargaining agent; employees remain free to select those who will speak for them within the bargaining agent's roster and to replace their bargaining agent. Prosecutors would be a small selection of the province wide group of employees but this does not mean *PSERA* does not provide the required degree of choice. The hallmark of choice is a guarantee for employees as a collective, not for each minority group or subset of employees.

41 Nothing in the *PSERA* prevents employees from setting or changing their collective workplace goals. *PSERA* allows for employees to identify and pursue their interests even if the employees are a minority group like Crown prosecutors. The Act ensures that employees are free from employer interference and that the bargaining process is under the control of employees. The Act identifies acts that are prohibited by the employer which includes participation or interference in the formation and administration of a union and it requires employers to meet and commence to bargain collectively in good faith. Under the Act, the bargaining agent is accountable to its members and owes a duty to provide representation to all of its members.

42 The Court was clear that "*Charter* compliance is evaluated based on the degrees of independence and choice guaranteed by the labor relation scheme considered with careful attention to the entire context of the scheme and

must not be considered in isolation. Assessment must be global and there must be a determination of whether employees are able to meaningful pursue collective workplace goals."

43 The Respondents argue that the right to such entails a sufficient degree of choice but that this is a feature of the right to meaningful collective bargaining not a right itself. Degree of choice by a labor relations scheme is assessed by determining if their has been substantial interference with such bargaining. It should not be assessed on its own or elevated to a determinative factor.

44 The Court must examine the entire scheme and the goal of such examination is to determine whether employees are able to have effective input into the selection of their collective goals. This is the key and the search is not for an ideal model of collective bargaining. The requirement of choice can be respected by a variety of labor relations models as long as such models allow collective bargaining to be pursued in a meaningful way.

45 The Respondents submit that the *PSERA* allows such effective input into the selection of collective goals and here the necessary hallmarks of free association set by the Supreme Court of Canada have been met. In the end of such assessment, they submit the features of the *PSERA* ensure that employees in the public sector in Alberta have access to a process of meaningful collective bargaining as they have sufficient choice over workplace goals and may pursue workplace goals free from interference from their employer. Thus, the Crown prosecutors have not been left without a collective voice to determine and meet their collective goals. The system of meaningful collective bargaining here has been set in compliance with s. 2(d) of the *Charter*.

46 In ***Mounted Police***, the Supreme Court specifically stated that the *Wagner Act* model of labor relations provides sufficient choice for employees and went further and specifically stated that designated bargaining models are acceptable under the freedom of association guaranteed by s. 2(d). The Court gave an example of a model that provides the employees' bargaining agent as designated rather than chosen by the employees that can be acceptable even where the employees' bargaining agent under a model is designated rather than chosen by the employees. The question remains whether employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. The Court noted that beyond the examples cited, other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.

47 As above, the Respondents submit that the *PSERA* includes the hallmarks of employee choice as identified by the Supreme Court.

48 I have approached this issue as I have described above as I find it the clearest and cleanest explanation of the principles set out in ***Mounted Police***. I agree with the Respondents that the arguments of the Applicants and the Intervenor, besides quoting inapplicable statements from ***Mounted Police*** do, in my view, very much obfuscate the real issue here. Rather, I find that instead the principles from the authority are outlined properly above.

49 In the latter regard, the Applicants and Intervenor have stretched their argument very much beyond the principles defined.

50 Again, the Respondents are as one in making these submissions and in my view, they properly reflect the law in this area and I conclude that here the *PSERA* sets out a labour relation scheme that complies with the legal requirements and thus allows collective bargaining to be pursued in a meaningful way that satisfies s. 2(d).

51 I also accept the submissions of the Respondents that the notion of choice is an element of meaningful collective bargaining, but that choice does not extend to the absolute choice of bargaining agent as argued by the CACC. *PSERA* complies with the principles as outlined in the quotes above. Indeed, the Supreme Court in ***Mounted Police*** specifically stated that the Wagner Act model of labour relations provides sufficient choice for employees.

> The Wagner Act model of labour relations in force in most private sector and many public sector workplaces offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. That model permits a sufficiently large sector of employees to choose to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of "bargaining units" and the processes of certification and decertification -- all under the supervision of an independent labour relations board -- ensure that an employer deals with the association most representative of its employees.

If this was not clear enough, wary of its comments on "choice" being used for *Charter* overreach, the Supreme Court went further and also specifically stated that designated bargaining models are acceptable under the freedom of association:

> The Wagner Act model, however, is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining. The designated bargaining model (see, e.g., *School Boards Collective Bargaining Act*, 2014, S.O. 2014, c. 5) offers another example of a model that may be acceptable. Although the employees' bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. This is but one example; other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.

52 ACAA and CACC have not made submissions that recognize these principles.

53 I agree with the Respondents that the facts here are very distinguishable from the scheme of the Ontario government dealt with in ***Mounted Police***. It is distinguishable as that scheme particularly limited RCMP members by imposing on them a scheme that did not permit them to identify in advance their workplace concerns free from management's influence. This is also in accordance with the finding of the Supreme Court that the right to collective bargaining is one that guarantees a process rather than an outcome or a particular model of labor relations.

54 I have distinguished the facts here from those considered in the cases cited above. Section 2(d) does not guarantee the degree of choice argued by the CACC. I conclude, as did the Board, that limits on the choice of bargaining agent do not violate the freedom of association guaranteed by the *Charter*.

55 As stated above, and in argument, it is that principle that has been misinterpreted by the Applicants and Intervenor. Recall that in that case the Court found that the process failed to respect RCMP members in both its purpose and its effects. That to me appears obvious as the Court found that the Ontario government had in fact eroded choice and independence. One of the facts there was that the government had become a manager and imposed its own restrictions on future bargaining

The Principle of Prosecutorial Independence and Crown Prosecutors' Unique Role as Agents of the Attorney General

56 The Applicants' argument below hinges on the concept of prosecutorial independence. Which, the Respondents submit, is a premise mis defined by the Applicants and Intervener. As submitted by AUPE, independence simply refers to the need for a prosecutor to be independent when exercising his or her prosecutorial discretion: A prosecutor is obliged to not take into account any irrelevant or improper considerations when making decisions related to the bringing, ending or managing of prosecutions: ***R v Cawthorne***, 2016 SCC 32. ***Cawthorne*** cautioned against taking the independence principle too far, emphasizing that prosecutorial discretion does not somehow require prosecutors as individuals to be independent of larger structures or entities.

57 Put simply, the Court found that the principle of prosecutorial independence requires both that a prosecutor be independent and that a reasonable person perceive him or her as independent. Crowns must be free and appear to be free to exercise prosecutorial discretion without interference.

58 Both Respondents submit that the Applicants argues for a much more expansive definition of prosecutorial independence than is supported by the case law or the Law Society of Alberta's Professional Code.

59 AUPE argues that the Applicants must show that somehow, simply by virtue of being AUPE members, Crowns would either take improper considerations into account when exercising prosecutorial discretion or to be seen to be taking improper considerations into account in a manner that rebuts the strong presumption that prosecutors exercise their discretion properly. It submits that ACAA can show neither of these things.

60 The POA makes a similar submission. It states that the argument that the placement of Crowns in the GOA bargaining unit would submerge the interests of the Crowns and deny them of a meaningful process of collective bargaining is not supported by proof of this as facts and it is not supported by the cases cited by the CACC.

61 Each of the Respondents expanded on their arguments, in particular the lack of evidence that AUPE will not speak up or challenge the POA in the manner of the Crown Prosecutors choosing or the Crown Prosecutors will not be able to meaningful advance their interests.

62 Indeed, that position would actually be contrary to the Supreme Court's pronouncements that s. 2(d) does not guarantee a specific process or bargaining outcome given the lack of degree of guarantees over outcomes. Even if certain member's goals are not pursued by the bargaining agent, this alone would not constitute a violation of s. 2(d). Thus, the so called "submergence theory" is not supportable by evidence here or the law.

63 I conclude that the interests of Crown Prosecutors have not been proved to be and will not be submerged in the all POA employee bargaining unit. Also that freedom of association does not guarantee that the interests of a minority group will not be submerged. The Board correctly found that collective bargaining through AUPE would not be detrimental to the interests of the Crown Prosecutors and there would not be any substantial interference with the process of meaningful collective bargaining. I conclude the Board correctly looked at the requirements imposed by *PSERA* here and assessed whether they breached the freedom of association rights and that it was correct for the Board to assess that *PSERA* is a framework independent of the bargaining activity between the POA and the ACAA. Again this submission was made by CACC as a bare statement without any reference to evidence here.

64 I also would agree that according to the CACC's position, it would be a mistake to look at the labour relations regime available to the employees and instead an adjudicator would have to look at how the workers had chosen to associate. Clearly, this is not what the law requires. Rather, freedom of association does not guarantee the preferred outcomes of employees. It protects against substantial interference with the process of meaningful collective bargaining. That has not, in my view, occurred here.

65 I also agree that the CACC's statement that "the fact that another avenue for possible collective bargaining may exist" does not necessarily trump a *Charter* claim in this context. I agree with the Respondents, if an avenue for collective bargaining exists, then there is no breach of s. 2(d). The fact that the claimant would prefer a different means of bargaining or association is not relevant. I agree it is not about trumping a *Charter* claim, but is instead about assessing whether collective bargaining is possible. If meaningful collective bargaining is possible, there is no *Charter* violation.

66 I do not necessarily agree with the position of POA on the sequence of addressing breach and prosecutional independence and the appropriate sequence of arguments. In my view, the Board correctly found that s. 2(d) does not provide the degree of choice argued by the ACCA and CACC and that makes the issue of prosecutorial independence not relevant to the issues of choice and analysis of the legislation and of s. 2(d).

Lack of Evidence

67 The CACC makes representations that the interests of the Crown Prosecutors will be submerged. POA and

AUPE respond that there has been no proof of such led by the Applicants and Intervenor. AUPE goes further and makes points that would belie any suggestion of submergence.

68 The Board found, and I find, that the suggestion itself is not adequate evidence of the fact. There is no evidence that the interests of Crown Prosecutors would be lost within the all GOA employee bargaining unit.

69 POA submits that these arguments are based on the number of Crown Prosecutors in comparison to other employees. Indeed, both the Respondents have pointed to facts that should have been proved and those include features about the makeup of AUPE and internal structural mechanisms in place to protect and advance the unique interests of any of its employees. This would include the Crown Prosecutors without proof that they would indeed be submerged or their interests not advocated.

70 This point must be weighed by the principles governing a breach assessment of s. 2(d). It is not just a numerical exercise.

71 Again, the Applicants and Intervenor rely on ***York University v YUFA***, *[1977] OLRB Rep 611*, *1977 CarswellOnt 934*, which predates the *Charter* and has different facts including the evidence proved that the interests of law professors had already been disregarded once in bargaining and there was potential for this to occur again.

72 Many of the arguments made by the Applicants and Intervenor are based on the bold statements I have referred to above rather than the principles that govern a determination of a s. 2(d) breach. That thread goes throughout their arguments.

Alberta has Refused to Negotiate with the ACCA

73 This is not a relevant consideration. Given the Board's and my conclusion there's been no breach of s. 2(d). *PSERA* applies so any bargaining must occur between POA and AUPE.

Conclusion

74 Accordingly, I conclude that the Applicants and Intervenor have not made their case that the Board was incorrect in its determination of the issues. This application is dismissed.

Dated at Edmonton, Alberta this 29th day of November, 2021.

D.A. SULYMA J.

End of Document

R. v. Cawthorne

Supreme Court Reports

Supreme Court of Canada

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

Heard: April 25, 2016;

Judgment: July 22, 2016.

[page984]

File Nos.: 36466, 36844.

[2016] 1 S.C.R. 983 | *[2016] 1 R.C.S. 983* | *[2016] S.C.J. No. 32* | *[2016] A.C.S. no 32* | *2016 SCC 32*

Her Majesty The Queen, Appellant; v. Ordinary Seaman Cawthorne, Respondent, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia and Director of Criminal and Penal Prosecutions of Quebec, Interveners. And Her Majesty The Queen, Appellant; v. Warrant Officer J.G.A. Gagnon, Respondent, and Her Majesty The Queen, Appellant; v. Corporal A.J.R. Thibault, Respondent, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec and Attorney General of British Columbia, Interveners.

(44 paras.)

Appeal From:

ON APPEAL FROM THE COURT MARTIAL APPEAL COURT OF CANADA

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Fundamental justice — Armed forces — Prosecutorial independence — Right to trial by independent tribunal — Members of Canadian Forces charged with criminal offences — Sections 230.1 and 245(2) of National Defence Act, *R.S.C. 1985, c. N-5*, giving Minister of National Defence authority to appeal from decisions of court martial or Court Martial Appeal Court — Whether these provisions violate ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

Criminal law — Trial — Evidence — Mistrial — Accused bringing motion for mistrial on basis of prejudice arising from inadmissible re-examination evidence — Whether military judge erred in declining to grant mistrial.

Summary:

C was charged with two child pornography offences. At trial, defence counsel objected to re-examination evidence given by C's former girlfriend. The military judge ruled that it was inadmissible and advised the jury panel to disregard it, but C brought a motion for a mistrial on the basis of the prejudice arising from it. The military judge dismissed the motion and gave a further limiting instruction to the panel. C was found guilty. On appeal, a majority of the Court Martial Appeal Court found that the mistrial ought to have been granted and ordered a new trial. The Minister of National Defence ("Minister") appeals as of right to this Court, pursuant to s. 245(2) of the *National Defence Act*, arguing that the military judge made no error in declining to grant a mistrial. C brings a motion to

quash the Minister's appeal, on the basis that s. 245(2), which gives the Minister the authority to appeal to this Court, violates ss. 7 and 11(*d*) of the *Charter*.

G and T were each charged with sexual assault. G was acquitted and the Minister appealed, seeking a new trial. T presented a plea in bar of trial, on the basis that the matter was not under military jurisdiction because of an insufficient nexus with military service. The military judge allowed the plea and the Minister appealed. G and T brought motions to quash the Minister's appeals on the basis that s. 230.1 of the *National Defence Act*, which gives the Minister the authority to appeal to the Court Martial Appeal Court, violates s. 7 of the *Charter*. The Court Martial [page985] Appeal Court dismissed the motions to quash but agreed that s. 230.1 should be invalidated, as it violates the right to an independent prosecutor. The Minister appeals to this Court.

Held: The motion to quash should be dismissed and the appeals should be allowed. Sections 230.1 and 245(2) of the *National Defence Act* are constitutional.

The power that ss. 230.1 and 245(2) of the *National Defence Act* confer on the Minister -- that is, to initiate an appeal -- may effect a deprivation of liberty. Therefore, s. 7 of the *Charter* is engaged. The law recognizes as constitutional the principle that prosecutors must not act for improper purposes, such as purely partisan motives. This principle is a basic tenet of our legal system. It safeguards the rights of the individual and the integrity of the justice system, and it satisfies the criteria to be considered a principle of fundamental justice. A prosecutor -- whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function -- has a constitutional obligation to act independently of partisan concerns and other improper motives.

The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister's membership in Cabinet does not displace that presumption. The law presumes that the Attorney General, also a member of Cabinet, can and does set aside partisan duties in exercising prosecutorial responsibilities, and there is no compelling reason to treat the Minister differently in this regard. Accordingly, Parliament's conferral of authority over appeals in the military justice system on the Minister does not violate s. 7 of the *Charter*. As to the argument that the impugned provisions violate the right to an independent tribunal guaranteed by s. 11(*d*) of the *Charter*, it cannot succeed.

The military judge in C's case did not err in declining to grant a mistrial. Once an error has occurred at trial, a trial judge may, in deciding whether to grant a mistrial, consider whether the error has been or can be remedied at trial. The decision of whether to grant a mistrial falls within the discretion of the judge, who must assess [page986] whether there is a real danger that trial fairness has been compromised. That discretion is not absolute, but its exercise must not be routinely second-guessed by the court of appeal.

Cases Cited

Referred to: *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(*d*).

Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii).

National Defence Act, R.S.C. 1985, c. N-5, ss. 130, 230.1, 245(2).

Authors Cited

Rosenberg, Marc. "The Attorney General and the Administration of Criminal Justice" *(2009), 34 Queen's L.J. 813*.

Scott, Ian. "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s" (1989), 39 U.T.L.J. 109.

Sterling, Lori, and Heather Mackay. "Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*" (2003), 20 S.C.L.R. (2d) 169.

History and Disposition:

MOTION to quash the appeal from a judgment of the Court Martial Appeal Court of Canada (Veit, Zinn and Abra JJ.A.), *2015 CMAC 1*, 472 N.R. 47, *[2015] C.M.A.J. No. 1* (QL), *2015 CarswellNat 1361* (WL Can.), setting aside the accused's convictions for possession of child pornography and accessing child pornography and ordering a new trial. Motion to quash dismissed. Appeal allowed.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Deschênes and Cournoyer JJ.A.), *2015 CMAC 2*, [page987] *[2015] C.M.A.J. No. 2* (QL), 2015 CarswellNat 7156 (WL Can.), declaring invalid s. 230.1 of the *National Defence Act*. Appeal allowed.

Counsel

David Antonyshyn, *Dylan Kerr* and *B. W. MacGregor*, for the appellant.

Mark Létourneau and *Jean-Bruno Cloutier*, for the respondents.

François Lacasse and *Ginette Gobeil*, for the intervener the Attorney General of Canada.

Patrick J. Monahan and *Jamie Klukach*, for the intervener the Attorney General of Ontario.

Sylvain Leboeuf, for the intervener the Attorney General of Quebec.

Joyce DeWitt-Van Oosten, *Q.C.*, for the intervener the Attorney General of British Columbia.

Joanne Marceau and *Patrick Michel*, for the intervener the Director of Criminal and Penal Prosecutions of Quebec.

The judgment of the Court was delivered by

McLACHLIN C.J.

I. Introduction

1 These appeals present two issues. First, do provisions of the *National Defence Act*, *R.S.C. 1985, c. N-5*, giving the Minister of National Defence ("Minister") the authority to appeal from decisions of a court martial or the Court Martial Appeal Court violate ss. 7 or 11(*d*) of the *Canadian Charter of Rights and Freedoms*? Second, did the military judge in the Cawthorne matter err in declining to grant a mistrial?

[page988]

II. Background

A. *Ordinary Seaman Cawthorne*

2 In July 2012, Ordinary Seaman Cawthorne was on exercise near Hawaii. On July 20, an able seaman found an iPhone on board the ship. To determine the owner of the phone, the seaman swiped the screen. He saw an image of a man having sex with a child. The seaman took the phone to a superior. The phone belongs to O.S. Cawthorne.

3 O.S. Cawthorne was charged with two child pornography offences under s. 130 of the *National Defence Act*. O.S. Cawthorne did not contest ownership of the phone, nor did he deny accessing and possessing pornographic images of teenage girls. He testified, however, that his practice was to download an entire thread of pornographic images, without reviewing each image individually. He claimed that his download of the child pornography was inadvertent, and that he had not knowingly possessed or accessed child pornography.

4 O.S. Cawthorne's former girlfriend testified for the prosecution at trial. During her examination-in-chief, she testified about several conversations she had with him. She stated that he told her that he had been arrested "for having inappropriate images on his phone". She also asked him what types of images were on his phone. When asked if she recalled his answer, her response was the following: "He said they were children and I believe that he said they were both male and female."

5 In brief cross-examination, she was asked whether her conversations with O.S. Cawthorne amounted to his merely advising her of the allegations against him (i.e., as opposed to his admitting culpability). She agreed.

6 In re-examination, she was asked, "During any of those conversations, do you recall him [page989] saying that he did in fact do these things?" She said: "Yes."

7 Defence counsel objected, and the military judge ruled that her evidence on re-examination was inadmissible because it did not arise from cross-examination. The military judge advised the jury panel to disregard the question and answer.

8 The defence then brought a motion for a mistrial on the basis of the prejudice arising from the inadmissible re-examination evidence. The military judge dismissed the motion and gave a further limiting instruction to the panel:

> ... I further instruct you that you shall not draw any inference against the accused ... from that inadmissible evidence because it is both unreliable and prejudicial. I therefore instruct you to completely and absolutely ignore the inadmissible evidence and that you shall evacuate from your mind anything about it.

9 The panel returned a verdict of guilty on both counts charged.

10 A majority of the Court Martial Appeal Court found that the mistrial ought to have been granted. The court allowed O.S. Cawthorne's appeal and ordered a new trial (*2015 CMAC 1*, 472 N.R. 47).

11 The Minister appeals as of right to this Court, pursuant to s. 245(2)(a) of the *National Defence Act*. The Minister argues that the military judge made no error in declining to grant a mistrial. O.S. Cawthorne seeks to quash the Minister's appeal on the basis that s. 245(2) violates ss. 7 and 11(*d*) of the *Charter*.

B. *Warrant Officer Gagnon and Corporal Thibault*

12 Warrant Officer Gagnon and Corporal Thibault were each charged with sexual assault.

13 Warrant Officer Gagnon was acquitted. The Minister appealed to seek a new trial, on the basis that the military judge erred by putting the defence [page990] of honest but mistaken belief in consent to the panel.

14 Corporal Thibault presented a plea in bar of trial, claiming that the matter was not under military jurisdiction because of an insufficient nexus with military service. The military judge allowed the plea (2015 CM 1001). The Minister appealed.

15 Warrant Officer Gagnon and Corporal Thibault brought motions to quash the Minister's appeals on the basis that s. 230.1 of the *National Defence Act*, which gives the Minister the authority to appeal to the Court Martial Appeal Court, violates s. 7 of the *Charter*.

16 The Court Martial Appeal Court dismissed the motions to quash but agreed that s. 230.1 of the *National Defence Act* should be invalidated. It found that the law's conferral of the authority to appeal on the Minister violates the right to an independent prosecutor, which it held is a principle of fundamental justice under s. 7 of the *Charter* (*2015 CMAC 2*).

III. The Challenged Legislation

17 Sections 230.1 and 245(2) of the *National Defence Act* provide the following:

> **230.1** The Minister, or counsel instructed by the Minister for that purpose, has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:
>
> **(a)** with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;
>
> **(a.1)** the decision not to make an order under subsection 745.51(1) of the *Criminal Code*;
>
> **(b)** the legality of any finding of not guilty;
>
> **(c)** the legality of the whole or any part of the sentence;
>
> [page991]
>
> **(d)** the legality of a decision of a court martial that terminates proceedings on a charge or that in any manner refuses or fails to exercise jurisdiction in respect of a charge;
>
> **(e)** the legality of a finding of unfit to stand trial or not responsible on account of mental disorder;
>
> **(f)** the legality of a disposition made under section 201, 202 or 202.16;
>
> **(f.1)** the legality of an order for a stay of proceedings made under subsection 202.121(7);
>
> **(g)** the legality of a decision made under any of subsections 196.14(1) to (3); or
>
> **(h)** the legality of a decision made under subsection 227.01(2).
>
> **245**...
>
> **(2)** The Minister, or counsel instructed by the Minister for that purpose, may appeal to the Supreme Court of Canada against a decision of the Court Martial Appeal Court
>
> **(a)** on any question of law on which a judge of the Court Martial Appeal Court dissents; or
>
> **(b)** on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

IV. Analysis

A. *Is the Conferral of the Authority to Appeal on the Minister of National Defence Unconstitutional?*

18 The main question on these appeals is whether provisions of the *National Defence Act* that give the Minister the authority to appeal from decisions of a court martial or Court Martial Appeal Court infringe the right to liberty under s. 7 of the *Charter*, and if so, whether the limitation is justified under s. 1 of the *Charter*. It is also argued that the law infringes the right to trial by an independent tribunal under s. 11(*d*) of the *Charter*.

[page992]

19 Section 7 of the *Charter* provides:

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

20 The power that ss. 230.1 and 245(2) of the *National Defence Act* confer on the Minister - that is, to initiate an appeal - may effect a deprivation of liberty. Section 7 is engaged.

21 The next question is whether the deprivation of liberty conforms to the principles of fundamental justice. If it does not, the law violates s. 7.

22 The answer is found in this Court's jurisprudence on prosecutorial independence and abuse of process. It establishes, as a matter of constitutional law, that partisan or other improper considerations must not influence prosecutorial decisions.

23 Our cases on prosecutorial independence tend to discuss this principle in the context of the role of the Attorney General. In *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, Iacobucci and Major JJ., writing for the Court, noted that there is a "constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions": para. 30. Charron J. reiterated this point in *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, describing the independence of the Attorney General as a "constitutionally entrenched" principle that "requires that the Attorney General act independently of political pressures from government": para. 46. But the logic of these statements clearly extends to Crown prosecutors and other public officials exercising a prosecutorial function. Indeed, both *Krieger* and *Miazga* cited with approval Binnie J.'s reasons (dissenting on another point) in *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 157, where he remarked that a Crown Attorney's duty "to respect his or her 'Minister of Justice' obligations of objectivity and independence" easily [page993] met the criteria for a principle of fundamental justice under s. 7 of the *Charter*.

24 These cases establish that a prosecutor - whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function - has a constitutional obligation to act independently of partisan concerns and other improper motives: see generally L. Sterling and H. Mackay, "Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*" (2003), 20 S.C.L.R. (2d) 169, at p. 170; see also M. Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009), 34 Queen's L.J. 813, at pp. 832-36.

25 This principle is also reflected in this Court's abuse of process jurisprudence. We have long recognized that the Crown's unfair or oppressive treatment of an accused can rise to the level of an abuse of the court's process and warrant judicial intervention: see *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 612-15. Both the common law and s. 7 of the *Charter* empower a court to stay proceedings

> where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings.

(*R. v. Jewitt*, [1985] 2 S.C.R. 128, at pp. 136-37, quoted in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at p. 455.)

Those principles of justice may be violated where there is "conspicuous evidence of improper motives or of bad faith" on the Crown's part: *Power*, at p. 616.

[page994]

26 I conclude that the law recognizes as constitutional the principle that prosecutors must not act for improper purposes, such as purely partisan motives. This principle is a basic tenet of our legal system. It safeguards the rights of the individual and the integrity of the justice system. And it satisfies the criteria for a principle of fundamental justice identified in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113, and

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 8. This principle is, accordingly, a principle of fundamental justice under s. 7 of the *Charter*.

27 I emphasize that the scope of "partisan" in this context is narrow. "Partisan" is not broadly synonymous with "political". An Attorney General - like other public officials exercising a prosecutorial function - is a "protector of the public interest": Sterling and Mackay, at p. 179. As L'Heureux-Dubé J. explained in *Power*, at p. 616:

> ... the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision.

28 Decisions to prosecute (or to not prosecute) can have broad social repercussions, and regard for those repercussions properly informs prosecutorial discretion: Sterling and Mackay, at p. 179; Rosenberg, at pp. 821-22, fn. 24. It is not open to a court to scrutinize this exercise of discretion, or to question a prosecutor's particular conception of the public interest. A government policy of strict prosecution of certain offences, if motivated by concerns for the public interest, does not offend s. 7. It is only when the considerations underlying a prosecution are partisan - that is, when a prosecutor acts not for the public good, but "for the good of the [page995] government of the day" - that a court's intervention is warranted: Sterling and Mackay, at p. 179, citing I. Scott, "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s" (1989), 39 U.T.L.J. 109, at p. 121.

29 Whether a prosecutor's purposes are "improper" will depend on the facts of the case. It would be impossible to exhaustively define all considerations that are improper in the context of a prosecution, but our abuse of process decisions provide some guidance on that issue. These decisions indicate that, whatever the circumstances of the particular case, the bar for finding that a prosecutor's conduct was prompted by an improper motive is rightly very high.

30 Recognition of this principle as one of fundamental justice does not affect the existing and well-developed doctrine of abuse of process; indeed, the two are integrally related. Claims of improper prosecutorial conduct, including partisan-motivated conduct, will continue to be brought and assessed under the doctrine of abuse of process, which determines the standard for improper conduct and the appropriate remedy: see *Power*, at pp. 615-16; *O'Connor*, at pp. 465-68.

31 There is no evidence of any improper prosecutorial conduct in the cases before us. But the respondents say such evidence is unnecessary. In their view, the principle of prosecutorial independence requires both that a prosecutor be independent *and* that a reasonable person perceive him or her as independent. The Minister, they say, is independent neither in fact nor in appearance. They emphasize that the Minister is a member of Cabinet not bound by the conventions of independence that apply to the Attorney General, and that the Minister's "quasi-judicial" role is incompatible with his control and administration of the Canadian Forces. Accordingly, [page996] the respondents argue that the law's conferral on the Minister of authority over appeals in the military justice system violates s. 7 of the *Charter*.

32 I cannot agree. The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister's membership in Cabinet does not displace that presumption. Indeed, the law presumes that the Attorney General - also a member of Cabinet - can and does set aside partisan duties in exercising prosecutorial responsibilities. There is no compelling reason to treat the Minister differently in this regard.

33 It follows that Parliament's conferral of authority over appeals in the military justice system on the Minister does not violate s. 7 of the *Charter*.

34 It is conceivable that a statute could create a prosecutorial framework that genuinely casts doubt on a prosecutor's independence, for example, by requiring the prosecutor to take partisan or other improper

considerations into account in the exercise of prosecutorial discretion. But short of such a statutory regime, and in the absence of "conspicuous evidence" of partisan conduct in a particular case, there is no violation of s. 7 of the *Charter*.

35 The respondents did not press the argument that the law violates s. 11(*d*) of the *Charter*, except to suggest that an abusive prosecution may taint the entire judicial process. In my view, the argument that the law violates the right to an independent tribunal cannot succeed.

36 I conclude, accordingly, that the impugned provisions of the *National Defence Act* do not violate s. 7 or s. 11(*d*) of the *Charter*.

[page997]

B. *Did the Military Judge in the Cawthorne Matter Err in Declining to Grant a Mistrial?*

37 The Crown says that the Court Martial Appeal Court should not have disturbed the military judge's considered decision to not grant a mistrial. It argues that the evidence of O.S. Cawthorne's former girlfriend was not inadmissible, but that even if it was, the military judge correctly applied the proper law. The respondent says that the inadmissibility of the evidence is not properly before this Court, and further that the military judge erred in dismissing the motion for a mistrial.

38 I would give effect to this ground of appeal. Even if the evidence in question was inadmissible, of which I am not convinced, the military judge did not err in declining to grant a mistrial.

39 The legal principles on the granting of a mistrial were discussed by LeBel J. in his reasons in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823. Once an error has occurred at trial, a trial judge may, in deciding whether to grant a mistrial, consider whether the error has been or can be remedied at trial: para. 79. The decision of whether to grant a mistrial "falls within the discretion of the judge, who must assess whether there is a real danger that trial fairness has been compromised": *ibid.* That discretion is not absolute, but "its exercise must not be routinely second-guessed by the court of appeal": *ibid.*

40 The majority of the Court Martial Appeal Court did not ask itself whether the judge had erred in declining to grant a mistrial, but instead focused on the curative proviso of s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. The curative proviso applies only when an error has been established. The issue on appeal is the following: Did the military judge commit a reviewable error in declining to grant a mistrial? Only if the answer to that question is yes do we turn to the curative proviso. [page998] The Court Martial Appeal Court erred in failing to ask itself the right question: see *Khan*, at para. 19, per Arbour J.

41 In my view, the military judge did not err in declining to grant the motion for a mistrial. As LeBel J. stated in *Khan*, at paras. 80-82:

> A decision on whether an incident has affected trial fairness in a way which would warrant declaring a mistrial must take into account any corrective measure which has been brought, or could be brought, by the judge to remedy the irregularity ... .
>
> Thus, when a trial judge realizes that an error has occurred but decides not to order a mistrial, the court should consider the remedy selected by the judge, if any, as one of the elements in its assessment of whether the trial has been or has appeared unfair. If the remedy chosen by the judge consisted of a warning to the jury on what they should or should not consider in reaching their verdict, the ability of a jury to follow instructions must be recognized, although this reality is obviously subject to its own limits... .
>
> Thus, we should not presume that jurors are incapable of following instructions given by the judge. On the contrary, when the judge issues a clear and forceful warning about the use of some information, we are entitled to presume that it diminishes the danger that the jury will misuse this information when rendering its verdict. [Emphasis added.]

42 Here, the decision not to grant a mistrial was within the military judge's discretion. He made a reasonable attempt to remedy the error through two instructions, one immediate and another mid-trial. In his mid-trial instruction, he instructed the panel to disregard the evidence because it was both "unreliable and prejudicial". Nothing suggested to the judge that the panel was unwilling or unlikely to follow his instruction. I would not interfere with his decision.

[page999]

V. Conclusion

43 In the Cawthorne matter, I would dismiss O.S. Cawthorne's motion to quash the appeal. Section 245(2) of the *National Defence Act* is constitutional. The Minister's appeal is allowed and the convictions entered at trial against O.S. Cawthorne are reinstated.

44 In the Gagnon and Thibault matter, I would allow the Minister's appeal. Section 230.1 of the *National Defence Act* is constitutional. The matter is remitted to the Court Martial Appeal Court for the hearing of the appeals on the merits.

Motion to quash appeal dismissed. Appeals allowed.

Solicitors:

Solicitor for the appellant: Canadian Military Prosecution Service, Ottawa.

Solicitor for the respondents: Defence Counsel Services, Gatineau.

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 Quebec: Attorney General of Quebec, Québec.

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

Solicitor for the intervener the Director of Criminal and Penal Prosecutions of Quebec: Director of Criminal and Penal Prosecutions of Quebec, Québec.

End of Document

UNIVERSITY OF VICTORIA
PO BOX 2400 STN CSC VICTORIA BC V8W 3H7 CANADA
TELEPHONE (250) 721-8777, FAX (250) 721-6607
EMAIL: SOWEN@UVIC.CA

STEPHEN OWEN, Q.C.
LAM PROFESSOR OF LAW & PUBLIC POLICY
DIRECTOR, INSTITUTE FOR DISPUTE RESOLUTION

December 31, 1999

Wendy Stephen
President
British Columbia Crown Counsel Association
Regional Crown Counsel Office
The Law Courts, Begbie Square
New Westminster, BC V3M 1C9

Philip M. Topalian
Senior Labour Relations Officer
Labour Relations Branch
PO Box 9494 Stn Prov. Govt.
Victoria, BC V8W 9V1

Dear Ms. Stephen and Mr. Topalian:

RE: Crown Counsel Association - Provincial Government Mediation

Mediator's Report

Introduction

By terms of reference set out in a letter dated March 25, 1999 from the Attorney General to the Assistant Deputy Attorney General for Criminal Justice (Appendix A), I was asked to assist the parties in reaching an agreement on all issues in dispute between the Crown Counsel Association (CCA) and the Public Service Employee Relations Commission (PSERC). Where agreement was not possible, I was empowered to make non-binding recommendations to the parties as to the disposition of those issues remaining in dispute. While it was acknowledged that I could not immediately undertake this task because of other commitments, the CCA called off the job action planned to take place on March 11 and 12, 1999, and both parties expressed the intention that the reporting process be completed as soon as possible. This report completes that process.

This report supplements my Interim Report dated October 31, 1999 (Appendix B). In the Interim Report, I stated my opinion that the relationship between Crown Counsel and the provincial government would not be improved by in independent mediator reporting out, ad hoc, on the substantive employment issues in dispute. Rather, I made tentative recommendations for a formal, multi-layered and permanent set of processes which respects both government responsibility and the high level of professionalism of Crown Counsel.

Since the Interim Report, I have had the opportunity to meet separately with each of the CCA and

PSERC, to hold a mediation session with them together, and to receive their further considered views separately. I committed myself to report out the parties on issues of process by December 31, 1999.

Issues

1. Processes

The set of processes described in the Interim Report have, generally, been favourably received by the CCA and PSERC. In particular, it is accepted that the *Public Service Labour Relations Act (PSLRA)* should be amended to remove the exclusion of persons practising law under the *Legal Professions Act* so as to permit formal certification and collective bargaining by Crown Counsel.

The CCA has proposed that the *PSLRA* also be amended to provide that the appropriate bargaining unit includes only Crown Counsel and that the bargaining agent be the CCA. The CCA says that it is inappropriate for Crown Counsel to be part of a wider bargaining unit or to be represented by the Professional Employees Association (PEA) because of the distinct role that Crown Counsel play compared to other professional public servants. PSERC, on the other hand, says that appropriate bargaining agent is the PEA, to which lawyers working for the Legal Services Society (LSS) belong.

Crown Counsel exercise prosecutorial discretion under the authority of the Attorney General in his independent role as chief law officer of the Crown. As such, Crown Counsel must act in a quasi-judicial manner outside of political direction from government, which is quite different than other public servants. In addition, LSS lawyers often represent accused persons being prosecuted by Crown Counsel. Being a part of the same union could both create at least an appearance of conflict of interest and threaten the essential operations of the criminal courts and the rights of accused persons should job action by either group occur. In these special circumstances, it is my recommendation that Crown Counsel be represented by a discrete bargaining unit, not withstanding the generally favoured trend in British Columbia of limiting the number of public sector unions.

Regarding other process issues addressed in my interim report, I have heard nothing from the parties to suggest that they are inappropriate. In my opinion, the recommendation of mandatory non-binding arbitration to resolve interest disputes arising from collective bargaining, followed by a reasoned response tabled in the Legislature by the Attorney General, remains the best approach. This provides for a focussed presentation of evidence and argument at a formal adjudicative process which is better able to determine and distinguish issues of fact, law and policy, than a mediated negotiation and report out. Appropriate amendments to the CCA will be required to implement this recommendation.

Regarding my recommendation that the Attorney General commission independent, expert comparative studies of financial terms of employment, classification and workload for Crown

Counsel every five years, I remain convinced that these are required to properly inform collective bargaining, dispute resolution and collaborative management.

A workload study was completed in February 1999, has been accepted by government, and should be implemented as soon as possible.

2. Classification

Classification remains a major point of frustration, with many Crown Counsel having reached the maximum "working level" salary increases of ten years, and being barred from promotion to "merit" positions by the restricted number of these.

While the frustration of Crown Counsel is understandable given the apparently arbitrary distinctions between many in the working and merit levels, this must be distinguished from what are merely financial issues. The classification structure should not be a historical accident, but a conscious, professional decision based on the most effective composition of the public prosecution service.

If the intention of the Criminal Justice Branch is to attract or develop and retain as many as possible senior, experienced Crown Counsel to prosecute the most complex and serious cases, then the structure of the system should properly reward this. Merit positions in this sense must be distinguished from the public sector management structure, where there are limited numbers of senior positions which logically decrease as seniority increases. If the number and proportion of cases that require senior counsel to prosecute them is increasing, then the number of Crown Counsel in that category must also increase. If not, then either morale or quality, or both, will decrease.

It is evident that changes in the criminal law, criminal justice policy on dangerous offenders, *Charter* implications, justice reform and case volumes all contribute to increased pressure on the prosecution service. The structural question is whether the Criminal Justice Branch intends these difficult cases to be handled in-house, or whether it wants to use senior counsel from the private Bar. Both are legitimate policy decisions, but the classification system should fit the choice. At present, it appears not to do so.

However, changes to the classification system should not be merely a way to circumvent government policy on wage increases. While an increase in the total salary budget may be appropriate to deal with systemic inequities and changing circumstances, restructuring itself will likely cause some winners and some losers within a largely static budget. Those who may lose position should be "grandfathered" and this is an appropriate transitional cost for government to bear.

The best result in restructuring the classification system will come from a genuine collaboration between Criminal Justice Branch management and the CCA, informed by their own professional experience, criminal justice policy on ad hoc counsel, and a comparative

study of other processes. The Criminal Justice Branch management and the CCA should undertake this as a collaborative management task, and make joint recommendations to the Attorney General and PSERC for restructuring.

3. Expedited Process

The CCA has suggested a three year collective agreement with the comparative salary study being prepared in time to inform the collective bargaining process, and the arbitration process, if necessary. These are details that can properly await the collective bargaining process to resolve.

However, given the time elapsed since the expiry of the last agreement (March 31, 1998), and the time necessary to amend legislation, constitute a bargaining unit and commence and conclude collective bargaining, it essential to achieve an interim resolution of the major financial interest issues such as salaries, pensions, vacation and professional benefits. A formal, non-binding arbitration process as discussed above, convened on an expedited basis, is the most appropriate way to hear evidence and adjudicate on these issues, given the wide differences in the current position of the parties. This expedited, non-binding arbitration should determine with accuracy the comparative total financial benefits of Crown Counsel to Legal Services Society lawyers in British Columbia, and to Crown Counsel in other Canadian jurisdictions, and report out in time for any recommended adjustment to be included in the Spring 2000 provincial budget.

I have had discussions with the CCA and PSERC on acceptable arbitrators that might be available to hold hearings and report out during February 2000, and I believe this is an achievable time frame.

I remain available to discuss the issues addressed in this report, if that should prove helpful.

Sincerely,

Stephen Owen

Stephen Owen

cc. Austin Cullen

Canada (Attorney General) v. JTI-Macdonald Corp.

Supreme Court Reports

Supreme Court of Canada

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

Heard: February 19, 2007;

Judgment: June 28, 2007.

File No.: 30611.

[2007] 2 S.C.R. 610 | *[2007] 2 R.C.S. 610* | *[2007] S.C.J. No. 30* | *[2007] A.C.S. no 30* | *2007 SCC 30*

Attorney General of Canada, Appellant/Respondent on cross-appeal; v. JTI-Macdonald Corp., Respondent/Appellant on cross-appeal. And Attorney General of Canada, Appellant/Respondent on cross-appeal; v. Rothmans, Benson & Hedges Inc., Respondent/Appellant on cross-appeal. And Attorney General of Canada, Appellant/Respondent on cross-appeal; v. Imperial Tobacco Canada Ltd., Respondent/Appellant on cross-appeal, and Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan and Canadian Cancer Society, Interveners.

(142 paras.)

[page611]

Appeal From: ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Freedom of expression — Advertising and promotion of tobacco — Whether limits imposed on tobacco manufacturers' freedom of expression by provisions of Tobacco Act and Tobacco Products Information Regulations justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Tobacco Act, *S.C. 1997, c. 13, ss. 18*, 19, 20, 22, 24, 25 — Tobacco Products Information Regulations, *SOR/2000-272*.

Summary:

In 1995, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, *[1995] 3 S.C.R. 199*, the Court struck down provisions of the *Tobacco Products Control Act* that broadly prohibited all advertising and promotion of tobacco products, subject to specific exceptions, and required that unattributed warning labels be affixed on tobacco product packaging. In response to the Court's decision, Parliament enacted the *Tobacco Act* and the *Tobacco Products Information Regulations*. The scheme of the new legislation, in broad terms, involves permitting information and brand-preference advertising, while forbidding lifestyle advertising and promotion, advertising appealing to young persons, and false or misleading advertising or promotion. In addition, the size of mandatory and attributed health warnings on packaging is increased from 33 percent to 50 percent of the principal display surfaces. The appellant tobacco manufacturers challenged the new legislation, alleging that some provisions limited their right to freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and that those limits were not justified under s. 1 of the *Charter*. More specifically, they challenged (1) the provisions' effect on funded scientific publications, (2) the provisions dealing with false and erroneous promotion, (3) the provisions relating to advertising appealing to young people, (4) the ban on lifestyle advertising, (5) the ban on sponsorship promotion and (6) the

requirement regarding health warning labels. The trial judge determined that the impugned provisions were constitutional and dismissed the manufacturers' actions. The Quebec Court of Appeal upheld most of the scheme, but found parts of some of the provisions to be unconstitutional. The Attorney General of Canada appealed the findings of unconstitutionality, and the tobacco manufacturers cross-appealed on some of the provisions held to be constitutional.

[page612]

Held: The appeals should be allowed and the cross-appeals dismissed.

Properly construed, ss. 18 and 19 of the *Tobacco Act* permit the publication of legitimate scientific works sponsored by the tobacco manufacturers and do not unjustifiably restrict the manufacturers' right to freedom of expression. These sections, as applied to scientific works, are ambiguous. Although the primary object of s. 18 is "product placement" directed at consumers, s. 18(2)(*a*), read literally and in combination with the definition of "promotion" in s. 18(1) and the general prohibition in s. 19, would effect a broad ban on funded scientific works. Such a reading would fit neither the scheme of ss. 18 and 19 nor Parliament's goals. To bring the reference to "scientific work" in s. 18(2)(*a*) into harmony with the purpose and wording of s. 18 as a whole, the word "promotion" in s. 18 should be read as meaning commercial promotion directly or indirectly targeted at consumers. Read in this way, ss. 18 and 19 do not prevent the publication of legitimate scientific works funded by tobacco manufacturers. However, a manufacturer would be prohibited from paying for a particular brand to be included in a commercial scientific work directed at consumers, and this limit on free expression would be saved under s. 1 of the *Charter*. [paras. 52-57]

Section 20 of the *Tobacco Act*, which bans "false, misleading or deceptive" promotion, as well as promotion "likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions", clearly infringes the guarantee of freedom of expression. However, the ban, and more specifically the ban on promotion "likely to create an erroneous impression", are justified under s. 1. This phrase is directed at promotion that, while not literally false, misleading or deceptive in the traditional legal sense, conveys an erroneous impression about the effects of the tobacco product, in the sense of leading consumers to infer things that are not true. It represents an attempt to cover the grey area between demonstrable falsity and invitation to false inference that tobacco manufacturers have successfully exploited in the past. Parliament's objective of combating the promotion of tobacco products by half-truths and by invitation to false inference constitutes a pressing and substantial objective, and prohibiting such forms of promotion is rationally connected to Parliament's public health and consumer protection purposes. The ban on promotion "likely to create an erroneous impression" is not [page613] overbroad or vague, but rather falls within a range of reasonable alternatives. Finally, the impugned phrase meets the requirement of proportionality of effects. The objective is of great importance, nothing less than a matter of life or death for millions of people who could be affected, and the evidence shows that banning advertising by half-truths may help reduce smoking. The expression at stake -- the right to invite consumers to draw an erroneous inference as to the healthfulness of a product that, on the evidence, will almost certainly harm them -- is of low value. [para. 58] [para. 63] [paras. 65-66] [paras. 68-69]

Section 22(2) of the *Tobacco Act* permits information and brand-preference advertising in certain media and certain locations, but s. 22(3) bans "advertising that could be construed on reasonable grounds to be appealing to young persons". This limit on free expression imposed by s. 22(3), properly interpreted, is justified under s. 1 of the *Charter*. Section 22(3) requires the prosecution in a given case to prove that there are reasonable grounds to believe that the advertisement of a tobacco product at issue could be appealing to young persons, in the sense that it could be particularly attractive and of interest to young persons, as distinguished from the general population. This interpretation yields a common meaning for the French and English versions of s. 22(3) and is consistent with Parliament's stated purpose of preventing young people in particular from taking up smoking and becoming addicted to tobacco. This purpose is pressing and substantial, and a ban on advertising appealing to young persons is rationally connected to it. Further, s. 22(3), properly interpreted, satisfies the minimal impairment requirement. The provision does not impose a total ban on advertising. Information and brand-preference advertising is permitted, provided that it is not done in places that young persons are likely to frequent or in publications not addressed to adults, and provided that it is not lifestyle advertising or advertising that there are reasonable grounds

to believe that it could be appealing to young people as a group. Given the sophistication and subtlety of tobacco advertising practices in the past, Parliament cannot be said to have gone further than necessary in blocking advertising that might influence young persons to start smoking. Lastly, s. 22(3) meets the requirement of proportionality of effects. The prohibited speech is of low value, and the beneficial effects of the ban for young persons and for society at large may be significant. Moreover, the vulnerability of the [page614] young may justify measures that privilege them over adults in matters of free expression. [para. 71] [paras. 88-89] [paras. 92-95]

The ban on "lifestyle advertising" in s. 22(3), properly interpreted, also constitutes a justified limit on free expression. The first part of the definition of lifestyle advertising in s. 22(4), which, combined with s. 22(3), removes advertising that associates a product with a way of life from the broad ambit of s. 22(2), is unproblematic. As for the phrase "or evokes a positive or negative emotion about or image of, a way of life", it is aimed at precluding arguments that to constitute lifestyle advertising, there must be a link, on the face of the advertisement, between the tobacco product and a way of life. However, this phrase should be interpreted in a way that leaves room for true information and brand-preference advertising, which s. 22(2) permits. Furthermore, the words "such as one that includes glamour, recreation, excitement, vitality, risk or daring" are to be read as illustrations of lifestyle advertising. As with the other challenged provisions, the pressing and substantial nature of Parliament's objective is beyond challenge. The sophistication and subtlety of lifestyle advertising are reflected in the means Parliament has chosen to deal with it, and there is a rational connection between this provision and Parliament's objective. Minimal impairment is also established. True information and brand-preference advertising continues to be permitted under s. 22(2). Such advertising crosses the line when it associates a product with a way of life or uses a lifestyle to evoke an emotion or image that may, by design or effect, lead more people to become addicted or lead people who are already addicted to increase their tobacco use. Lastly, the proportionality of the effects is clear. The suppressed expression is of low value compared with the significant benefits in lower rates of consumption and addiction that the ban may yield. [para. 101] [para. 109] [para. 111] [paras. 113-115]

Sponsorship promotion, which is subject to a general ban under s. 24 of the *Tobacco Act*, is essentially lifestyle advertising in disguise. For the same reasons as for the prohibition of lifestyle advertising, this clear limit on expression is justified under s. 1. The specific prohibition on using corporate names in sponsorship [page615] promotion and on sports or cultural facilities, which is set out in ss. 24 and 25 of the Act, is also justified. The evidence establishes that as restrictions on tobacco advertising tightened, manufacturers increasingly turned to sports and cultural sponsorship as a substitute form of lifestyle promotion. Placing a tobacco manufacturer's name on a facility is one form such sponsorship takes, and the aim of curbing such promotion justifies imposing limits on free expression. The rational connection element is made out, because placing a corporate name on a list of sponsors or on a sports or cultural facility may promote the use of tobacco in a number of ways. Even where there is no overt connection between the corporate name and the brand name of a tobacco product, the corporate name may serve to promote the sale of the tobacco product. Given the nature of the problem, and in view of the limited value of the expression in issue compared with the beneficial effects of the ban, the proposed solution is proportional. [para. 118] [para. 120] [paras. 125-129]

The requirement in the *Tobacco Products Information Regulations* that the government's health warnings occupy at least 50 percent of the principal display surfaces of packages infringes s. 2(*b*) of the *Charter*, but the infringement is justified under s. 1. Parliament's goal, notably to inform and remind potential purchasers of the product of the health hazards it entails, is pressing and substantial. The evidence as to the importance and effectiveness of such warnings establishes a rational connection between Parliament's requirement for warnings and its objects of reducing the incidence of smoking and of the disease and death it causes. Regarding minimal impairment, the requirement for warning labels, including their size, falls within a range of reasonable alternatives. The reasonableness of the government's requirement is supported, notably, by the fact that many countries require warnings at least as large as Canada's. Finally, the benefits flowing from larger warnings are clear, while the detriments to the manufacturers' expressive interest in creative packaging are small. [para. 130] [paras. 134-135] [paras. 137-140]

Cases Cited

Applied: *R. v. Oakes*, [1986] 1 S.C.R. 103; **referred to:** *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; [page616] *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Lucas*, [1998] 1 S.C.R. 439; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

Statutes and Regulations Cited

Animal Pedigree Act, R.S.C. 1985, c. 8 (4th Supp.), s. 64.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 7.

Food and Drugs Act, R.S.C. 1985, c. F-27, s. 5(1).

Radiation Emitting Devices Act, R.S.C. 1985, c. R-1, s. 5(1).

Tobacco Act, S.C. 1997, c. 13, ss. 4, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 43, 47, 49, 50.

Tobacco Products Control Act, S.C. 1988, c. 20.

Tobacco Products Information Regulations, SOR/2000-272, ss. 2, 3, 4, 5.

Treaties and Other International Instruments

WHO Framework Convention on Tobacco Control, 2302 U.N.T.S. 229, arts. 11(1)(a), 13(4)(a).

Authors Cited

Barak, Aharon. "Proportional Effect: The Israeli Experience" (2007), 57 U.T.L.J. 369.

Canadian Oxford Dictionary, 2nd ed. Edited by Katherine Barber. Don Mills, Ont.: Oxford University Press, 2004, "appeal".

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2., 5th ed. Scarborough, Ont.: Thomson/Carswell, 2007.

Hogg, Peter W., Allison A. Bushell Thornton and Wade K. Wright. "*Charter* Dialogue Revisited -- Or 'Much Ado About Metaphors'" (2007), 45 Osgoode Hall L.J. 1.

[page617]

History and Disposition:

APPEALS and CROSS-APPEALS from judgments of the Quebec Court of Appeal (Beauregard, Brossard and Rayle JJ.A.), [2005] Q.J. No. 11174 (QL), 2005 QCCA 725 (*sub nom. Imperial Tobacco Canada Ltée v. Canada (Procureure générale)*), and [2005] R.J.Q. 2018, 260 D.L.R. (4th) 224, [2005] Q.J. No. 10915 (QL), 2005 QCCA 726 (*sub nom. JTI-Macdonald Corp. v. Canada (Attorney General)*), and [2005] Q.J. No. 11175 (QL), 2005 QCCA 727

(*sub nom. Rothmans, Benson & Hedges Inc. v. Canada (Procureure générale)*), reversing in part a decision of Denis J., [2003] R.J.Q. 181, 102 C.R.R. (2d) 189, [2002] Q.J. No. 5550 (QL). Appeals allowed and cross-appeals dismissed.

Counsel

Claude Joyal, *Bernard Mandeville* and *Maurice Régnier*, for the appellant/respondent on cross-appeal.

Douglas C. Mitchell, *Georges R. Thibaudeau* and *Catherine McKenzie*, for the respondent/appellant on cross-appeal JTI-Macdonald Corp.

Steven I. Sofer and *Rachel Ravary*, for the respondent/appellant on cross-appeal Rothmans, Benson & Hedges Inc.

Simon V. Potter, *Gregory B. Bordan* and *Sophie Perreault*, for the respondent/appellant on cross-appeal Imperial Tobacco Canada Ltd.

Robin K. Basu and *Mark Crow*, for the intervener the Attorney General of Ontario.

Dominique A. Jobin and *Caroline Renaud*, for the intervener the Attorney General of Quebec.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Cynthia Devine, for the intervener the Attorney General of Manitoba.

Craig Jones and *Jonathan Penner*, for the intervener the Attorney General of British Columbia.

[page618]

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Julie Desrosiers and *Robert Cunningham*, for the intervener the Canadian Cancer Society.

The judgment of the Court was delivered by

McLACHLIN C.J.

I. Overview

1 These appeals concern the constitutionality of Canada's laws on tobacco advertising and promotion, under the *Tobacco Act*, S.C. 1997, c. 13, and the *Tobacco Products Information Regulations*, SOR/2000-272 ("*TPIR*"). The main issue is whether the limits certain provisions impose on freedom of expression are justified as reasonable under s. 1 of the *Canadian Charter of Rights and Freedoms*.

2 The case pits tobacco manufacturers against the Attorney General of Canada, who is supported by a number of provincial Attorneys General and the Canadian Cancer Society. The tobacco manufacturers, at this stage of the litigation, challenge six aspects of the legislative and regulatory scheme: (1) its effect on funded scientific publications; (2) its provisions dealing with false and erroneous promotion; (3) its provisions relating to advertising appealing to young persons; (4) its ban on lifestyle advertising; (5) its ban on sponsorship promotion; and (6) its regulatory requirement that health warning labels occupy 50 percent of tobacco packaging.

3 The trial judge, Denis J., upheld the provisions as constitutional ([2003] R.J.Q. 181, 102 C.R.R. (2d) 189). The

Quebec Court of Appeal upheld most of the scheme, but found parts of some of the provisions to be unconstitutional: *[2005] R.J.Q. 2018*, *[2005] Q.J. No. 10915* (QL), *2005 QCCA 726*; [2005] Q.J. No. 11174 (QL), *2005 QCCA 725*; [page619] [2005] Q.J. No. 11175 (QL), *2005 QCCA 727*. The Attorney General of Canada appeals the findings of unconstitutionality to this Court, and the tobacco manufacturers cross-appeal on some of the provisions that the Court of Appeal held constitutional.

4 I conclude that properly interpreted, the legislative and regulatory provisions at issue do not unjustifiably infringe s. 2(*b*) of the *Charter* and should be upheld, for the reasons that follow.

II. Background

5 Before analyzing the six disputed aspects of the legislative and regulatory scheme, it is necessary to set the stage by discussing the historical background of the legislation and its social and legal contexts.

6 In 1995, this Court struck down the advertising provisions of the *Tobacco Products Control Act*, S.C. 1988, c. 20: *RJR-MacDonald Inc. v. Canada (Attorney General)*, *[1995] 3 S.C.R. 199*. This Act broadly prohibited all advertising and promotion of tobacco products, subject to specific exceptions, and required affixing unattributed warning labels on tobacco product packaging. The majority of the Court in that case held that the provisions limited free expression and that the government had failed to justify the limitations under s. 1 of the *Charter*. In particular, the government, by failing to show that less intrusive measures were not available, had failed to establish that the limits met the requirement of minimal impairment developed in *R. v. Oakes*, *[1986] 1 S.C.R. 103* (McLachlin J., at paras. 163 and 165, and Iacobucci J., at para. 191). While the majority agreed that s. 1 justification on issues such as this does not require scientifically precise proof, it found that the absence of virtually any proof was fatal to the government's case. The trial judge had found that the requirements for justification were not met on the evidence. The majority concluded that on the record before it, there was [page620] no basis to interfere with the trial judge's conclusion.

7 In response to the Court's decision in *RJR*, Parliament enacted the *Tobacco Act* and regulations at issue on these appeals. The scheme of the new legislation, in broad terms, involved permitting information and brand-preference advertising, while forbidding lifestyle advertising and promotion, advertising appealing to young persons, and false or misleading advertising or promotion. In addition, the size of mandatory and attributed health warnings on packaging was increased from 33 percent to 50 percent of the principal display surfaces. In general, the new scheme was more restrained and nuanced than its predecessor. It represented a genuine attempt by Parliament to craft controls on advertising and promotion that would meet its objectives as well as the concerns expressed by the majority of this Court in *RJR*.

8 The government's response to the inevitable challenge to the new scheme, when it came, also reflected the Court's decision in *RJR*. The government presented detailed and copious evidence in support of its contention that where the new legislation posed limits on free expression, those limits were demonstrably justified under s. 1 of the *Charter*.

9 Parliament was assisted in its efforts to craft and justify appropriately tailored controls on tobacco advertising and promotion by increased understanding of the means by which tobacco manufacturers seek to advertise and promote their products and by new scientific insights into the nature of tobacco addiction and its consequences. On the findings of the trial judge in the present case, tobacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We now know that half of smokers will die [page621] of tobacco-related diseases and that the costs to the public health system are enormous. We also know that tobacco addiction is one of the hardest addictions to conquer and that many addicts try to quit time and time again, only to relapse.

10 Moreover, the international context has changed since 1995. Governments around the world are implementing anti-tobacco measures similar to and, in some cases, more restrictive than Canada's. The *WHO Framework Convention on Tobacco Control* (May 2003), 2302 U.N.T.S. 229, which Canada ratified in 2004, mandates a comprehensive ban on tobacco promotion, subject to state constitutional requirements. The Convention, with 168 signatories and 148 parties, is one of the most widely embraced of multilateral treaties. Domestically, governments

now widely accept that protecting the public from second-hand smoke is a legitimate policy objective. Many provinces have banned smoking in enclosed public places, and some are legislating to recover health care costs from tobacco manufacturers and to restrict tobacco promotion even further than the federal *Tobacco Act*. The tobacco industry has been criticized for its use of "light" and "mild" cigarette designations, which the manufacturers agreed in 2006 to discontinue following an investigation by the Competition Bureau.

11 None of these developments remove the burden on the Crown to show that limitations on free expression imposed by the legislation are demonstrably justified in a free and democratic society, as required by s. 1 of the *Charter*. The mere fact that the legislation represents Parliament's response to a decision of this Court does not militate for or against deference: P. W. Hogg, A. A. Bushell Thornton and W. K. Wright, "*Charter* Dialogue Revisited -- Or 'Much Ado About Metaphors'" *(2007), 45 Osgoode Hall L.J. 1*, at pp. 47-48. The [page622] legal template set out in *Oakes* and *RJR* remains applicable. However, when that template is applied to the evidence adduced by the government in this case more than a decade later, different conclusions may emerge. *RJR* was grounded in a different historical context and based on different findings supported by a different record at a different time. The *Tobacco Act* must be assessed in light of the knowledge, social conditions and regulatory environment revealed by the evidence presented in this case.

III. The Evidence

12 The trial judge's findings of fact are worth examining in detail; the key points are as follows.

13 Some 45,000 Canadians die from tobacco-related illnesses every year. By this measure, smoking is the leading public health problem in Canada.

14 Most smokers begin as teenagers, between the ages of 13 and 16. Tobacco advertising serves to recruit new smokers, especially adolescents. It is completely unrealistic to claim that tobacco advertising does not target people under 19 years of age. Recent tobacco advertising has three objectives: reaching out to young people, reassuring smokers (to discourage quitting), and reaching out to women.

15 Tobacco contains nicotine, a highly addictive drug. Some 80 percent of smokers wish they could quit but cannot. However, new smokers, especially young people, are often unaware of (or tend to deceive themselves about) the possibility of addiction. Tobacco companies have designed cigarettes to deliver increased levels of nicotine.

16 The percentage of Canadians who smoke fell from 35 percent to 24 percent between 1985 and [page623] 2000. The percentage of smokers fell in every age group except 15- to 19-year-olds.

17 The manufacturers admitted that they produce almost all of the cigarettes sold in Canada, and that their businesses are profitable despite the fact that cigarettes are heavily taxed. They also admitted to spending substantial sums promoting their respective brands.

IV. The Legislative and Regulatory Scheme

18 The purposes of the *Tobacco Act* are "to provide a legislative response to a national public health problem of substantial and pressing concern" and, more particularly, "to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases"; "to protect young persons and others from inducements to use tobacco products and the consequent dependence on them"; "to protect the health of young persons by restricting access to tobacco products"; and "to enhance public awareness of the health hazards of using tobacco products": s. 4(*a*), (*b*), (*c*) and (*d*) (see Appendix A, setting out relevant portions of the Act).

19 The *Tobacco Act* seeks to accomplish these purposes by targeting "the four Ps" of tobacco marketing: product, price, point of sale and promotion. These appeals deal only with the fourth "P" -- promotion -- which is regulated under Part IV of the Act. In addition to the provisions impugned in these appeals, Part IV prohibits celebrity

endorsements, regulates the distribution of branded accessories and non-tobacco products, prohibits sales promotions such as rebates, prizes and free samples, and regulates the retail display of tobacco products. The government chose the current structure of the legislation after extensive public consultation and after considering a number of alternatives.

20 Restrictions on tobacco advertising are a valid exercise of Parliament's criminal law power: *RJR*. [page624] However, the regulatory offences created by the *Tobacco Act* are not true crimes and are punishable on a strict liability basis: see *R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154*. Violations of the promotion provisions carry serious penalties: fines of up to $300,000 per day and/or imprisonment for up to two years (ss. 43 and 47). A tobacco company can be convicted of a separate offence for each day the violation continues (s. 49). Directors and officers can be convicted for offences committed by corporations (s. 50).

21 The basic structure of the limitations on advertising and promotion, along with the manufacturers' objections to them, may be described as follows.

1. *Promotion*

22 The starting point is a general prohibition on promoting tobacco products, except as authorized by the Act or regulations:

> **19.** No person shall promote a tobacco product or a tobacco product-related brand element except as authorized by this Act or the regulations.

"Promotion" is defined in s. 18. The basic definition is broad:

> **18.** (1) In this Part, "promotion" means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.

23 Section 18(2) creates exceptions to this general prohibition. The first is an exception for representations of tobacco products in works of art or science, provided no consideration is given for the use or depiction in the work, production or [page625] performance: s. 18(2)(*a*). The second is an exception for "a report, commentary or opinion in respect of a tobacco product", provided no consideration is given by a manufacturer or retailer for a reference to a tobacco product: s. 18(2)(*b*). The third exception, which does not concern us here, is for promotion within the tobacco industry: s. 18(2)(*c*). The manufacturers argue that the prohibition on depiction of tobacco products in scientific works if consideration is given prevents them from funding and publishing scientific research on tobacco products.

2. *Specific Prohibitions: False Promotion; Lifestyle Advertising and Advertising Appealing to Young Persons*

24 Having broadly prohibited promotion subject to the specific exceptions within s. 18(2) and other provisions of the Act or regulations, the legislation goes on to make a number of specific prohibitions.

25 The first is a broad blanket prohibition against false or deceptive promotion of tobacco products:

> **20.** No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.

The manufacturers argue that this prohibition is impermissibly vague and overbroad, because it forbids not only false or deceptive promotion (terms that have a recognized legal meaning), but goes on to prohibit anything "likely to create an erroneous impression about the characteristics" and health risks of tobacco products.

26 The legislation also prohibits testimonials and endorsements (s. 21), which the manufacturers do not challenge.

Prohibitions affecting packaging [page626] and display (ss. 23, 24, 25 and 26) are similarly not challenged (with the exception of mandatory health warnings on packaging).

27 In s. 22(1), the Act prohibits advertisements that depict "a tobacco product, its package or a brand element". However, in s. 22(2), it goes on to carve out an exception from this prohibition for information and brand-preference advertising in publications addressed and mailed to identified adults, in publications with an adult readership of not less than 85 percent, or in signs in places not frequented by young persons.

28 The effect of s. 22(2) is to allow information or brand-preference advertising of tobacco products in publications and venues where adults will constitute the principal audience. However, presumably because Parliament was concerned that such advertising could still reach young people (for example, because publications with an 85 percent adult readership may nevertheless be read by large numbers of young persons), or could cross the line into lifestyle advertising, it further qualified this already restricted form of advertising:

> **22.** ...
>
> (3) Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.

"Lifestyle advertising" is defined in s. 22(4) as "advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring". No definition is provided of what might be appealing to young persons. The manufacturers argue that the prohibitions on lifestyle advertising and advertising appealing to young persons are vague and overbroad, and thus unconstitutional.

[page627]

29 The disputed phrases referring to lifestyle advertising and advertising appealing to young persons reappear in s. 27, which prevents the use of brand elements of tobacco products on non-tobacco products.

3. *Sponsorships*

30 Section 24 of the *Tobacco Act* forbids the display of tobacco brand elements or manufacturers' names in any promotion "that is used, directly or indirectly, in the sponsorship of a person, entity, event, activity or permanent facility". Section 25 forbids display of brand elements or manufacturers' names on any "permanent facility", if this associates the element or name with a sports or cultural event or activity. The manufacturers challenge these prohibitions on sponsorships. They argue first that the general ban on promotion is not justified and, alternatively, that if it is, the specific ban on the use of corporate names, as distinguished from brand elements, is overbroad, and thus unconstitutional.

4. *Warnings on Packaging*

31 Finally, the new regulations (the *TPIR* (see Appendix B)) increase the required size of warning labels on packaging from 33 percent to 50 percent of the principal display surfaces (s. 5(2)(*b*)). The manufacturers object to the increase, arguing that the warnings infringe their freedom of expression and that the government has not shown the increase in size to be justified.

V. Analysis

32 Before turning to the challenged provisions in more detail, it may be helpful to discuss the main principles that guide the analysis of their constitutionality.

33 The manufacturers challenge the disputed provisions on the ground that they infringe or limit their [page628] right to freedom of expression under s. 2(*b*) of the *Charter*. The government concedes this infringement, except in the case of the increase in size of the warning labels, but says the limits on the right are justified under s. 1 of the *Charter*.

34 Section 2(*b*) of the *Charter* provides:

> **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;

When the *Charter* was adopted, the question arose of whether the free expression guarantee extended to commercial expression by corporations. This Court ruled that it did: *Irwin Toy Ltd. v. Quebec (Attorney General)*, *[1989] 1 S.C.R. 927*. The Court premised this conclusion on an examination of the values protected by the free expression guarantee: individual self-fulfilment, truth seeking and democratic participation. It concluded that, given the Court's previous pronouncements that *Charter* rights should be given a large and liberal interpretation, there was no sound reason for excluding commercial expression from the protection of s. 2(*b*). It noted that commercial speech may be useful in giving consumers information about products and providing a basis for consumer purchasing decisions: *Ford v. Quebec (Attorney General)*, *[1988] 2 S.C.R. 712*, at pp. 766-67.

35 The main issue with respect to the challenged provisions is whether the government has shown them to be "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*, which provides:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject [page629] only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

36 This engages what in law is known as the proportionality analysis. Most modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate. The concept of proportionality finds its roots in ancient and scholastic scholarship on the legitimate exercise of government power. Its modern articulations may be traced to the Supreme Court of Germany and the European Court of Human Rights, which were influenced by earlier German law: A. Barak, "Proportional Effect: The Israeli Experience" *(2007), 57 U.T.L.J. 369*, at pp. 370-71). This Court in *Oakes* set out a test of proportionality that mirrors the elements of this idea of proportionality -- first, the law must serve an important purpose, and second, the means it uses to attain this purpose must be proportionate. Proportionality in turn involves rational connection between the means and the objective, minimal impairment and proportionality of effects. As Dickson C.J. stated in *Oakes*, at p. 139:

> There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance". [Emphasis deleted.]

37 The broad objective of the limitations on freedom of expression at issue in this case is to deal with the public health problem posed by tobacco consumption by protecting Canadians against [page630] debilitating and fatal diseases associated with tobacco consumption. More particularly, the Act seeks to enhance public awareness of the health hazards of using tobacco products and to protect the health of young people by restricting access to tobacco products: s. 4. An objective will be deemed proper if it is for the realization of collective goals of fundamental importance: P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at p. 132; *Oakes*, at p. 136. In the words of *Oakes*, the objective must be "pressing and substantial".

38 As discussed in *RJR*, determining the objective of a statute for the purposes of the proportionality analysis may be difficult. Statutes may have different objectives, at different levels of abstraction. The broader and more expansive the objective, the harder it may be to show that the means adopted to promote it impair rights minimally. In this case, Parliament has stated its overall objective broadly: protecting the health of Canadians and responding

to a national public health problem. No one disputes the importance of this objective. But Parliament has also stated its objectives more narrowly, linking the broader purpose to the objective of the particular provisions at issue, for example protecting young persons and others from inducements to use tobacco and enhancing public awareness of the health hazards of using tobacco. By defining its objective with such precision, Parliament has taken care not to overstate it or exaggerate its importance: *RJR*, at para. 144.

39 This brings us to the other side of the proportionality analysis -- the means by which Parliament has chosen to pursue its objective. Here those means involve a limitation on free expression which is protected by the Constitution. To pass muster, the means must be rationally connected to the objective, impair the right in a minimal, tailored fashion, and be proportionate or balanced in effect. Whether these requirements are met must be assessed in relation to the particular restriction imposed.

[page631]

40 Few cases have foundered on the requirement of rational connection. That, however, does not mean that this step is unimportant. The government must establish that the means it has chosen are linked to the objective. At the very least, it must be possible to argue that the means may help to bring about the objective. This was a problem in *RJR*, where the trial judge found that while the government had completely banned commercial advertising, it had not established that pure information or brand-preference advertising was connected to an increase in consumption. In the current Act, Parliament sought to avoid this difficulty by permitting information and brand-preference advertising, subject to exceptions.

41 Deference may be appropriate in assessing whether the requirement of rational connection is made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.

42 The means must not only be rationally connected to the objective; they must be shown to be "minimally impairing" of the right. The means must be carefully tailored to the objective. Parliament is entitled to pursue its objective, but in doing so, it must impair the rights of Canadians as little as possible.

43 Again, a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem. There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the [page632] alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives: *R. v. Edwards Books and Art Ltd.*, *[1986] 2 S.C.R. 713*; *Irwin Toy*.

44 The minimal impairment analysis in this case will also be coloured by the relationship between constitutional review and statutory interpretation. Before engaging in constitutional review, the law must be construed. This may have a critical effect at the stage of minimal impairment, where overbreadth is alleged. The process of interpretation may resolve ambiguity in favour of a more limited meaning. This may only be done in cases of real ambiguity in the statute. In cases of ambiguity, therefore, claims of overbreadth may be resolved by appropriate interpretation: *R. v. Sharpe*, *[2001] 1 S.C.R. 45*, *2001 SCC 2*, at para. 32.

45 The final question is whether there is proportionality between the *effects* of the measure that limits the right and the law's *objective*. This inquiry focuses on the practical impact of the law. What benefits will the measure yield in

terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?

46 Although cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be [page633] weighed against the impact on the right. If rational connection and minimal impairment were to be met, and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective.

47 As will be seen, this case, while argued mainly on the basis of minimal impairment, engages concerns relating to proportionality of effects. The potential benefits of decreasing tobacco use and discouraging young people from becoming addicted to it are high. On the other hand, a number of the deleterious effects on the right arguably fall at the low end of the spectrum of free expression. (The alleged ban on publication of scientific research is an exception.) W hen commercial expression is used, as alleged here, for the purposes of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.

48 Against this background, I turn more specifically to the challenged provisions of the legislative and regulatory scheme.

1. *Publication of Manufacturer-Sponsored Scientific Works*

49 As mentioned previously, s. 19 of the Act sets out a general ban on the promotion of tobacco products, subject to specific exceptions. Section 18(2) excludes some forms of promotion from this ban, including "literary, dramatic, musical, cinematographic, scientific, educational or artistic" works that "us[e] or depic[t]" tobacco products, so long as no consideration is given for the use or depiction of the tobacco product.

50 The manufacturers argue that this exception is not broad enough to exempt the publication of legitimate scientific research. If they sponsor research, they will be giving consideration for it. This bars them from publishing the results of legitimate [page634] scientific research. For example, research carried out by a tenured professor under a grant from a tobacco manufacturer, producing results that are favourable to (and hence "promoting") a tobacco product, could not, they claim, even be published in a peer-reviewed journal.

51 The trial judge, Denis J., held that s. 18 is confined to commercial promotion and that this does not restrict legitimate scientific research. However, the Court of Appeal, *per* Beauregard J.A., held that ss. 18 and 19 did impose a restriction on publication of scientific research, and went on to find them an unjustified intrusion on the right of free expression. To correct the situation, the Court of Appeal ordered that the exclusion from the exemption of works for which consideration is given, as applied to scientific works, should be read out of s. 18(2).

52 A ban on the publication of all sponsored scientific work, if that is what the Act requires, is difficult to justify. Even if it could be argued that such a ban meets the rational connection test on the basis that sponsored research might produce results that could encourage tobacco consumption, such a ban would likely not minimally intrude on the right of free expression. The possibility of sponsoring scientific work on tobacco could, to be sure, be abused. For example, tobacco companies could pay for scientific studies that are deceptive or misleading, or the publication of which is aimed at teenagers. But these concerns, it might be argued, do not justify a wholesale ban on publishing scientific works; they can and should be specifically targeted. Nor, arguably, would a total ban on sponsored scientific works satisfy the requirement of proportionality of effects. The benefits of publishing legitimate scientific research are likely to outweigh any detriment to Parliament's goals. The expressive activity of publishing scientific research is valuable, and prohibitions on it have an impact on the right to free expression in a serious manner. By contrast, the beneficial effect of the ban could be tenuous. [page635] However it is viewed, the manufacturers assert, the ban unjustifiably restricts their right of freedom of expression. Potentially valuable expression is restricted, to no good or proportionate end.

53 The question remains, however: Do the provisions, properly interpreted, impose a total ban on sponsored

scientific research? In my view, the answer to this question is no. Properly construed, ss. 18 and 19 permit the publication of legitimate scientific works sponsored by the tobacco manufacturers.

54 I begin with the proposition that these sections, as applied to scientific works, are ambiguous. It is not clear, on the face of the words, what Parliament intended. Section 18 is oddly drafted. Read literally, s. 18(2)(*a*), in combination with the definition in s. 18(1) and the prohibition in s. 19, would effect a broad ban on scientific works. Such a reading seems misplaced. It fits neither the scheme of ss. 18 and 19 nor Parliament's goals. The primary object of s. 18 is "product placement" directed at consumers, such as the practice of a tobacco manufacturer paying a studio to have its brand of cigarettes appear in a film. Although the Attorney General claims that the same concerns about "product placement" arise in regard to scientific works, it is hard to see why this would lead to a ban on all legitimate, funded scientific work.

55 Confronted with a statutory provision that, read literally, seems to make no sense, the Court should [page636] ask whether the section can be interpreted in a manner that fits the context and achieves a rational result. This flows from the modern approach to statutory interpretation, as expressed by Driedger in a passage often quoted by this Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Sharpe*, at para. 33, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.)

56 The Attorney General of Canada urges a purposive interpretation of s. 18 that confines "promotion" to commercial promotion. This was the approach of the trial judge, Denis J., who held that only commercial promotion targeting consumers was caught by s. 18 (at para. 341). Read in this way, ss. 18 and 19 do not prohibit the publication of legitimate scientific research, because it is neither commercial nor aimed at consumers. On the other hand, a manufacturer would be prohibited from paying for a particular brand to be included in a commercial scientific work directed at consumers. Such a limit on free expression would, however, be saved under s. 1 of the *Charter*; rational connection, minimal impairment and proportionality of effects would be clearly established. This interpretation brings the reference to "scientific ... work" in s. 18(2)(*a*) into harmony with the purpose and wording of s. 18 as a whole.

57 I conclude that "promotion" in s. 18 should be read as meaning commercial promotion directly or indirectly targeted at consumers.

2. *False Promotion*

58 Section 20 bans "false, misleading or deceptive" promotion, as well as promotion "likely to create [page637] an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions".

59 The trial judge upheld this provision, on the basis that it did not violate the s. 2(*b*) guarantee of freedom of expression. The Court of Appeal, *per* Beauregard J.A., held that the words "likely to create an erroneous impression" were vague and overbroad and thus could not be justified as a reasonable limit on free expression under s. 1. The court ordered the offending phrase struck from s. 20.

60 Section 20 clearly infringes the guarantee of freedom of expression. The *Charter* is content-neutral and protects the expression of both truths and falsehoods. Consequently, the regulation of falsehoods must be justified under s. 1 of the *Charter*. See *R. v. Zundel, [1992] 2 S.C.R. 731*; *R. v. Lucas, [1998] 1 S.C.R. 439*.

61 The s. 1 inquiry into the justification of the ban imposed by s. 20 of the Act must be set in the factual context of a long history of misleading and deceptive advertising by the tobacco industry. The creative ability of the manufacturers to send positive messages about a product widely known to be noxious is impressive. In recent years, for example, manufacturers have used labels such as "additive free" and "100% Canadian tobacco" to

convey the impression that their product is wholesome and healthful. Technically, the labels may be true. But their intent and effect is to falsely lull consumers into believing, as they ask for the package behind the counter, that the product they will consume will not harm them, or at any rate will harm them less than would other tobacco products, despite evidence demonstrating that products bearing these labels are in fact no safer than other tobacco products. The wording chosen by Parliament in s. 20 and its justification must be evaluated with this context in mind. Parliament's concern was to combat misleading false inferences about product [page638] safety and to promote informed, enlightened consumer choice.

62 The specific objection is to the phrase "or that are likely to create an erroneous impression" in s. 20. The manufacturers argue that this phrase is overbroad and vague, and introduces subjective considerations. How, they ask, can they predict what is "likely to create an erroneous impression"? The words false, misleading or deceptive, used as legal terms, generally refer to objectively ascertainable facts. If "likely to create an erroneous impression" adds something to "false, misleading or deceptive", as presumably was Parliament's intent, what is it?

63 The answer is that the phrase "likely to create an erroneous impression" is directed at promotion that, while not literally false, misleading or deceptive in the traditional legal sense, conveys an erroneous impression about the effects of the tobacco product, in the sense of leading consumers to infer things that are not true. It represents an attempt to cover the grey area between demonstrable falsity and invitation to false inference that tobacco manufacturers have successfully exploited in the past.

64 The industry practice of promoting tobacco consumption by inducing consumers to draw false inferences about the safety of the products is widespread. This suggests that it is viewed by the industry as effective. Parliament has responded by banning promotion that is "likely to create an erroneous impression". This constitutes a limit on free expression. The only question is whether the limit is justified under s. 1 of the *Charter*.

[page639]

65 Parliament's objective of combating the promotion of tobacco products by half-truths and by invitation to false inference constitutes a pressing and substantial objective, capable of justifying limits on the right of free expression. Prohibiting such forms of promotion is rationally connected to Parliament's public health and consumer protection purposes.

66 The impugned phrase does not impair the right of free expression more than is necessary to achieve the objective. The words false, misleading or deceptive do not do the work assigned to the additional phrase, "likely to create an erroneous impression". Nor is it easy to find narrower words that would accomplish that task. The exact wording of the impugned phrase appears in the English version of Articles 11(1)(a) and 13(4)(a) of the *WHO Framework Convention on Tobacco Control*. The French version uses almost identical wording. The Convention mandates the use of such language in parties' national law, subject to the application of domestic constitutional principles. At least three other Canadian statutes use similar wording: the *Food and Drugs Act*, R.S.C. 1985, c. F-27, s. 5(1); the *Radiation Emitting Devices Act*, R.S.C. 1985, c. R-1, s. 5(1); the *Animal Pedigree Act*, R.S.C. 1985, c. 8 (4th Supp.), s. 64. These examples lend weight to the conclusion that the ban on promotion "likely to create an erroneous impression" is not overbroad or vague, but on the contrary, falls within a range of reasonable alternatives.

67 I would reject the manufacturers' claim that the French wording "*susceptible de créer une fausse impression*" is significantly broader than the English "likely to create an erroneous impression". "*Susceptible*" is not equivalent to the English "susceptible"; it is often used as the equivalent of "likely", including in the *WHO Framework Convention on Tobacco Control*. When the English and French versions of the statute are considered together, the meaning is clear.

[page640]

68 Finally, the impugned phrase meets the requirement of proportionality of effects. On the one hand, the objective

is of great importance, nothing less than a matter of life or death for millions of people who could be affected, and the evidence shows that banning advertising by half-truths and by invitation to false inference may help reduce smoking. The reliance of tobacco manufacturers on this type of advertising attests to this. On the other hand, the expression at stake is of low value -- the right to invite consumers to draw an erroneous inference as to the healthfulness of a product that, on the evidence, will almost certainly harm them. On balance, the effect of the ban is proportional.

69 I conclude that the ban on false promotion, and particularly on promotion "likely to create an erroneous impression", is justified under s. 1 of the *Charter* as a reasonable limit on free expression and that s. 20 of the *Tobacco Act* is constitutional.

3. *Advertising and Promotion Appealing to Young Persons*

70 The *Tobacco Act* uses three particular means of protecting young persons from tobacco advertising and promotion. The first consists of the placement restrictions, found in s. 22(2). The second is a ban on advertising that "could be construed on reasonable grounds to be appealing to young persons", found in s. 22(3). The third is a ban on the use of tobacco brand elements on non-tobacco products that are "associated with young persons or could be construed on reasonable grounds to be appealing to young persons": s. 27(*a*). The manufacturers challenge the second of these measures, the ban on advertising that "could be construed on reasonable grounds to be appealing to young persons": s. 22(3).

[page641]

71 The structure of the scheme at issue, broadly put, is this. As mentioned previously, s. 22(2) permits information and brand-preference advertising in certain media and certain locations. Brand-preference advertising is broadly defined as "advertising that promotes a tobacco product by means of its brand characteristics". Brand characteristics arguably may include elements that are directed at young persons. To remove these elements, s. 22(3) of the Act claws them back. The result is to ban this type of advertising.

72 There is no doubt that this ban limits free expression and thus infringes s. 2(*b*) of the *Charter*. The only question is whether the ban is justified under s. 1 of the *Charter*. I conclude that it is.

73 Once again, the analysis must begin by interpreting s. 22(3). Again, the question is what Parliament intended the section to mean. In this case, the task of interpretation is challenging. The language used, whether in English or in French, is not without difficulty. To complicate matters, the two versions can be read as imparting different nuances.

74 The courts below struggled with these difficulties. The trial judge, Denis J., began by rejecting the tobacco industry's evidence that tobacco advertising does not target youth, and is directed only at brand-switching among adults. He found that much of the industry's advertising is in fact aimed at youth, and that persuading teenagers to take up smoking was a calculated and deliberate industry advertising strategy. He went on to hold that the phrases "reasonable grounds", "could be" and "appealing to young persons" are well understood and sufficient to allow a judge in a particular case to decide if a violation had been made out.

75 The Court of Appeal divided on the constitutionality of the provision. The majority (Brossard [page642] and Rayle JJ.A.) upheld it. Like the trial judge, they took the test to be whether the words are capable of interpretation by a tribunal. They held that they were. They emphasized that on this matter, a great deal of deference must be accorded to Parliament's choice. Parliament, in their view, has the right to be draconian when it comes to children and youth. The offence, they noted, is not criminal but regulatory. The ban is aimed at protecting a vulnerable group. When the importance of the objective is compared with the lack of value of the expression constrained, there can be no doubt that it is proportionate, in their view. The courts, in these circumstances, must defer to Parliament.

76 Beauregard J.A. dissented. In his view, the provision is overbroad. It is not enough that a judge be able to apply

the section; in addition, it must permit the tobacco manufacturers to know what is allowed and what is not allowed. It must be possible to distinguish between what is appealing to young persons and is banned, and what is appealing to adults and is permitted. Because this line cannot be drawn, the effect, in the view of Beauregard J.A., is to make this a total ban on all information and brand-preference advertising, contrary to the clear purport of s. 22(2). The remedy, in his view, was to strike from s. 22(3) the phrase "or advertising that could be construed on reasonable grounds to be appealing to young persons".

77 The manufacturers attribute two vices to the provision banning advertising that could be appealing to youth: vagueness and overbreadth. The two are related. The manufacturers' main point is that the provision offers insufficient guidance for them to know when they might be running afoul of the law. The manufacturers' argument strongly resembles a s. 7 "vagueness" argument. However, since s. 7 is not at issue in this case, it is appropriate to deal with this under s. 1, either as a lack of a "limit prescribed by law" or as a lack of minimal impairment. As [page643] Sopinka J. stated in *Osborne v. Canada (Treasury Board)*, *[1991] 2 S.C.R. 69*, at pp. 94-95 (cited with approval by a unanimous Court in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *[1996] 3 S.C.R. 480*, at para. 56):

> Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power... . In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a *Charter* right within reasonable limits. In this sense vagueness is an aspect of overbreadth.

78 It is thus clear that both overbreadth and vagueness can be considered in determining whether a limit on free expression is justified under s. 1 of the *Charter*, although the two concepts raise distinct considerations. Overbreadth is concerned with whether the provision on its face catches more expression than necessary to meet the legislator's objective. The criticism is not that the words are unclear, but that while clear, they go too far. Vagueness, by contrast, focuses on the generality and imprecision of the language used. The argument is that because the language is vague and unclear, it may be applied in a way that in fact goes beyond the legislator's stated goals. A citizen, corporate or otherwise, who wishes to stay within the law may have no choice but to err on the side of caution. The result may be that the citizen says less than is required in fact to accomplish the state's object. Indeed, confronted by vague bans on speech, the prudent citizen may be reduced to saying nothing [page644] at all. Like clear language that casts the statutory net too broadly, overbreadth by reason of vagueness goes to the heart of the requirement of minimal impairment.

79 It follows from this that two things must be shown in order to refute a claim of vagueness and overbreadth: first, the provision must give adequate guidance to those expected to abide by it; and second, it must limit the discretion of state officials responsible for its enforcement. While complete certainty is impossible, and some generalization is inevitable, the law must be sufficiently precise to provide guidance for legal debate: *R. v. Nova Scotia Pharmaceutical Society*, *[1992] 2 S.C.R. 606*. The trial judge and the majority in the Court of Appeal emphasized the need for flexibility and the impossibility of achieving absolute certainty, but Beauregard J.A. correctly insisted as well on the principle of providing citizens with substantive notice in order to guide their conduct. To ask only whether a trial judge will be able to apply the impugned law when a case comes before him or her provides an inadequate response to the concern that the law may in the future be applied in an overbroad way. In effect, it defers the critical question of actual overbreadth to another day.

80 Against this background, I turn to the task of interpreting s. 22(3). As stated, the aim is to ascertain the intention of Parliament. To do this, one considers the words used in their legal and social context. One seeks a common meaning between the English and French texts. And throughout, one is guided by Parliament's objective, or purpose. On the matter at issue, Parliament could not have made its purpose clearer than it has in the *Tobacco Act*. It is, quite simply, "to protect young persons and others from inducements to use tobacco [page645] products and the consequent dependence on them": s. 4(*b*).

81 A number of phrases in the ban on advertising appealing to young people are, at first blush, problematic: "could be construed", "on reasonable grounds" and "appealing to young persons" are, viewed individually, far from precise. However, it is the global intention that we must seek.

82 The first striking aspect of s. 22(3) is its insistence on "reasonable grounds" for concluding that the advertising is within the prohibited designation. The English version uses the phrase "that could be construed on reasonable grounds". The French version uses a different grammatical construction but picks up the same idea: "*dont il existe des motifs raisonnables de croire*" (for which there are reasonable grounds to believe). The English construction is unusual. The French, however, is one familiar to the law. "Reasonable grounds to believe" is a common concept, particularly in criminal law. I conclude that the common meaning of this part of the provision is reasonable grounds to believe that the advertising in question falls within the prohibition. This is an objective standard, and one with clear legal content.

83 The more difficult aspect of the wording is the use of the conditional "could be" or "*pourrait*" in the provision. "Reasonable grounds to believe" in the criminal context is generally used with the factual, indicative tense; the person making the assessment must have reasonable grounds for the belief in question. Section 22(3) is different. The English version uses "could be construed on reasonable grounds". This suggests that there should be reasonable grounds, but that the person making the assessment would not need to be as certain of their actual existence as would be the case in the criminal context. The French version uses a different construction altogether. The conditional "*pourrait*" in the French version does not describe the activity of assessing or construing the grounds, as in the English version, but rather the character of the prohibited advertising: "*qu'elle pourrait être [page646] attrayante pour les jeunes*", i.e. that it could be appealing to young persons.

84 Again, I find the French version more helpful. The suggestion in the English version that there be reasonable grounds but that the person assessing them need not be entirely certain about them seems to involve a contradiction in terms. If reasonable grounds exist, it is hard to imagine how one could be in doubt about them. The French version avoids this difficulty: one must have reasonable grounds to conclude that the advertising "could be" appealing to young persons. This captures the idea that the reasonable grounds exist but that there may be doubt about whether in fact young persons would find the advertising appealing. Read thusly, the phrase serves the purpose of relieving the prosecutor of proving that a particular advertisement in fact was appealing to one or more young persons. All that is required is that the evidence establish that the advertising could be appealing to young persons.

85 This leaves the phrase "appealing to young persons". In the English version, "appealing" could arguably be read as a verb, in the sense of "making an appeal to", although its adjectival sense of something that is "attractive [and] of interest" appears to be more natural (*Canadian Oxford Dictionary* (2nd ed. 2004), at p. 61). In French, the phrase "*attrayante*" is clearly adjectival -- the question is whether the advertisement could be "*attrayante*" or appealing to young persons. I conclude that "appealing" must be read as an adjective in English as well.

86 The last part of the puzzle is what Parliament intended by singling out advertising appealing "to young persons". Could this include all advertising, even advertising that is primarily appealing to adults, on the theory that such advertising could also be appealing to some young persons? Or did Parliament intend to confine the exception carved out from the broader permission for information and brand-preference advertising to advertising that is particularly appealing to young persons?

[page647]

87 In my view, the only reasonable conclusion is the latter. Parliament had already said, in s. 22(2), that information and brand-preference advertising was permitted in appropriate places. The purpose of s. 22(3) is to protect a narrower subset of consumers whose particular tastes cannot be reflected in advertising. To read "could be ... appealing to young persons" as including all advertising would defeat this purpose and render s. 22(2) meaningless. Moreover, the words "to young persons" must be assumed to have been included for a purpose. To

read them as extending to everyone also renders them meaningless. The rule that the legislator does not speak in vain suggests that this interpretation should be rejected: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, *[1985] 1 S.C.R. 831*. Finally, reading s. 22(3) as confined to advertising particularly appealing to young persons is consistent with Parliament's purpose of preventing young people from taking up smoking and becoming addicted to tobacco.

88 For these reasons, I conclude that s. 22(3) must be read as creating a ban for information and brand-preference advertising that could be appealing to a particular segment of society, namely young people. In order to establish this element, the prosecutor must show that the advertisement in question could be attractive to young people, as distinguished from the general adult population.

[page648]

89 At the end of this exercise in interpretation, we arrive at a common meaning for the French and English versions of s. 22(3), which is consistent with Parliament's stated purpose of preventing young persons in particular from taking up smoking. Section 22(3), thus interpreted, requires the prosecution in a given case to prove that there are reasonable grounds to believe that the advertisement of a tobacco product at issue could be appealing to young persons, in the sense that it could be particularly attractive and of interest to young persons, as distinguished from the general population.

90 Having established the meaning of s. 22(3), I turn to the question of whether the incursion on free expression that it represents has been shown to be a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

91 It is not disputed that Parliament's objective of preventing young people from being tempted to take up tobacco use and consequently becoming addicted is pressing and substantial. Nor is there doubt that a ban on advertising appealing to young persons is rationally connected to this goal.

92 The manufacturers' claims that the provision is not minimally impairing by reason of vagueness and overbreadth, however, require close consideration. I cannot endorse the view of Rayle J.A. that [TRANSLATION] "in the context of the protection of children, the minimal impairment branch of the section 1 test is not relevant" (*[2005] R.J.Q. 2018*, *[2005] Q.J. No. 10915* (QL), at para. 341). However, I conclude that s. 22(3), construed as I have suggested, is not vague. It does not impose a total ban on advertising. Information and brand-preference advertising is permitted, provided that it is not done in places that young persons are likely to frequent or publications not addressed to adults, and provided that it is not lifestyle advertising (considered below) or advertising that there are reasonable grounds to believe could be appealing to young people as a group.

93 Is the ban on advertising that could appeal to young persons overbroad? Does it go farther than necessary to accomplish Parliament's purpose? It might be argued that it is enough to confine advertising to information and brand-preference and to impose placement restrictions, and that the further limit imposed by s. 22(3) is unnecessary. But this argument overlooks the breadth of Parliament's definition of brand-preference advertising, which may well permit advertising targeted at young persons. Information, too, can be packaged in many ways. [page649] These realities, coupled with the possibility that young persons may see or read that material permitted by the placement restrictions, justify a specific restriction on material that could be appealing to young persons. Brand-preference advertising is permitted in publications sent by mail to an identified adult (s. 22(2)(*a*)) or with an adult readership of at least 85 percent (s. 22(2)(*b*)). These publications may nevertheless be read by young persons. The purpose of s. 22(3), in this context, is to prevent advertising in these publications that "could be" appealing to young people, as opposed to the general adult population. Section 22(3) simply forbids presenting this type of advertising in a way that could have a particular appeal to young persons. Given the sophistication and subtlety of tobacco advertising practices in the past, as demonstrated by the record in this case, Parliament cannot be said to have gone farther than necessary in blocking advertising that might influence young persons to start smoking.

94 Finally, s. 22(3) meets the requirement of proportionality of effects. The prohibited speech is of low value. Information about tobacco products and the characteristics of brands may have some value to the consumer who is already addicted to tobacco. But it is not great. On the other hand, the beneficial effects of the ban for young persons and for society at large may be significant. The placement restrictions may mean that the majority of people seeing the advertising prohibited by s. 22(3) are adults. The restrictions may impose a cost in terms of the information and brand-preference advertising they may be able to receive. But that cost is small; all that is prohibited is advertising that could be specifically appealing to young people. Moreover, the vulnerability of the young may justify measures that privilege them over adults in matters of free expression. Thus in *Irwin Toy*, at p. 982, the Court [page650] upheld a stipulation that the late hour of advertising did not create a presumption that it was not aimed at children, with the observation that such a stipulation "makes clear that children's product advertising, if presented in a manner aimed to attract children, is not permitted even if adults form the largest part of the public likely to see the advertisement".

95 I conclude that the limit on free expression imposed by s. 22(3), properly interpreted, is justified as reasonable under s. 1 of the *Charter*.

4. *Lifestyle Advertising*

96 Section 22(3) carves out from permitted information and brand-preference advertising under s. 22(2) two types of advertising: advertising that could appeal to young persons, just considered, and lifestyle advertising.

97 Section 22(4) defines lifestyle advertising as follows:

> "lifestyle advertising" means advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

98 It is agreed that this provision infringes the s. 2(*b*) guarantee of freedom of expression. The manufacturers, however, argue that it is overbroad and ask that it be struck down. Alternatively, they ask that the definition of lifestyle be restricted to the lifestyles specifically referred to in s. 22(4).

99 The trial judge, Denis J., detailed the industry practice of using appeals to various lifestyles as a means of selling tobacco products. Different lifestyles are directed to different segments of the [page651] population. Women and young persons rank high among those targeted by this type of advertising. The advertising is highly sophisticated. Some associate a product with a romanticized lifestyle, such as the cowboy image of the "Marlboro man". Other advertising may evoke elements of a more ordinary lifestyle, for example, the image of a cup of coffee or a bath, coupled with a cigarette. Sometimes the cigarette disappears altogether; only the bath or cup of coffee is shown, connected discreetly with a particular brand name. Denis J. upheld the ban on lifestyle advertising on the basis that despite its references to images and emotions, it was sufficiently clear to permit a court to interpret it in a particular case.

100 The Court of Appeal divided on the issue. The majority (Brossard and Rayle JJ.A.) upheld the ban. Parliament, in its view, was justified in employing a broad definition in order to cover creative forms of advertising that might not fit within a more traditional definition of lifestyle advertising. In dissent, Beauregard J.A. argued that it may be impossible to advertise certain products without evoking a positive or negative emotion about a lifestyle already associated with those products.

101 I conclude that properly interpreted, the ban on lifestyle advertising in s. 22(3) constitutes a reasonable and demonstrably justified limit on the right of free expression.

102 As with the other provisions challenged in these appeals, the first task is one of interpretation. Some background may be helpful. In *RJR*, the majority agreed that on the evidence presented in that case, a prohibition on lifestyle advertising (but not information and brand-preference advertising) could have been considered

minimally impairing (*per* McLachlin J., at para. 164; *per* Iacobucci J., at para. 191). This was based on the understanding that lifestyle advertising invariably seeks to [page652] increase overall tobacco consumption, not just to inform existing smokers.

103 The Attorney General of Canada asserts that s. 22 is Canada's response to the "guidelines" of the Court. However, the *Tobacco Act* departs in important respects from the template discussed in *RJR*, making direct comparisons inconclusive.

104 First, the Act defines "lifestyle" differently than did the discussion in *RJR*. The definition of lifestyle advertising alluded to in *RJR* was broad, unencumbered by the references to "glamour, recreation, excitement, vitality, risk or daring" found in the Act. Moreover, the Court in *RJR* focused on advertising that "associates" a product with a way of life, and made no references to advertising that "evokes a positive or negative emotion about or image of" a way of life, as found in the *Tobacco Act*.

105 Second, the *Tobacco Act* defines brand-preference advertising more broadly than the Court did in *RJR*. In *RJR*, brand-preference advertising was restricted in that it had to be aimed only at existing smokers, inducing them to switch brands, and was restricted to colour, design and package appearance (*per* La Forest J., relying on the definition used in the Court of Appeal (*[1993] R.J.Q. 375, 102 D.L.R. (4th) 289*), *per* Brossard J.A.). The *Tobacco Act*, by contrast, simply defines brand-preference advertising as "advertising that promotes a tobacco product by means of its brand characteristics". This means that the window for permissible advertising opened by s. 22(2) is broader than it would have been had the narrower *RJR* definition of brand preference been adopted.

106 These differences mean that direct comparisons cannot be made between the lifestyle provisions of the *Tobacco Act* and the impact of *RJR*'s [page653] conclusions on brand preference on the scope of lifestyle advertising . The majority's approval of brand-preference advertising in *RJR* was premised not only on different evidence, but on different definitions of pivotal concepts. The broad space s. 22(2) allows for permitted advertising must be taken into account in determining whether the claw-back in s. 22(3) is overbroad. It follows that the Attorney General's argument that s. 22(3) must be valid because it represents Parliament's response to the "guidelines" the Court offered in *RJR* oversimplifies the matter. Our focus must be on the structure and wording of the *Tobacco Act*, not on what was said in *RJR* on different facts and different definitions of the central concepts.

107 How, then, is lifestyle advertising in s. 22(3) to be construed? First, the scheme of s. 22 as a whole must be considered. We start with the fact that s. 22(2) permits information and brand-preference advertising. Information advertising is relatively clear: it consists of factual information about the product. This does not exclude, however, the possibility that information may be so presented that it evokes a lifestyle. Brand-preference advertising under the Act is even broader. As noted above, the Act did not adopt the narrow concept of brand-preference advertising set forth in *RJR*. Rather, it adopted a definition of "advertising that promotes a tobacco product by means of its brand characteristics". As the Canadian Cancer Society argues, the concept of a "brand" is associated with a lifestyle; in marketing, brands are intangible images, usually associated with particular lifestyles.

108 After broadly permitting information and brand-preference advertising under s. 22(2), the Act goes on to claw back lifestyle advertising as described in s. 22(4). In other words, s. 22(2) permits advertising that is associated with a way of life, as well as [page654] advertising that evokes images and emotions, but s. 22(3) removes this permission.

109 The first part of the definition of lifestyle advertising in s. 22(4) is unproblematic. Combined with s. 22(3), it removes advertising that associates a product with a way of life from the broad ambit of s. 22(2). This exclusion, discussed in *RJR*, is well understood. The next phrase, however, presents difficulties: "or evokes a positive or negative emotion about or image of, a way of life". What does this add? Beauregard J.A. argued that any advertisement that evokes an image or emotion about a way of life must necessarily "associate" a product with that way of life.

110 We must, however, attempt to find a meaning for this phrase, on the rule that the legislator does not speak in

vain: *Carrières Ste-Thérèse*. That meaning emerges from an appreciation of the problem Parliament was tackling in relation to lifestyle advertising. The express provision that lifestyle advertising need only evoke an emotion or image may be seen as aimed at precluding arguments that to constitute lifestyle advertising, there must be a link, on the face of the advertisement, between the tobacco product and a way of life. While advertising that associates a tobacco product with a way of life will arguably evoke an emotion or an image, it is not clear that advertising evoking an emotion or an image will invariably associate a tobacco product with a lifestyle. A lifestyle image in an advertisement might be aimed at evoking an emotion or image which subliminally evokes a particular tobacco product, for example. Charged with an offence, the advertiser might raise the defence that the advertisement did not "associate" the lifestyle with the product, arguing that there is no evidence of a link between the product and the lifestyle in the advertisement. The phrase "or evokes a positive or negative emotion about or image of, a way of life" would defeat such an argument. It is true that "associates" can be read as including even subliminal or subtle influences. But it can also be read more narrowly. Expressly including lifestyle [page655] advertising that evokes emotions and images makes it clear that even advertising that does not appear on its face to connect a lifestyle with a tobacco product is prohibited if it subliminally connects a tobacco product with a lifestyle.

111 The phrase "evokes a positive or negative emotion ... or image" should not, however, be read so broadly as to encompass every perceptual impression. It should be interpreted in a way that leaves room for true information and brand-preference advertising, which s. 22(2) permits. This brings to mind the definition of brand-preference advertising used in *RJR*, which was confined to existing smokers and restricted to the colour, design and appearance of the packaging. It is possible to argue that a colour or image evokes an emotion in some highly abstract, artistic sense. Parliament, however, was concerned with emotions and images that may induce people to start to use or to increase their use of tobacco. Parliament used these terms in the context of its purpose -- to prevent the increase of tobacco consumption through advertising and to confine permissible advertising to hard, factual data directed to confirmed smokers. The provision should be construed accordingly.

112 The reference to "positive or negative" emotion poses a further difficulty. One would expect lifestyle advertising to evoke a positive emotion about the lifestyle and the use of the product. However, it is not beyond the ingenuity of advertisers to rely on negative emotions to subtly persuade. A lifestyle depiction that sends messages of non-smokers being left out of the crowd or being seen as unsophisticated comes to mind.

113 Finally, what is the effect of qualifying "way of life" in s. 22(4) with the words, "such as one that [page656] includes glamour, recreation, excitement, vitality, risk or daring"? The words "such as" indicate that "way of life" is not limited by the terms that follow. Rather, they are to be read as illustrations of lifestyle advertising.

114 Read in this way, the prohibition on lifestyle advertising is reasonable and demonstrably justified under s. 1 of the *Charter*. As with the other challenged provisions, the pressing and substantial nature of Parliament's objective is beyond challenge. The record is replete with examples of lifestyle advertisements promoting tobacco products. It amply establishes the power of such advertisements to induce non-smokers to begin to smoke and to increase tobacco consumption among addicted smokers. It also establishes the sophistication and subtlety of such advertising. Lifestyle advertising spans the spectrum from the bold association of the Marlboro man with cowboy culture to the subtle suggestion emerging from a cup of coffee or a bath scene that evokes tobacco use through learned prior imagery.

115 The sophistication and subtlety of lifestyle advertising are reflected in the means Parliament has chosen to deal with it. A ban on lifestyle advertising must catch not only clear associations, but subtle subliminal evocations. Hence the inclusion of advertising that "evokes a positive or negative emotion ... or image". There is a rational connection between this provision and Parliament's objective. Minimal impairment is also established. True information and brand-preference advertising continues to be permitted under s. 22(2). Such advertising crosses the line when it associates a product with a way of life or uses a lifestyle to evoke an emotion or image that may, by design or effect, lead more people to become addicted or lead people who are already addicted to increase their tobacco use. Finally, the proportionality of the effects is clear. The suppressed expression -- the inducement of increased tobacco consumption -- is of low value, compared with the significant [page657] benefits in lower rates of consumption and addiction that the ban may yield.

116 The challenge of dealing with today's sophisticated advertising of tobacco products is not insignificant. The distinction between information and brand-preference advertising directed to market share, on the one hand, and advertising directed to increased consumption and new smokers, on the other, is difficult to capture in legal terms. Parliament in its wisdom has chosen to take the task on. Properly interpreted, the law it has adopted meets the requirements of justification under s. 1 of the *Charter*.

5. *Sponsorships*

117 Tobacco manufacturers have a long tradition of sponsoring sporting and cultural events and facilities as a means of promoting their product and, they would argue, acting as good corporate citizens. Parliament, in the *Tobacco Act*, has chosen to ban the promotion of these sponsorships. The question is whether that ban is constitutional.

118 Section 24 of the Act bans the display of tobacco-related brand elements or names in promotions that are used, directly or indirectly, in the "sponsorship of a person, entity, event, activity or permanent facility". Section 25 goes further and prohibits the display of tobacco-related brand elements or names on a permanent facility, if the brand elements or names are thereby associated with a sports or cultural event or activity. Together, these sections mean that tobacco manufacturers are not permitted to use their brand elements or names to sponsor events, nor to put those brand elements or names on sports or cultural facilities.

[page658]

119 Two questions arise for consideration. The first is whether the general ban on sponsorship is constitutional. Since it clearly limits freedom of expression under s. 2(*b*) of the *Charter*, the only issue is whether it has been shown to be justified under s. 1 of the *Charter*.

120 The trial judge, Denis J., correctly held that sponsorship promotion is essentially lifestyle advertising in disguise. If lifestyle advertising is prohibited, sponsorship provides an alternative means for tobacco companies to associate their products with glamour, recreation, etc. The Court of Appeal unanimously upheld this conclusion, going so far as to state that ss. 24 and 25 were possibly redundant as they are but particular applications of the ban on lifestyle advertising.

121 The prohibition of sponsorship promotion is rationally connected to the legislative goal for the same reasons as for the prohibition on lifestyle advertising. Similarly, since the ban on lifestyle advertising is accepted as minimally impairing, so is the ban on sponsorship. A finding of minimal impairment is reinforced by the fact that Parliament phased in the ban over five years so that it would not have a disruptive impact. I would also note that, contrary to their assertions, the manufacturers are not prohibited from sponsoring anything; they are only prohibited from using the fact of their sponsorship to gain publicity.

122 The second question, the use of corporate names in sponsorship, is more complicated. The majority of the Court of Appeal found that this ban constituted an unjustified intrusion on free expression, and declared inoperative the words "or the name of a tobacco manufacturer" in ss. 24 and 25, thereby allowing the use of corporate names in sponsorship promotion and on facilities, except if the corporate name refers, directly or [page659] indirectly, to a tobacco brand name (Brossard and Rayle JJ.A.).

123 In the view of the majority, a corporate name in an event program or on a building might not evoke or promote a product, raising concerns of rational connection. (It may be noted that the final order entered is narrower than the reasons for judgment and is confined to company names that are not used as brand names.)

124 Beauregard J.A. dissented, arguing that the only reason a corporation would affix its name to a building would be to evoke that brand or name of the product, and that therefore the ban was justified.

125 I agree with Beauregard J.A. that the prohibition on using corporate names in sponsorship promotion and on sports or cultural facilities is justified.

126 Parliament's objective, once again, is clearly pressing and substantial. As found by Denis J., the evidence establishes that as restrictions on tobacco advertising tightened, manufacturers increasingly turned to sports and cultural sponsorship as a substitute form of lifestyle promotion. Placing a tobacco manufacturer's name on a facility is one form such sponsorship takes. The prohibition on sponsorship by means of names on facilities in s. 25 only applies to facilities used for sports or cultural activities, not for all facilities. The aim of curbing such promotion justifies imposing limits on free expression.

127 Nor is the means chosen to achieve the objective disproportionate. The element of rational connection is made out. Placing a corporate name on a list of sponsors or on a sports or cultural facility may promote the use of tobacco in a number [page660] of ways. This is clear when the corporate name is connected with the brand name of a tobacco product. (The appellant argued that all the respondents have brand names that include portions of their corporate names; the respondents did not contradict this.) But even where there is no overt connection between the corporate name and the brand name of a tobacco product, the corporate name may serve to promote the sale of the tobacco product. Connections may be established in a variety of ways. The corporate name may, without referencing a brand name, nevertheless contain a reference to tobacco. Or the corporate name may have historically been associated with tobacco. The evidence established the tobacco industry's practice of using shell corporations as an element in brand identification. Associations between the parent company and the shell company may persist in the public mind. As a result, the corporate name in the sponsorship promotion or on the building or facility may evoke a connection with the shell company and its brand.

128 Given the nature of the problem, and in view of the limited value of the expression in issue compared with the beneficial effects of the ban, the proposed solution -- a total ban on the use of corporate names in sponsorship promotion, or on sports or cultural facilities -- is proportional. And in view of the limited value of the expression in issue compared with the beneficial effects of the ban, proportionality of effects is established.

129 I conclude that the impugned sponsorship provisions are a reasonable limit justified under s. 1 of the *Charter.*

6. *Health Warning Labels*

130 The regulations pursuant to the Act (the *TPIR*) increased the minimum size of the mandatory health warnings on tobacco packaging from 33 percent under the old Act to 50 percent of the [page661] principal display surfaces. The question is whether this constitutes an infringement of s. 2(*b*) and, if so, whether that infringement is justified.

131 The question of whether the mandatory warning requirement infringes s. 2(*b*) is not easily answered. The Attorney General argues that s. 2(*b*) is not infringed, claiming that it neither deprives the manufacturers of a vehicle for communicating their message, nor limits the form of expression. He relies on *Lavigne v. Ontario Public Service Employees Union*, *[1991] 2 S.C.R. 211*, at pp. 279-80, where Wilson J. stated: "If a law does not really deprive one of the ability to speak one's mind or does not effectively associate one with a message with which one disagrees, it is difficult to see how one's right to pursue truth, participate in the community, or fulfil oneself [-- the values protected by s. 2(*b*) -- are] denied." The regulations under the *TPIR* permit the manufacturers to present the health warnings, not as their messages, but as messages from Health Canada. The manufacturers still have half the package to convey such messages as they choose, and they are not confined to a particular size or style of package that might inhibit that ability. As a result, the Attorney General argues, the manufacturers have not shown that they are prevented from conveying messages of their choice on their packaging. Not having discharged this burden, they have not established a breach of their freedom of expression, he concludes.

132 However, this Court has taken a broad view of "expressive activity" for s. 2(*b*) cases. In *Irwin Toy*, the Court went so far as to say that parking a car could be an expressive activity. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *[1990] 1 S.C.R. 1123*, at p. 1184, Lamer J. stated that in some circumstances, silence

could constitute expressive activity. To hold that minor restrictions or requirements with respect to packaging violate the s. 2(*b*) guarantee of freedom of expression might be to trivialize the guarantee. However, the requirement that manufacturers place the [page662] government's warning on one half of the surface of their package arguably rises to the level of interfering with how they choose to express themselves. I therefore conclude that s. 2(*b*) is infringed by the warning requirements in general, and specifically the requirement that 50 percent of the principal display surfaces of the package be devoted to the warnings.

133 This leaves the question of whether the infringement is justified as a reasonable limit under s. 1 of the *Charter*. I conclude that it is.

134 Parliament's objective in requiring that a large part of packaging be devoted to a warning is pressing and substantial. It is to inform and remind potential purchasers of the product of the health hazards it entails. This is designed to further Parliament's larger goal of discouraging tobacco consumption and preventing new smokers from taking up the habit. The importance of warnings is reinforced by the trial judge's finding that consumers and the general public are not well informed on the dangers of smoking.

135 The evidence as to the importance and effectiveness of such warnings establishes a rational connection between Parliament's requirement for warnings and its objectives of reducing the incidence of smoking and of the disease and death it causes. In the course of the previous proceedings dealing with the ban on tobacco advertising, this Court unanimously held that "both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society": *RJR-MacDonald Inc. v. Canada (Attorney General)*, *[1994] 1 S.C.R. 311*, *per* Sopinka and Cory JJ., at p. 353; see also *RJR*, McLachlin J., at para. 158. A mass of evidence in the intervening years supports this conclusion.

[page663]

136 If further evidence were required of the rationality of Parliament's requirement that warnings occupy 50 percent of product packaging, it is supplied by the manufacturers' response to the increase from 33 percent to 50 percent of the principal display surfaces. The evidence reveals that they saw the increase as a threat and sought to meet it by devising counter-strategies to minimize the overall impact of the warnings.

137 Regarding minimal impairment, the question is whether the requirement for warning labels, including their size, falls within a range of reasonable alternatives. The manufacturers argue that the increase from 33 percent to 50 percent of the package cannot be justified. However, the evidence established that bigger warnings may have a greater effect. Parliament is not required to implement less effective alternatives: *RJR*, at paras. 160 and 163.

138 The reasonableness of the government's requirement is supported by the fact that Australia, Belgium, Switzerland, Finland, Singapore and Brazil require warnings at least as large as Canada's, and the minimum size in the European Union is 48 percent of the package. The *WHO Framework Convention on Tobacco Control* stipulates that warning labels "should" cover at least 50 percent and "shall" cover at least 30 percent of the package.

139 Finally, proportionality of effects is established. The benefits flowing from the larger warnings are clear. The detriments to the manufacturers' expressive interest in creative packaging are small.

140 I conclude that the requirement that 50 percent of the principal display surfaces be devoted to a warning of the health hazards of the product is a reasonable measure demonstrably justified in our society and is constitutional under s. 1 of the *Charter*.

[page664]

VI. Conclusion

141 I conclude that the impugned provisions of the *Tobacco Act* and the *TPIR*, properly interpreted, are constitutional in their entirety. I would therefore allow the Attorney General's appeals, dismiss the manufacturers' cross-appeals and restore the order of the trial judge. Costs are awarded to the Attorney General of Canada in this Court and in the Court of Appeal.

142 The constitutional questions are answered as follows:

1. Do ss. 18, 19, 20, 22, 24 and 25 of the *Tobacco Act*, S.C. 1997, c. 13, in whole or in part or through their combined effect, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

3. Do the provisions of the *Tobacco Products Information Regulations*, SOR/2000-272, governing the size of the mandatory messages infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

* * * * *

APPENDIX A

Tobacco Act, S.C. 1997, c. 13

PURPOSE

4. [Purpose of Act] The purpose of this Act is to provide a legislative response to a national public health [page665] problem of substantial and pressing concern and, in particular,

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

(*b*) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;

(*c*) to protect the health of young persons by restricting access to tobacco products; and

(*d*) to enhance public awareness of the health hazards of using tobacco products.

...

PART IV

PROMOTION

18. (1) [Definition of "promotion"] In this Part, "promotion" means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.

(2) [Application] This Part does not apply to

(*a*) a literary, dramatic, musical, cinematographic, scientific, educational or artistic work, production or performance that uses or depicts a tobacco product or tobacco product-related brand element, whatever the mode or form of its expression, if no consideration is given directly or indirectly for that use or depiction in the work, production or performance;

(*b*) a report, commentary or opinion in respect of a tobacco product or a brand of tobacco product if no consideration is given by a manufacturer or retailer, directly or indirectly, for the reference to the tobacco product or brand in that report, commentary or opinion; or

(*c*) a promotion by a tobacco grower or a manufacturer that is directed at tobacco growers, manufacturers, persons who distribute tobacco products or retailers but not, either directly or indirectly, at consumers.

[page666]

19. [Prohibition] No person shall promote a tobacco product or a tobacco product-related brand element except as authorized by this Act or the regulations.

20. [False promotion] No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.

21. (1) [Testimonials or endorsements] No person shall promote a tobacco product by means of a testimonial or an endorsement, however displayed or communicated.

(2) [Depiction of person] For the purposes of subsection (1), the depiction of a person, character or animal, whether real or fictional, is considered to be a testimonial for, or an endorsement of, the product.

(3) [Exception] This section does not apply to a trade-mark that appeared on a tobacco product for sale in Canada on December 2, 1996.

22. (1) [Advertising] Subject to this section, no person shall promote a tobacco product by means of an advertisement that depicts, in whole or in part, a tobacco product, its package or a brand element of one or that evokes a tobacco product or a brand element.

(2) [Exception] Subject to the regulations, a person may advertise a tobacco product by means of information advertising or brand-preference advertising that is in

(*a*) a publication that is provided by mail and addressed to an adult who is identified by name;

(*b*) a publication that has an adult readership of not less than eighty-five per cent; or

(*c*) signs in a place where young persons are not permitted by law.

(3) [Lifestyle advertising] Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.

(4) [Definitions] The definitions in this subsection apply in this section.

[page667]

"brand-preference advertising" means advertising that promotes a tobacco product by means of its brand characteristics.

"information advertising" means advertising that provides factual information to the consumer about

(*a*) a product and its characteristics; or

(*b*) the availability or price of a product or brand of product.

"lifestyle advertising" means advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

23. [Packaging] No person shall package a tobacco product in a manner that is contrary to this Act or the regulations.

24. [Prohibition -- sponsorship promotion] No person may display a tobacco product-related brand element or the name of a tobacco manufacturer in a promotion that is used, directly or indirectly, in the sponsorship of a person, entity, event, activity or permanent facility.

25. [Prohibition -- name of facility] No person may display a tobacco product-related brand element or the name of a tobacco manufacturer on a permanent facility, as part of the name of the facility or otherwise, if the tobacco product-related brand element or name is thereby associated with a sports or cultural event or activity.

26. (1) [Accessories] Subject to the regulations, a manufacturer or retailer may sell an accessory that displays a tobacco product-related brand element.

(2) [Promotion] No person shall promote an accessory that displays a tobacco product-related brand element except in the prescribed manner and form and in a publication or place described in paragraphs 22(2)(*a*) to (*c*).

27. [Non-tobacco product displaying tobacco brand element] No person shall furnish or promote a tobacco product if any of its brand elements is displayed on a [page668] non-tobacco product, other than an accessory, or is used with a service, if the non-tobacco product or service

(*a*) is associated with young persons or could be construed on reasonable grounds to be appealing to young persons; or

(*b*) is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

28. (1) [Exception -- tobacco product] Subject to the regulations, a person may sell a tobacco product, or advertise a tobacco product in accordance with section 22, if any of its brand elements is displayed on a non-tobacco product, other than an accessory, or used with a service, if the non-tobacco product or service does not fall within the criteria described in paragraphs 27(*a*) and (*b*).

(2) [Exception -- non-tobacco product] Subject to the regulations, a person may promote a non-tobacco product, other than an accessory, that displays a tobacco product-related brand element, or a service that uses a tobacco product-related brand element, to which section 27 does not apply.

29. [Sales promotions] No manufacturer or retailer shall

(*a*) offer or provide any consideration, direct or indirect, for the purchase of a tobacco product, including a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, lottery or contest;

(*b*) furnish a tobacco product without monetary consideration or in consideration of the purchase of a product or service or the performance of a service; or

(*c*) furnish an accessory that bears a tobacco product-related brand element without monetary consideration or in consideration of the purchase of a product or service or the performance of a service.

30. (1) [Retail display of tobacco products] Subject to the regulations, any person may display, at retail, a tobacco product or an accessory that displays a tobacco product-related brand element.

(2) [Signs] A retailer of tobacco products may post, in accordance with the regulations, signs at retail that indicate the availability of tobacco products and their price.

31. (1) [Communication media] No person shall, on behalf of another person, with or without consideration, publish, broadcast or otherwise disseminate any promotion that is prohibited by this Part.

(2) [Exception] Subsection (1) does not apply to the distribution for sale of an imported publication or the retransmission of radio or television broadcasts that originate outside Canada.

(3) [Foreign media] No person in Canada shall, by means of a publication that is published outside Canada, a broadcast that originates outside Canada or any communication other than a publication or broadcast that originates outside Canada, promote any product the promotion of which is regulated under this Part, or disseminate promotional material that contains a tobacco product-related brand element in a way that is contrary to this Part.

32. [Report to Minister] Every manufacturer shall provide the Minister, in the prescribed manner and within the prescribed time, with the prescribed information about any promotion under this Part.

APPENDIX B

Tobacco Products Information Regulations, SOR/2000-272

APPLICATION

2. [Retail sale] These Regulations apply to tobacco products that are for retail sale in Canada.

GENERAL

3. (1) [Must be legible] Any written information that is required by these Regulations to be displayed shall be displayed

(*a*) in both official languages, in the same manner; and

(*b*) in a manner that ensures that the information is legible and prominently displayed.

(2) [Health warnings and health information] Health warnings and health information shall

(*a*) except for those set out in subsections 5(4) to (6), be obtained from the Minister and reproduced from electronic images obtained from the electronic files [page670] used by the Minister to generate the source document; and

(*b*) be adapted to meet the requirements of paragraph 5(2)(*b*).

(3) [Colour and clarity] All health warnings and health information shall be reproduced

(*a*) in a colour that is as close as possible to the colour in which they are set out in the source document; and

(*b*) as clearly as possible taking into consideration the method of printing used by the manufacturer.

4. (1) [Attribution] If a manufacturer attributes information that, in accordance with these Regulations, must be displayed, the manufacturer shall do so by displaying only the following under the information, in the same colour as the text of the information and in Universal type in a pitch that is not greater than the smallest pitch used in the attributed information:

(*a*) if the information is in English, the phrase "Health Canada"; and

(*b*) if the information is in French, the phrase "Santé Canada".

(2) [Removal of attribution] Every manufacturer that does not attribute a health warning or health information may remove the attribution contained in the electronic files obtained under paragraph 3(2)(*a*).

HEALTH WARNINGS

5. (1) [Obligation to display] Subject to subsections (4) to (6), every manufacturer of bidis, cigarettes, cigarette tobacco, kreteks, leaf tobacco, chewing tobacco, snuff, tobacco stricks, or pipe tobacco, other

than pipe tobacco described in section (6), shall display the applicable health warnings for the tobacco product on every package of the tobacco product that they manufacture, in accordance with this section.

(2) [Manner of display] The health warnings must

(*a*) be displayed in English on one principal display surface and in French on the other principal display surface;

(*b*) occupy at least 50% of the principal display surfaces and be positioned parallel to the top edge of the package, towards the top part of the package as [page671] much as possible while satisfying the requirements of paragraph (*c*), and in the same direction as the other information that is on the package;

(*c*) be displayed on a principal display surface in a manner that ensures that none of the words of the warning will be severed when the package is opened; and

(*d*) be selected, except in the case of bidis, chewing tobacco and snuff, from the formats provided by the Minister for each health warning and based on the shape of the space as determined in accordance with paragraph (*b*).

Solicitors

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

Solicitors for the respondent/appellant on cross-appeal JTI-Macdonald Corp.: Irving Mitchell Kalichman, Westmount.

Solicitors for the respondent/appellant on cross-appeal Rothmans, Benson & Hedges Inc.: McCarthy Tétrault, Montréal.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Ltd.: Ogilvy Renault, Montréal.

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 New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

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

[page672]

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitors for the intervener the Canadian Cancer Society: Fasken Martineau DuMoulin, Montréal.

End of Document

Alberta v. Hutterian Brethren of Wilson Colony

Supreme Court Reports

Supreme Court of Canada

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

Heard: October 7, 2008;

Judgment: July 24, 2009.

File No.: 32186.

[2009] 2 S.C.R. 567 | *[2009] 2 R.C.S. 567* | *[2009] S.C.J. No. 37* | *[2009] A.C.S. no 37* | *2009 SCC 37* | 194 C.R.R. (2d) 12

Her Majesty The Queen in Right of the Province of Alberta, Appellant; v. Hutterian Brethren of Wilson Colony and Hutterian Brethren Church of Wilson, Respondents, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Canadian Civil Liberties Association, Ontario Human Rights Commission, Evangelical Fellowship of Canada and Christian Legal Fellowship, Interveners.

(203 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Freedom of religion — New regulation requiring photo for all Alberta driver's licences — Members of Hutterian Brethren sincerely believing that Second Commandment prohibits them from having their photograph willingly taken — Whether regulation infringed freedom of religion — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(a) — Operator Licensing and Vehicle Control Regulation, *Alta. Reg. 320/2002, s. 14*(1)(b) (am. Alta. Reg. 137/2003, s. 3).

Catchwords:

Constitutional law — Charter of Rights — Right to equality — Discrimination based on religion — New regulation requiring photo for all Alberta driver's [page568] licences — Members of Hutterian Brethren sincerely believing that Second Commandment prohibits them from having their photograph willingly taken — Whether regulation infringed right to equality — Canadian Charter of Rights and Freedoms, s. 15 — Operator Licensing and Vehicle Control Regulation, *Alta. Reg. 320/2002, s. 14*(1)(b) (am. Alta. Reg. 137/2003, s. 3).

Summary:

Alberta requires all persons who drive motor vehicles on highways to hold a driver's licence. Since 1974, each licence has borne a photograph of the licence holder, subject to exemptions for people who objected to having their photographs taken on religious grounds. Religious objectors were granted a non-photo licence called a Condition Code G licence, at the Registrar's discretion. In 2003, the Province adopted a new regulation and made the photo requirement universal. The photograph taken at the time of issuance of the licence is placed in the Province's facial

recognition data bank. There were about 450 Condition Code G licences in Alberta, 56 percent of which were held by members of Hutterian Brethren colonies. The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities. They sincerely believe that the Second Commandment prohibits them from having their photograph willingly taken and objected to having their photographs taken on religious grounds. The Province proposed two measures to lessen the impact of the universal photo requirement but, since these measures still required that a photograph be taken for placement in the Province's facial recognition data bank, they were rejected by the members of the Wilson Colony. They proposed instead that no photograph be taken and that non-photo driver's licences be issued to them marked "Not to be used for identification purposes". Unable to reach an agreement with the Province, the members of the Wilson Colony challenged the constitutionality of the regulation alleging an unjustifiable breach of their religious freedom. The case proceeded on the basis that the universal photo requirement infringes s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. The claimants led evidence asserting that if members could not obtain driver's licences, the viability of their communal lifestyle would be threatened. The Province, for its part, led evidence that the adoption of the universal photo requirement was connected to a new system aimed at minimizing identity theft associated with driver's licences and that the new facial recognition data bank was aimed at reducing the risk of this type of fraud. Both the chambers judge and the majority of the Court of Appeal held that the infringement of [page569] freedom of religion was not justified under s. 1 of the *Charter*.

Held (LeBel, Fish and Abella JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, Deschamps and Rothstein JJ.: The regulation is justified under s. 1 of the *Charter*. Regulations are measures "prescribed by law" under s. 1, and the objective of the impugned regulation of maintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft is clearly a goal of pressing and substantial importance, capable of justifying limits on rights. The universal photo requirement permits the system to ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence. The Province was entitled to pass regulations dealing not only with the primary matter of highway safety, but also with collateral problems associated with the licensing system. [para. 39] [para. 42] [para. 45]

The regulation satisfies the proportionality test. First, the universal photo requirement is rationally connected to the objective. The Province's evidence demonstrates that the existence of an exemption from the photo requirement would materially increase the vulnerability of the licensing system and the risk of identity-related fraud. Second, the universal photo requirement for all licensed drivers minimally impairs the s. 2(*a*) right. The impugned measure is reasonably tailored to address the problem of identity theft associated with driver's licences. The evidence discloses no alternative measures which would substantially satisfy the government's objective while allowing the claimants to avoid being photographed. The alternative proposed by the claimants would significantly compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage. Without the licence-holder's photograph in the data bank, the risk that the identity of the holder can be stolen and used for fraudulent purposes is significantly increased. Although there are over 700,000 Albertans who do not hold driver's licences and whose pictures do not appear in the data bank, the objective of the driver's licence photo requirement is not to eliminate all identity theft in the province, but rather to maintain the integrity of the driver's licensing system so as to minimize identity theft associated with that system. Within that system, any exemptions, including those for [page570] religious reasons, pose real risk to the integrity of the licensing system. Lastly, where the validity of a law of general application is at stake, the doctrine of reasonable accommodation is not an appropriate substitute for a proper s. 1 *Oakes* analysis. The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects. [para. 50] [para. 52] [paras. 59-60] [paras. 62-63] [para. 71]

Third, the negative impact on the freedom of religion of Colony members who wish to obtain licences does not outweigh the benefits associated with the universal photo requirement. The most important of these benefits is the enhancement of the security or integrity of the driver's licensing scheme. It is clear that a photo exemption would have a tangible impact on the integrity of the licensing system because it would undermine the one-to-one and one-

to-many photo comparisons used to verify identity. The universal photo requirement will also assist in roadside safety and identification and, eventually, harmonize Alberta's licensing scheme with those in other jurisdictions. With respect to the deleterious effects, the seriousness of a particular limit must be judged on a case-by-case basis. While the impugned regulation imposes a cost on those who choose not to have their photographs taken -- the cost of not being able to drive on the highway -- that cost does not rise to the level of depriving the claimants of a meaningful choice as to their religious practice, or adversely impacting on other *Charter* values. To find alternative transport would impose an additional economic cost on the Colony, and would go against their traditional self-sufficiency, but there is no evidence that this would be prohibitive. It is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion. When the deleterious effects are balanced against the salutary effects of the impugned regulation, the impact of the limit on religious practice associated with the universal photo requirement is proportionate. [para. 4] [paras. 79-80] [para. 82] [para. 91] [paras. 96-98] [para. 100] [para. 103]

The impugned regulation does not infringe s. 15 of the *Charter*. Assuming it could be shown that the regulation creates a distinction on the enumerated ground [page571] of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is therefore no discrimination within the meaning of s. 15. [para. 108]

Per Abella J. (dissenting): The government of Alberta did not discharge its burden of demonstrating that the infringement of the Hutterites' freedom of religion is justified under s. 1 of the *Charter*. [para. 176]

The purpose of the mandatory photo requirement and the use of facial recognition technology is to help prevent identity theft. An exemption to the photo requirement for the Hutterites was in place for 29 years without evidence that the integrity of the licensing system was harmed in any way. In addition, more than 700,000 Albertans have no driver's licence and are therefore not in the facial recognition database. The benefit to that system therefore, of adding the photographs of around 250 Hutterites who may wish to drive, is only marginally useful to the prevention of identity theft. While the salutary effects of the mandatory photo requirement are therefore slight and largely hypothetical, the mandatory photo requirement seriously harms the religious rights of the Hutterites and threatens their autonomous ability to maintain their communal way of life. The impugned regulation and the alternatives presented by the government involve the taking of a photograph. This is the very act that offends the religious beliefs of the Wilson Colony members. This makes the mandatory photo requirement a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or giving up the self-sufficiency of their community, a community that has historically preserved its religious autonomy through its communal independence. [para. 148] [paras. 155-156] [para. 158] [paras. 162-164] [para. 170] [para. 174]

The harm to the constitutional rights of the Hutterites, in the absence of an exemption, is dramatic. On the other hand, the benefits to the province of requiring the Hutterites to be photographed are, at best, marginal. This means that the serious harm caused by the infringing measure weighs far more heavily on the s. 1 scales than the benefits the province gains from its imposition on the Hutterites. The province has therefore not discharged its onus of justifying the imposition of a mandatory photo requirement on the members of the Wilson Colony. [paras. 114-116]

Per LeBel J. (dissenting): Abella J.'s comments on the nature of the guarantee of freedom of religion under s. 2(*a*) of the *Charter* and her opinion that the impugned regulation, which limits freedom of religion, [page572] has not been properly justified under s. 1 of the *Charter* are both agreed with. The regulatory measures in issue have an impact not only on the Hutterites' belief system, but also on the life of the community. The majority's reasons understate the nature and importance of this aspect of the guarantee of freedom of religion. [para. 178] [para. 182]

Under s. 1, courts have only rarely questioned the purpose of a law or regulation or found that it does not meet the rational connection requirement of the proportionality analysis, but this does not mean that courts will never or should never intervene at these earlier stages. It is generally at the minimal impairment and the balancing of effects stages that the means are questioned and their relationship to the law's purpose is challenged and reviewed. It is also where the purpose itself must be reassessed with regard to the means chosen by Parliament or the legislature.

The proportionality analysis thus depends on a close connection between the final two stages of the *Oakes* test. The court's goal is essentially the same at both stages: to strike a proper balance between state action on the one hand, and the preservation of *Charter* rights and the protection of rights or interests that may not be guaranteed by the Constitution but that may nevertheless be of high social value or importance on the other. The proportionality analysis reflects the need to leave some flexibility to government in respect of the choice of means. But the review of those means must also leave the courts with a degree of flexibility in the assessment of the range of alternatives that could realize the goal, and also in determining how far the goal ought to be attained in order to achieve the proper balance between the objective of the state and the rights at stake. The stated objective is not an absolute and should not be treated as a given and alternative solutions should not be evaluated on a standard of maximal consistency with the stated objective. An alternative measure might be legitimate even if the objective could no longer be obtained in its complete integrity. A court must assess the objectives, the impugned means and the alternative means together, as necessary components of a seamless proportionality analysis. [para. 188] [paras. 190-191] [paras. 195-196] [para. 199]

In this case, the Government of Alberta has failed to demonstrate that the regulation is a proportionate response to the identified societal problem of identity theft. The driver's licence that it denies is not a privilege as it is not granted at the discretion of governments. Such a licence is often of critical importance in daily life and is certainly so in rural Alberta. Other approaches to identity fraud might be devised that would fall within [page573] a reasonable range of options and that could establish a proper balance between the social and constitutional interests at stake. This balance cannot be obtained by belittling the impact of the measures on the beliefs and religious practices of the Hutterites and by asking them to rely on transportation services to operate their farms and to preserve their way of life. Absolute safety is probably impossible in a democratic society. A limited restriction on the Province's objective of minimizing identity theft would not unduly compromise this aspect of the security of Alberta residents and might lie within the range of reasonable and constitutional alternatives. [paras. 200-201]

Per Fish J. (dissenting): For the reasons given by LeBel J., the disposition of the appeal as suggested by Abella J. and LeBel J. is agreed with. [para. 203]

Cases Cited

By McLachlin C.J.

Applied: *R. v. Oakes*, [1986] 1 S.C.R. 103; **referred to:** *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Therens*, [1985] 1 S.C.R. 613; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; Eur. Court H. R., *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641; *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[page574]

By Abella J. (dissenting)

R. v. Oakes, [1986] 1 S.C.R. 103; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art*

Ltd., [1986] 2 S.C.R. 713; Eur. Court H. R., *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A; *ahin v. Turkey* [GC], No. 44774/98, ECHR 2005-XI; *Metropolitan Church of Bessarabia and Others v. Moldova*, No. 45701/99, ECHR 2001-XII; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Bothwell v. Ontario (Minister of Transportation)* (2005), 24 Admin. L.R. (4th) 288; *Hofer v. Hofer*, [1970] S.C.R. 958; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

By LeBel J. (dissenting)

R. v. Oakes, [1986] 1 S.C.R. 103; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(a), 15, 24(1), 33.

Criminal Code, R.S.C. 1985, c. C-46, s. 34.

Constitution Act, 1982, s. 52.

Operator Licensing and Vehicle Control Amendment Regulation, Alta. Reg. 137/2003, s. 3.

Operator Licensing and Vehicle Control Regulation, Alta. Reg. 320/2002, ss. 14(1)(b) [am. Alta. Reg. 137/2003, s. 3(a)], (3) [ad. *idem*, s. 3(b)].

Traffic Safety Act, R.S.A. 2000, c. T-6.

Authors Cited

Aquinas, Thomas. *Treatise on Law*. Washington, D.C.: Regnery Gateway, 1991.

Barak, Aharon. "Proportional Effect: The Israeli Experience" (2007), 57 U.T.L.J. 369.

Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 5e éd. Cowansville, Qué.: Yvon Blais, 2008.

Cameron, Jamie. "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 Osgoode Hall L.J. 1.

Choudhry, Sujit. "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the [page575] Canadian *Charter*'s Section 1" (2006), 34 S.C.L.R. (2d) 501.

Davis, Morris, and Joseph F. Krauter. *The Other Canadians: Profiles of Six Minorities*. Toronto: Methuen, 1971.

Eissen, Marc-André. "The Principle of Proportionality in the Case-Law of the European Court of Human Rights", in R. St. J. Macdonald, F. Matscher and H. Petzold, eds., *The European System for the Protection of Human Rights*. Dordrecht, The Netherlands: Martinus Nijhoff, 1993, 125.

Emiliou, Nicholas. *The Principle of Proportionality in European Law: A Comparative Study*. London: Kluwer Law International, 1996.

Grimm, Dieter. "Proportionality in Canadian and German Constitutional Jurisprudence" *(2007), 57 U.T.L.J. 383*.

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp., vol. 2. Scarborough, Ont.: Thomson/Carswell, 2007 (updated 2008, release 1).

Hurka, Thomas. "Proportionality in the Morality of War" (2005), 33 *Phil. & Pub. Aff.* 34.

McLachlin, The Right Honourable Beverley M. "Freedom of Religion and the Rule of Law: A Canadian Perspective", in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*. Montreal and Kingston: McGill-Queen's University Press, 2004, 12.

Mullan, David J. *Administrative Law: Cases, Text, and Materials*, 5th ed. Toronto: Emond Montgomery, 2003.

Nussbaum, Martha C. *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*. New York: Basic Books, 2008.

Taylor, Charles. *Philosophical Arguments*. Cambridge, Mass.: Harvard University Press, 1995.

Van der Schyff, Gerhard. *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights*. Nijmegen, The Netherlands: Wolf Legal Publishers, 2005.

Webber, Jeremy. "The Irreducibly Religious Content of Freedom of Religion", in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada*. Vancouver: UBC Press, 2006, 178.

Webber, Jeremy. "Understanding the Religion in Freedom of Religion", in Peter Cane, Carolyn Evans and Zoë Robinson, eds., *Law and Religion in Theoretical and Historical Context*. Cambridge: Cambridge University Press, 2008, 26.

Weinstock, Daniel M. "Philosophical Reflections on the *Oakes* Test", in Luc B. Tremblay and Grégoire C. N. Webber, eds., *The Limitation of Charter Rights: [page576] Critical Essays on R. v. Oakes*. Montréal: Les Éditions Thémis, 2009, 115.

History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Conrad, O'Brien and Slatter JJ.A.), *2007 ABCA 160*, *417 A.R. 68*, 410 W.A.C. 68, *283 D.L.R. (4th) 136*, *[2007] 9 W.W.R. 459*, *156 C.R.R. (2d) 234*, *77 Alta. L.R. (4th) 281*, *49 M.V.R. (5th) 45*, *[2007] A.J. No. 518* (QL), *2007 CarswellAlta 622*, affirming a decision of LoVecchio J., *2006 ABQB 338*, *398 A.R. 5*, *269 D.L.R. (4th) 757*, *[2006] 8 W.W.R. 190*, *141 C.R.R. (2d) 227*, *57 Alta. L.R. (4th) 300*, *33 M.V.R. (5th) 16*, *[2006] A.J. No. 523* (QL), *2006 CarswellAlta 576*. Appeal allowed, LeBel, Fish and Abella JJ. dissenting.

Counsel

Roderick S. Wiltshire and *Randy Steele*, for the appellant.

K. Gregory Senda, for the respondents.

Donald J. Rennie and *Sharlene Telles-Langdon*, for the intervener the Attorney General of Canada.

Robert E. Charney and *Michael T. Doi*, for the intervener the Attorney General of Ontario.

Isabelle Harnois, for the intervener the Attorney General of Quebec.

Leah Greathead and *Tyna Mason*, for the intervener the Attorney General of British Columbia.

Mahmud Jamal, Colin Feasby and *David Grossman*, for the intervener the Canadian Civil Liberties Association.

Kikee Malik and *Brian Smith*, for the intervener the Ontario Human Rights Commission.

Charles M. Gibson, Albertos Polizogopoulos, Don Hutchinson and *Faye Sonier*, for the interveners the Evangelical Fellowship of Canada and the Christian Legal Fellowship.

[page577]

The judgment of McLachlin C.J. and Binnie, Deschamps and Rothstein JJ. was delivered by

McLACHLIN C.J.

I. Introduction

1 The Province of Alberta requires all persons who drive motor vehicles on highways to hold a driver's licence. Since 1974 each licence has borne a photograph of the licence holder, subject to exemptions for people who objected to having their photos taken on religious grounds. In 2003 the Province made the photo requirement universal in order to reduce the risk of driver's licences being used for identity theft, a growing problem in Alberta and the country. All licence holders are now required to have their photos taken for purposes of placement in the Province's facial recognition data bank.

2 The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities. They object on religious grounds to having their photographs taken. After the religious exemption to the photo requirement was revoked in 2003, Colony members began these proceedings against the Alberta government, alleging a breach of their religious freedom. The Province has offered to lessen the impact of the universal photo requirement by issuing special licences without photos, relieving Colony members of the need to carry their photos. However, it insists that their photos be taken for purposes of placement in the central data bank. The members of the Wilson Colony have rejected this proposal.

3 The case has proceeded on the basis that the universal photo requirement constitutes a limit on the freedom of religion of Colony members who wish to obtain a driver's licence and thus infringes s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. The issue on this appeal is whether this [page578] limit is a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter*. If not, the regulation is inconsistent with the *Charter* and is null and void pursuant to s. 52 of the *Constitution Act, 1982*.

4 I conclude that the evidence led by the Province establishes that the universal photo requirement is justified under s. 1 of the *Charter* on the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. The goal of setting up a system that minimizes the risk of identity theft associated with driver's licences is a pressing and important public goal. The universal photo requirement is connected to this goal and does not limit freedom of religion more than required to achieve it. Finally, the negative impact on the freedom of religion of Colony members who wish to obtain licences does not outweigh the benefits associated with the universal photo requirement. Accordingly, I would allow the appeal and uphold the regulation as constitutional.

II. Facts

5 Alberta began issuing driver's licences with photos in 1974. Until 2003, however, religious objectors were granted a non-photo licence called a Condition Code G licence, at the Registrar's discretion.

6 Driver's licences in Alberta are governed by the *Traffic Safety Act*, R.S.A. 2000, c. T-6, and regulations made under it. The power of the Registrar to grant exceptions to the photo requirement which existed previously in s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, was eliminated in May 2003 (*Operator Licensing and Vehicle Control Amendment Regulation*, Alta. Reg. 137/2003, s. 3). The new s. 14(1)(b) now requires that the Registrar "must require an image of the applicant's face, for incorporation in the licence, be taken". The amendment also added s. 14(3) which provides for use of the photo thus taken for "facial recognition [page579] software for the purpose of the identification of, or the verification of the identity of, a person who has applied for an operator's licence".

7 Members of the Wilson Colony, like many other Hutterites, believe that the Second Commandment prohibits them from having their photograph willingly taken. This belief is sincerely held.

8 Although the Colony attempts to be self-sufficient, some members need driver's licences so that they can travel outside the Colony to do business and attend to the needs of members. Under the 2003 regulation, members currently holding Condition Code G licences are required to have their photograph taken upon renewal of their licences, resulting in a violation of their religious beliefs. The Colony claimants led evidence asserting that if members could not obtain driver's licences, the viability of their communal lifestyle would be threatened. Mr. Samuel Wurz, the Colony's Secretary-Treasurer, deposed that each Colony member has a specific set of responsibilities assigned to him or her, some of which require the member to drive. If a Colony member cannot carry out these responsibilities, it "causes our religious commune to function improperly, thereby eroding the fabric of our social, cultural and religious way of life". In his view, the Province is effectively "attempting to force the Hutterian Brethren to make a choice between two of our religious beliefs", a choice they feel they should not have to make.

9 The Province, for its part, led evidence that the adoption of the universal photo requirement in 2003 was connected to a new system aimed at minimizing identity theft associated with driver's licences. The evidence showed that identity theft is a serious and growing problem in Alberta and elsewhere, and that drivers' licences, the most commonly used and accepted form of identification, could be and were being used for identity theft. [page580] The new facial recognition data bank was aimed at reducing the risk of this type of fraud.

10 Under the new system a digital photograph of every licensed driver is placed in a facial recognition data bank. This data bank is connected to facial recognition software which analyses the digital photographs of people who apply for licences. The software performs two kinds of comparison: one-to-one and one-to-many. The one-to-one comparison allows the government to be sure that the person trying to renew or replace a licence is the same person represented by the existing photo in the data bank. The one-to-many comparison allows it to be satisfied that a person applying for a new licence does not already hold another licence in another person's name.

11 A comprehensive photo requirement, whereby all valid licences are associated with a photo in the data bank, is essential to ensuring the efficacy of these mechanisms. To the extent that licences exist without holder photos in the central photo bank, others can appropriate the identity of the licence holder without detection by the facial recognition software. The Province also led evidence that this system was adopted with a view to harmonization with international and interprovincial standards for photo identification.

12 The Province has proposed measures to accommodate the Hutterian claimants' objection to the universal driver's licence photo requirement. The first is that the licence display a photo, but that the licence be carried in a sealed envelope or folder marked with the indication that it is the property of the Province, and that a digital photo be placed in the Province's facial recognition bank. The second is simply that a digital photo be placed in the bank, with no photo accompanying the driver's licence. The aim of these proposals is to minimize the impact of the universal photo requirement on religious beliefs by removing the need for [page581] Colony members to have any direct contact with the photos.

13 The Colony claimants reject both alternatives on the ground that they require a member to have a photo taken.

It proposes that no photo be taken, and that non-photo driver's licences be issued to them, marked "Not to be used for identification purposes".

III. History of Proceedings

A. *Alberta Court of Queen's Bench (LoVecchio J.), 2006 ABQB 338, 57 Alta. L.R. (4th) 300*

14 The chambers judge proceeded on the basis that the universal photo requirement limited Colony members' right to freedom of religion under s. 2(*a*) of the *Charter.* He went on to find that this limit was not shown to be justified under s. 1 of the *Charter.*

15 The chambers judge defined the government's objective as being "to prevent identity theft or fraud and the various forms of mischief which identity theft may facilitate, and ... the harmonization of international and interprovincial standards for photo identification" (para. 10), associated with the issuance of motor vehicle driver's licences. He concluded that the objective of preventing identity theft associated with driver's licences, while limited, was "pressing and substantial" (para. 14).

16 The chambers judge found that "the implementation of mandatory photographic licences, together with facial recognition software, is rationally connected to the objective of safeguarding the system of issuing operator's licences from fraud and for that mat[t]er the larger objective of limiting identity theft" (para. 16). He went on to find, however, that the requirement of minimal impairment [page582] was not met, in that the government had not accommodated the "distinctive character of the burdened group ... to the point of undue hardship" (para. 18), citing *Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 S.C.R. 256.* The accommodations offered by the Province would still require members to have their photos taken and offend the right. On the other hand, the Colony claimants' proposal that the driver's licence be marked "Not to be used for identification purposes" would satisfy the Colony members' concerns and also meet the government's objectives, since an individual seeking to impersonate the holder would be "significantly limited in the extent to which he or she could use the licence" (para. 28).

17 Although it was unnecessary, in view of his finding on minimal impairment, the chambers judge went on to consider proportionality of effects. He observed that while the requirement of photos combined with facial recognition software "may safeguard the system of issuing licences against fraud, and thereby constitute a useful tool against identity theft in general", this did not "safeguard the identity of the thousands of other individuals to whom operators' licences are never issued because they do not qualify to drive" (para. 31). He concluded: "In this regard, the effects of the measure appear somewhat limited when weighed against the acknowledged incursion upon the religious beliefs of the members of the applicant Colony" (para. 32).

18 The chambers judge concluded that the regulation is inconsistent with the *Charter* "to the extent that it renders a digital photograph mandatory for individuals who claim a valid religious objection" (para. 39). Accordingly, he held that the amendment removing the regulation's discretionary religions exemption was of no force and effect.

[page583]

B. *Alberta Court of Appeal, 2007 ABCA 160, 77 Alta. L.R. (4th) 281*

19 The majority, *per* Conrad J.A. (O'Brien J.A. concurring), dismissed the appeal.

20 Conrad J.A. characterized the purpose of the photo requirement narrowly as preventing licence duplication in order to permit the ready identification of licensed drivers at the roadside and minimize the number of disqualified people operating motor vehicles. Reasoning that the regulation, enacted under the *Traffic Safety Act*, was confined to enhancing traffic safety, she held that the goals of preventing identity theft, fraud and threats to public safety, could not be considered under s. 1. If the Province wished to assert these goals, in her view it should have enacted a law going specifically to these risks. She also noted the absence of legislative debate on the issue, suggesting that this rendered the regulation suspect.

21 Conrad J.A. expressed doubt about whether the photo requirement was rationally connected to the objective of identification associated with traffic safety. Since over 700,000 unlicensed Albertans are not in the facial recognition data bank, granting a few hundred Hutterites an exemption from the photo requirement would not have a significant impact on the number of identities available for unlawful appropriation.

22 However, Conrad J.A. went on to dispose of the case on the ground that the universal photo requirement did not minimally impair the right, because it did not reasonably accommodate Colony members' s. 2(a) religious freedom. She noted that the claimants had enjoyed an exemption from the requirement for close to 30 years, with no evidence of resultant harm. The result, according to Conrad J.A., was that "the impugned regulation offers only a very slight protection against the risk that [page584] a licence will be issued to an individual in a name other than his or her own, while completely infringing the respondents' rights" (para. 46). Conrad J.A. added that the effects of the regulation were disproportionate, in that "the mandatory photo requirement forces the Hutterian Brethren to either breach a sincerely held religious belief against being photographed or to cease driving", which would also have severe practical consequences for individuals in the community (para. 54).

23 Slatter J.A., dissenting, defined one of the goals of the universal photo requirement as maximizing the reliability and integrity of driver's licences as a widely used and respected method of personal identification. He found that the limit on freedom of religion imposed by the photo requirement, while it might not eliminate all identity theft, was rationally connected to the objective of "[m]aking forgery or unauthorized driving more difficult" (para. 99).

24 On minimal impairment, Slatter J.A. proceeded on the basis that the government must show that it has accommodated the right to the point of undue hardship. The accommodations offered by the Province, while they would still limit the Colony members' religion freedom, would go some way to fulfilling the requirements of the Second Commandment, since members would not have to look at their photos. He held that the accommodation proposed by the Colony claimants -- driver's licences marked "Not to be used for identification purposes" -- was no accommodation at all, but simply "an assertion that nothing which infringes the second commandment can ever be justified" (para. 121). In addition, it would prevent police officers from using non-photo licences for the basic function of driver identification. Slatter J.A. found that the Colony claimants' proposal would reduce the efficacy of the system with respect to identity theft. After alluding to harmonization with other systems, Slatter J.A. concluded that "[t]o require [page585] the [Province] to accommodate any further would require it to significantly compromise a central feature of the security of the licencing system, and would amount to undue hardship" (para. 124).

25 Slatter J.A. concluded that the salutary effects of having the photos of all licence holders in the data bank -- regulating traffic safety and ensuring the integrity and reliability of the driver's licence system to the benefit of Albertans -- outweighed the deleterious effects on Colony members' freedom of religion. He observed that the Colony members object only to having their photos taken *voluntarily*, and suggested that the element of state compulsion implied by the photo requirement would "considerably diminish any disobedience to their religious tenets" (para. 126). For those reasons, he took the view that "[i]n a free and democratic society minor infringements of this kind on religious doctrine can be tolerated" (para. 126).

26 Slatter J.A. accordingly concluded that the appeal should be allowed.

IV. Issues

27 A. Freedom of religion

1. The nature of the limit on the s. 2(*a*) right;
2. Is the limit on the s. 2(*a*) right justified under s. 1 of the *Charter*?
   (a) Is the limit prescribed by law?
   (b) Is the purpose for which the limit is imposed pressing and substantial?

(c) Is the means by which the goal is furthered proportionate?

(i) Is the limit rationally connected to the purpose?

(ii) Does the limit minimally impair the right?

(iii) Is the law proportionate in its effect?

(d) Conclusion on justification

B. The claim under s. 15

V. Analysis

A. *Freedom of Religion*

(1) The Nature of the Limit on the Section 2(*a*) Right

28 Section 2(*a*) of the *Charter* states that "[e]veryone has ... freedom of conscience and religion".

29 The members of the Colony believe that permitting their photo to be taken violates the Second Commandment: "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth" (Exodus 20:4). They believe that photographs are "likenesses" within the meaning of the Second Commandment, and want nothing to do with their creation or use. The impact of having a photo taken might involve censure, such as being required to stand during religious services.

30 Given these beliefs, the effect of the universal photo requirement is to place Colony members who wish to obtain driver's licences either in the position of violating their religious commitments, or of foregoing driver's licences. Without the ability of some members of the Colony to obtain driver's licences, Colony members argue that they will not be able to drive to local centres to do business and obtain the goods and services necessary [page587] to the Colony. The regulation, they argue, forces members to choose between obeying the Second Commandment and adhering to their rural communal lifestyle, thereby limiting their religious freedom and violating s. 2(*a*) of the *Charter*.

31 My colleague Abella J. notes at para. 130 that "freedom of religion has 'both individual and collective aspects'". She asserts that "[b]oth ... are engaged in this case." While I agree that religious freedom has both individual and collective aspects, I think it is important to be clear about the relevance of those aspects at different stages of the analysis in this case. The broader impact of the photo requirement on the Wilson Colony community is relevant at the proportionality stage of the s. 1 analysis, specifically in weighing the deleterious and salutary effects of the impugned regulation. The extent to which the impugned law undermines the proper functioning of the community properly informs that comparison. Community impact does not, however, transform the essential claim -- that of the individual claimants for photo-free licences -- into an assertion of a group right.

32 An infringement of s. 2(*a*) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, and *Multani*. "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct. As explained in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, *per* Dickson C.J.:

> The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern [page588] one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(*a*) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314. [Emphasis added.]

33 The Province concedes the first element of this s. 2(*a*) test, sincere belief in a belief or practice that has a nexus with religion. The chambers judge described the concession in the following terms:

> The Attorney General does not dispute that the Applicants hold sincere religious beliefs that conflict with the requirement that those who obtain or renew an Alberta operator's licence must permit a digital photograph to be taken and that those beliefs are honestly held. [para. 6]

34 The record does not disclose a concession on the second element of the test -- whether the universal photo requirement interferes with Colony members' religious freedom in a manner that is more than trivial or insubstantial. In order for such a determination to be made, it would need to be shown that the claimants' "religious beliefs or conduct might reasonably or actually be threatened" by the universal photo requirement: see *Edwards Books*, at p. 759. Evidence of a state-imposed cost or burden would not suffice; there would need to be evidence that such a burden was "capable of interfering with religious belief or practice": *Edwards Books*, at p. 759. In the present case, however, the courts below seem to have proceeded on the assumption that this requirement was met. Given this assumption, I will proceed to consider whether the limit is a reasonable one, demonstrably justified in a free and democratic society.

[page589]

(2) Is the Limit on the Section 2(*a*) Right Justified Under Section 1 of the *Charter*?

35 This Court has recognized that a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the *Charter*. Often, a particular problem or area of activity can reasonably be remedied or regulated in a variety of ways. The schemes are typically complex, and reflect a multitude of overlapping and conflicting interests and legislative concerns. They may involve the expenditure of government funds, or complex goals like reducing antisocial behaviour. The primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights.

36 Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community.

37 If the choice the legislature has made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives. Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified". Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned [page590] measure is a penal statute directly threatening the liberty of the accused. Courts recognize that the issue of identity theft is a social problem that has grown exponentially in terms of cost to the community since photo licences were introduced in Alberta in 1974, as reflected in the government's attempt to tighten the scheme when it discontinued the religious exemption in 2003. The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate: *Edwards Books*, at pp. 781-82, *per* Dickson C.J., and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 43, *per* McLachlin C.J.

38 With this in mind, I turn to the question of whether the limit on freedom of religion raised in this case has been shown to be justified under s. 1 of the *Charter*.

(a) *Is the Limit Prescribed by Law?*

39 Section 1 requires that before a proportionality analysis is undertaken, the court must satisfy itself that the measure is "prescribed by law". If a limit on a *Charter* right is not "prescribed by law" it cannot be justified under s. 1. Rather, it is a government act, attracting a remedy under s. 24 of the *Charter.* Regulations are measures "prescribed by law" under s. 1 of the *Charter*: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 981; *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 645.

40 The majority of the Court of Appeal expressed concern that the challenged measure was adopted by regulation and therefore without [page591] any legislative debate, pursuant to an Act with very different objectives. The respondents take this position much further and advance a general proposition that *Charter*-infringing measures may only be adopted by primary legislation. Concern about overextension of regulatory authority is understandable. Governments should not be free to use a broad delegated authority to transform a limited-purpose licensing scheme into a *de facto* universal identification system beyond the reach of legislative oversight. However, that is not what has happened here. A photo requirement has been an accepted part of the motor vehicle licensing scheme for decades. It is not a stand-alone identification divorced from the public-safety purpose of the authorizing legislation. Moreover, hostility to the regulation-making process is out of step with this Court's jurisprudence and with the realities of the modern regulatory state: see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 71; D.J. Mullan, *Administrative Law: Cases, Text and Materials* (5th ed. 2003), at p. 948. Regulations, passed by Order in Council and applied in accordance with the principles of administrative law and subject to challenge for constitutionality, are the life blood of the administrative state and do not imperil the rule of law. Whether the impugned measure was passed into law by statute or regulation is usually of no consequence for the s. 1 analysis.

(b) *Is the Purpose for Which the Limit Is Imposed Pressing and Substantial?*

41 The chambers judge defined the government's objective in imposing a universal photo requirement as being "to prevent identity theft or fraud and the various forms of mischief which identity theft may facilitate, and ... the harmonization of international and interprovincial standards for photo identification" (para. 10). This objective is part of the larger goal of ensuring the integrity [page592] of the system for licensing drivers. As Slatter J.A. explained:

> Driver's licences are an important part of the overall regulation of traffic safety. They have become a near universal form of identification. The integrity and reliability of the driver's licence system benefits all Albertans who require, on a routine basis, proof of their identity. The presence of photographs is an important part of the integrity of the system. There unfortunately are significantly large groups of people who seek to exploit the identities of others for financial or other purposes. The overall cost of the activities of this group are very large, and the [Province] (and all Albertans) have an obligation to do whatever they can to minimize the opportunities for identity theft. Photographs on driver's licences will not eliminate all misuse, and the value of the savings that will result are hard to measure. They are likely however to be significant. [para. 127]

42 Maintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft is clearly a goal of pressing and substantial importance, capable of justifying limits on rights. The purpose of a universal photo requirement is to have a complete digital data bank of facial photos to prevent wrongdoers from using driver's licences as breeder documents for purposes of identity theft. As discussed above (para. 10), the requirement permits the system to ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence.

43 The chambers judge found that the universal photo requirement was also aimed at harmonization of international and interprovincial standards for photo identification. The evidence supports the Province's contention that other provinces and nations are moving toward harmonization, and that a feature of this harmonization is likely to be a universal photo requirement for all licence holders. While the fact that other provinces have not yet moved to this requirement arguably undercuts the position that a universal photo requirement is necessary in Alberta now, governments are entitled to act in the present with a view to future developments. [page593] Accordingly,

harmonization may be considered as a factor relevant to the Province's goal of ensuring the integrity of the licensing system by reducing identity theft associated with the system.

44 The majority of the Court of Appeal suggested that the goal of the universal photo requirement should be confined to purposes related to traffic safety, since that was the subject of the authorizing Act. However, government regulations may deal both with the primary goal of an enabling law and with collateral concerns resulting from measures adopted to achieve this goal. As Slatter J.A. put it, "[i]t is the height of formality to suggest that the prevention of the misuse of a driver's licence is not one of the purposes of the *Traffic Safety Act*. Provisions that attempt to prevent the misuse or abuse of an enactment are well within the objectives of the enactment" (para. 90).

45 In this case, the government's primary goal is traffic safety, as denoted by the title of the Act. To further this goal, the Act puts in place a system of licensing drivers. A collateral effect of the licensing system is that the driver's licences issued under this system have become generalized identification documents, with the attendant risk that they might be misused for identity theft and the various mischiefs that flow from identity theft. The Province was entitled to pass regulations dealing not only with the primary matter of highway safety, but with collateral problems associated with the licensing system. It was therefore entitled to adopt a regulation requiring photos of all drivers to be held in a digital photo bank, thereby minimizing the risk of identity theft to the extent possible.

46 Finally, as explained above, the fact that the specific objectives of the impugned regulation were not debated or ratified by the legislature does not render them invalid for the purposes of s. 1. If a regulation is validly enacted pursuant to delegated [page594] legislative authority, its objective can properly be evaluated under the test established in *Oakes*.

47 I conclude that the Province has established that the goal of ensuring the integrity of the driver's licensing system so as to minimize identity theft associated with that system is pressing and substantial. Having established that the limit on the right is a measure "prescribed by law" and that the asserted purpose of the limit is pressing and substantial, the remaining issue is whether the limit is proportionate, in the sense that it is rationally connected to the goal, limits the right as little as reasonably necessary, and is proportionate in its effects.

(c) *Is the Means by Which the Goal Is Furthered Proportionate?*

(d) Is the Limit Rationally Connected to the Purpose?

48 At this stage, the Province must show that the universal photo requirement is rationally connected to the goal of preserving the integrity of the driver's licensing system by minimizing the risk of identity theft through the illicit use of driver's licences. To establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *RJR- MacDonald Inc. v. Canada (Attorney General)*, *[1995] 3 S.C.R. 199*, at para. 153 . The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.

49 The government argues that a universal system of photo identification for drivers will be more effective in preventing identity theft than a system that grants exemptions to people who object to photos being taken on religious grounds. The affidavit evidence filed by the government supports this view.

[page595]

50 Alberta's evidence demonstrates the ways in which the existence of an exemption from the photo requirement would increase the vulnerability of the licensing system and the risk of identity-related fraud. As Mr. Joseph Mark Pendleton, Director of the Special Investigations Unit of the Alberta Ministry of Government Services, put it in his affidavit supporting Alberta's position, "[o]pportunities for fraud are as numerous as criminals are clever and resourceful". The existence of non-photo licences in the system raises the possibility that a person could hold multiple licences in different names, as long as no more than one of them was a regular photographic licence. As

stated by Alberta, "each licensee whose photo is not entered in our database creates an opportunity for impersonation by wrongdoers, because that person's licence can be renewed or replaced by a wrongdoer without being detected by [facial recognition]". A non-photo licence can be obtained and used to obtain credit or enter into other commercial relationships to the detriment of the other parties to the transactions. Without the photographs of all licence holders in the photo identification bank, the assurance of a one-to-one correspondence between individuals and issued licences is lost, and the possibility of driver's licence-based fraud would be increased.

51 The majority of the Alberta Court of Appeal, while deciding the case on the basis of minimum impairment, expressed doubt on whether the universal photo requirement for all holders of driver's licences is rationally connected to the goal of preserving the integrity and security of the driver's licensing system. Conrad J.A. pointed out that many Albertans do not hold driver's licences and concluded that the risk flowing from exempting a few hundred Hutterites from the requirement was "minimal". These concerns confuse rational connection with proportionality of negative and positive effects of the measure. The issue at the stage of rational connection is simply whether there is a rational link between the infringing measure and the government goal. The balance between positive and negative effects of the measure [page596] falls to be considered at the final stage of the s. 1 analysis.

52 I conclude that the Province has established that the universal photo requirement is rationally related to its goal of protecting the integrity of the driver's licensing system and preventing it from being used for purposes of identity theft.

(ii) Does the Limit Minimally Impair the Right?

53 The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.

54 In *RJR-MacDonald*, the minimal impairment analysis was explained as follows, at para. 160:

> As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ... . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Emphasis added; citations omitted.]

In this manner, the legislative goal, which has been found to be pressing and substantial, grounds the minimum impairment analysis. As Aharon Barak, [page597] former President of the Supreme Court of Israel, puts it, "the rational connection test and the least harmful measure [minimum impairment] test are essentially determined against the background of the proper objective, and are derived from the need to realize it": "Proportional Effect: The Israeli Experience" *(2007), 57 U.T.L.J. 369*, at p. 374. President Barak describes this as the "internal limitation" in the minimum impairment test, which "prevents it [standing alone] from granting proper protection to human rights" (p. 373). The internal limitation arises from the fact that the minimum impairment test requires only that the government choose the least drastic means *of achieving its objective*. Less drastic means which do not actually achieve the government's objective are not considered at this stage.

55 I hasten to add that in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal

impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: *Charkaoui v. Canada (Citizenship and Immigration)*, *2007 SCC 9*, *[2007] 1 S.C.R. 350*. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner. As I will explain, in my view the record in this case discloses no such alternative.

56 The purpose of the limit in this case, I earlier concluded, is to maintain the integrity of the [page598] driver's licensing system by minimizing the risk of driver's licences being used for purposes of identity theft, so as to prevent fraud and various other misuses of the system. The regulation is part of a complex regulatory scheme and is aimed at an emerging and challenging problem. The question, therefore, is whether the means chosen to further its purpose -- the universal photo requirement for all licensed drivers -- is reasonably tailored to address the problem of identity theft associated with driver's licences.

57 The Province proposes alternatives which maintain the universal photo requirement, but minimize its impact on Colony members by eliminating or alleviating the need for them to carry photos. This would permit the Province to achieve its goal of a maximally efficient photo recognition system to combat fraud associated with driver's licences, while reducing the impact on the members' s. 2(*a*) rights.

58 However, the Hutterian claimants reject these proposals. For them, the only acceptable measure is one that entirely removes the limit on their s. 2(*a*) rights. They object to any photo being taken and held in a photo data bank. For them, the only alternative is a driver's licence issued without a photo, stamped with the words, "Not to be used for identification purposes".

59 The problem with the claimants' proposal in the context of the minimum impairment inquiry is that it compromises the Province's goal of minimizing the risk of misuse of driver's licences for identity theft. The stamp "Not to be used for identification purposes" might prevent a person who comes into physical possession of such a licence from using it as a breeder document, but it would not prevent a person from assuming the identity of the licence holder and producing a fake document, [page599] which could not be checked in the absence of a photo in the data bank. As Slatter J.A. pointed out, without the photo in the bank, the bank is neutralized and the risk that the identity of the holder can be stolen and used for fraudulent purposes is increased. The only way to reduce that risk as much as possible is through a universal photo requirement. The claimants' argument that the reduction in risk would be low, since few people are likely to request exemption from the photo requirement, assumes that some increase in risk and impairment of the government goal may occur, and hence does not assist at the stage of minimal impairment.

60 The claimants' proposal, instead of asking what is minimally required to realize the legislative goal, asks the government to significantly compromise it. An exemption for an unspecified number of religious objectors would mean that the one-to-one correspondence between issued licences and photos in the data bank would be lost. As shown by the Province, this disparity could well be exploited by wrongdoers. Contrary to the suggestion of LeBel J. (para. 201), the evidence discloses no alternative measures which would substantially satisfy the government's objective while allowing the claimants to avoid being photographed. In short, the alternative proposed by the claimants would *significantly* compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage.

61 This is not to suggest the Colony members are acting improperly. Freedom of religion cases may often present this "all or nothing" dilemma. Compromising religious beliefs is something adherents may understandably be unwilling to do. And governments may find it difficult to tailor laws to the myriad ways in which they may trench on different people's religious beliefs and practices. The result may be that the justification of a limit on the right falls to be decided not at the point of minimal impairment, which proceeds on the assumption the state goal is valid, but at the stage of proportionality [page600] of effects, which is concerned about balancing the benefits of the measure against its negative effects.

62 I conclude that the universal photo requirement minimally impairs the s. 2(*a*) right. It falls within a range of reasonable options available to address the goal of preserving the integrity of the driver's licensing system. All other options would significantly increase the risk of identity theft using driver's licences. The measure seeks to realize the legislative goal in a minimally intrusive way.

63 Much has been made of the fact that over 700,000 Albertans do not hold driver's licences. The argument is that the risk posed by a few hundred potential religious objectors is minuscule as compared to the much larger group of unlicensed persons. This argument is accepted by the dissent. In my view, it rests on an overly broad view of the objective of the driver's licence photo requirement as being to eliminate all identity theft in the province. Casting the government objective in these broad terms, my colleague Abella J. argues that the risk posed by a few religious dissenters is minimal, when compared to the general risk posed by unlicensed persons. But with respect, that is the wrong comparison. We must take the government's goal as it is. It is not the broad goal of eliminating all identity theft, but the more modest goal of maintaining the integrity of the driver's licensing system so as to minimize identity theft *associated with that system*. The question is whether, within that system, any exemptions, including for religious reasons, pose real risk to the integrity of the licensing system.

[page601]

64 The implication of Justice Abella's reasoning is that because the province tolerates the identity theft risk posed by unlicensed Albertans, it must therefore tolerate the risk associated with non-photographed licensees. On this logic, the province would be required to take the more radical approach of requiring photographic identification for every Albertan, which would directly contravene the respondents' religious beliefs, before it could rely upon a security risk argument in the context of the narrower driver's licensing program. In my opinion, the province has a legitimate interest in ensuring the integrity of its driver's licensing system and guarding against the risk that it will be used to perpetrate fraud. In order to accomplish this goal, it should not be forced to undertake broader measures that it might have resisted for other policy reasons.

65 The courts below approached minimum impairment in a different fashion. First, they conducted the balancing inquiry at the stage of minimal impairment. Second, drawing on this Court's decision in *Multani*, the courts below applied a reasonable accommodation analysis instead of the *Oakes* test.

66 In my view, a distinction must be maintained between the reasonable accommodation analysis undertaken when applying human rights laws, and the s. 1 justification analysis that applies to a claim that a law infringes the *Charter*. Where the validity of a law is at stake, the appropriate approach is a s. 1 *Oakes* analysis. Under this analysis, the issue at the stage of minimum impairment is whether the goal of the measure could be accomplished in a less infringing manner. The balancing of effects takes place at the third and final stage of the proportionality test. If the government establishes justification under the *Oakes* test, the law is constitutional. If not, the law is null and void under s. 52 insofar as it is inconsistent with the *Charter*.

[page602]

67 A different analysis applies where a government *action* or administrative *practice* is alleged to violate the claimant's *Charter* rights. If a *Charter* violation is found, the court's remedial jurisdiction lies not under s. 52 of the *Constitution Act, 1982* but under s. 24(1) of the *Charter*: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 61. In such cases, the jurisprudence on the duty to accommodate, which applies to governments and private parties alike, may be helpful "to explain the burden resulting from the minimal impairment test with respect to a particular individual" (emphasis added): *Multani*, at para. 53, *per* Charron J.

68 Minimal impairment and reasonable accommodation are conceptually distinct. Reasonable accommodation is a concept drawn from human rights statutes and jurisprudence. It envisions a dynamic process whereby the parties -- most commonly an employer and employee -- adjust the terms of their relationship in conformity with the

requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party. In *Multani*, Deschamps and Abella JJ. explained:

> The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs. [para. 131]

69 A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe *Charter* rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants [page603] before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis . A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.

70 Similarly, "undue hardship", a pivotal concept in reasonable accommodation, is not easily applicable to a legislature enacting laws. In the human rights context, hardship is seen as undue if it would threaten the viability of the enterprise which is being asked to accommodate the right. The degree of hardship is often capable of expression in monetary terms. By contrast, it is difficult to apply the concept of undue hardship to the cost of achieving or not achieving a legislative objective, especially when the objective is (as here) preventative or precautionary. Though it is possible to interpret "undue hardship" broadly as encompassing the hardship that comes with failing to achieve a pressing government objective, this attenuates the concept. Rather than strain to adapt "undue hardship" to the context of s. 1 of the *Charter*, it is better to speak in terms of minimal impairment and proportionality of effects.

71 In summary, where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper [page604] s. 1 analysis based on the methodology of *Oakes*. Where the government has passed a measure into law, the provisions of s. 1 apply. The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects.

(iii) Is the Law Proportionate in Its Effect?

72 The third and final step of the proportionality analysis is to determine proportionality of effects. We have seen that the regulation advances an important objective; that its limitation on the Colony members' religious freedom is rationally connected to that goal; and that the means chosen to achieve the government objective -- the universal photo requirement -- meet the requirement of minimal impairment.

73 This leaves a final question: are the overall effects of the law on the claimants disproportionate to the government's objective? When one balances the harm done to the claimants' religious freedom against the benefits associated with the universal photo requirement for driver's licences, is the limit on the right proportionate in effect to the public benefit conferred by the limit?

74 In *Oakes*, Dickson C.J. explained the function of this third and final step of the proportionality analysis:

> Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is

> still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The [page605] more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [pp. 139-40]

75 Despite the importance Dickson C.J. accorded to this stage of the justification analysis, it has not often been used. Indeed, Peter W. Hogg argues that the fourth branch of *Oakes* is actually redundant: *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.12. He finds confirmation of this view in the fact that he is unable to locate any case in which this stage of the analysis has been decisive to the outcome. In his opinion, this is because it essentially duplicates the analysis undertaken at the first stage, pressing and substantial objective. If a law has an objective deemed sufficiently important to override a *Charter* right and has been found to do so in a way which is rationally connected to the objective and minimally impairing of the right, Hogg asks rhetorically, how can the law's effects nonetheless be disproportionate to its objective? In his view, a finding that a law's objective is "pressing and substantial" at the first stage of *Oakes* will *always* produce a conclusion that its effects are proportionate. The real balancing must be done under the heading of minimal impairment and, to a much more limited extent, rational connection.

76 It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis -- pressing goal, rational connection, and minimum impairment -- could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the "severity of the deleterious effects of a measure on individuals or groups". As President Barak explains:

> [page606]
>
> Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right... . It requires placing colliding values and interests side by side and balancing them according to their weight. [p. 374]

In my view, the distinction drawn by Barak is a salutary one, though it has not always been strictly followed by Canadian courts. Because the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing between them. Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. Rather than reading down the government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*.

77 The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation. In *Thomson Newspapers Co. v. Canada (Attorney General)*, *[1998] 1 S.C.R. 877*, Bastarache J. explained:

> The third stage of the proportionality analysis performs a fundamentally distinct role... . The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. The third stage of the proportionality analysis [page607] provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [Emphasis in original; para. 125.]

78 In my view, this is a case where the decisive analysis falls to be done at the final stage of *Oakes*. The first two

elements of the proportionality test -- rational connection and minimum impairment -- are satisfied, and the matter stands to be resolved on whether the "deleterious effects of a measure on individuals or groups" outweigh the public benefit that may be gained from the measure. In cases such as this, where the demand is that the right be fully respected without compromise, the justification of the law imposing the limit will often turn on whether the deleterious effects are out of proportion to the public good achieved by the infringing measure.

1. *Salutary Effects*

79 The first inquiry is into the benefits, or "salutary effects" associated with the legislative goal. Three salutary effects of the universal photo requirement were raised on the evidence: (1) enhancing the security of the driver's licensing scheme; (2) assisting in roadside safety and identification; and (3) eventually harmonizing Alberta's licensing scheme with those in other jurisdictions.

80 The most important of these benefits and the one upon which Alberta principally relies is the enhancement of the security or integrity of the driver's licensing scheme. The photo requirement ensures both a "one-to-one" and "one-to-many" correspondence among licence holders. This makes it possible, through the use of computer software, to ensure that no person holds more than one licence. It is clear on the evidence that the universal photo requirement enhances the security of the [page608] licensing system and thus of Albertans. Mandatory photos represent a significant gain to the integrity and usefulness of the computer comparison system. In short, requiring that *all* licence holders are represented by a digital photo in the data bank will accomplish these security-related objectives more effectively than would an exemption for an as yet undetermined number of religious objectors. Any exemptions would undermine the certainty with which the government is able to say that a given licence corresponds to an identified individual and that no individual holds more than one licence. This evidence stands effectively uncontradicted.

81 Though it is difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions, it is clear that the internal integrity of the system would be compromised. In this respect, the present case may be contrasted with previous religious freedom cases where this Court has found that the potential risk was too speculative.

82 In *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, a risk was held to be overly speculative because there was insufficient evidence that potentially discriminatory beliefs were actually resulting in discriminatory conduct. In the present case, by contrast, it is clear that the photo exemption would have a tangible impact on the integrity of the licensing system because it would undermine one-to-one and one-to-many photo comparisons to verify identity.

83 Similarly, in *Amselem*, the "security concern" posed by the construction of personal succahs was purely speculative because there was no evidence that emergency exits were actually being blocked. The appellants had offered to set up their succahs "in such a way that they would not block any doors, would not obstruct fire lanes, [and] would pose no threat to safety or security in any way" (para. 89). The Court noted that "security [page609] concerns, if soundly established, would require appropriate recognition in ascertaining any limit on the exercise of the appellants' religious freedom" (para. 88). Here, by contrast, it is established that exempting people from the photo registry creates a real risk to security because it undermines the integrity of the system.

84 The requirement of a photo on a driver's licence serves the additional purpose of assisting police officers in reliably identifying drivers at the roadside. Alberta concedes that this benefit, given the relatively small number of persons who would seek religious exemptions, would not in itself justify limiting freedom of religion. Yet another salutary benefit may flow from eventual harmonization with other licensing systems. This benefit, however, remains to be realized. While these effects may not be determinative, they support the overall salutary effect of the universal photo requirement.

85 In summary, the salutary effects of the universal photo requirement for driver's licences are sufficient, subject to final weighing against the negative impact on the right, to support some restriction of the right. As discussed earlier,

a government enacting social legislation is not required to show that the law will in fact produce the forecast benefits. Legislatures can only be asked to impose measures that reason and the evidence suggest will be beneficial. If legislation designed to further the public good were required to await proof positive that the benefits would in fact be realized, few laws would be passed and the public interest would suffer.

2. *Deleterious Effects*

86 This brings us to the deleterious effects of the limit on Colony members' exercise of their [page610] s. 2(*a*) right. At this point, the seriousness of the effects of the limit on Colony members' freedom of religion falls to be addressed. Several points call for discussion.

87 A preliminary observation is that the seriousness of the limit on freedom of religion varies from case to case, depending on "the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society" (*Oakes*, at pp. 139-40).

88 The deleterious effects of a limit on freedom of religion requires us to consider the impact in terms of *Charter* values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy: *Thomson Newspapers*, at para. 125; see also *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 . The most fundamental of these values, and the one relied on in this case, is liberty -- the right of choice on matters of religion. As stated in *Amselem*, *per* Iacobucci J., religious freedom "revolves around the notion of personal choice and individual autonomy and freedom" (para. 40). The question is whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices.

89 There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.

[page611]

90 Because religion touches so many facets of daily life, and because a host of different religions with different rites and practices co-exist in our society, it is inevitable that some religious practices will come into conflict with laws and regulatory systems of general application. As recognized by the European Court of Human Rights in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A, cited by my colleague Abella J., this pluralistic context also includes "atheists, agnostics, sceptics and the unconcerned" (para. 31). Their interests are equally protected by s. 2(*a*): *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 347. In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs. The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit for purposes of the proportionality analysis. Indeed to end the inquiry with such an assertion would cast an impossibly high burden of justification on the state. We must go further and evaluate the degree to which the limit actually impacts on the adherent.

91 The seriousness of a particular limit must be judged on a case-by-case basis. However, guidance can be found in the jurisprudence. Limits that amount to state compulsion on matters of belief are always very serious. As the U.S. Supreme Court has stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State": *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at p. 851.

[page612]

92 Canadian law reflects the fundamental proposition that the state cannot by law directly compel religious belief or practice. Thus, this Court has held that if the purpose of a law is to interfere with religious practices, the law cannot be upheld: see *Big M Drug Mart, Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (C.A.), and *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.). To compel religious practice by force of law deprives the individual of the fundamental right to choose his or her mode of religious experience, or lack thereof. Such laws will fail at the first stage of *Oakes* and proportionality will not need to be considered.

93 Cases of direct compulsion are straightforward. However, it may be more difficult to measure the seriousness of a limit on freedom of religion where the limit arises not from a direct assault on the right to choose, but as the result of incidental and unintended effects of the law. In many such cases, the limit does not preclude choice as to religious belief or practice, but it does make it more costly.

94 The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice: see *Edwards Books*. Or the government program to which the limit is attached may be compulsory, with the result that the adherent is left with a stark choice between violating his or her religious belief and disobeying the law: *Multani*. The absence of a meaningful choice in such cases renders the impact of the limit very serious.

95 However, in many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the [page613] adherent with a meaningful choice concerning the religious practice at issue. The *Charter* guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion. Many religious practices entail costs which society reasonably expects the adherents to bear. The inability to access conditional benefits or privileges conferred by law may be among such costs. A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such choice.

96 This returns us to the task at hand -- assessing the seriousness of the limit on religious practice imposed in this case by the regulation's universal photo requirement for driver's licences. This is not a case like *Edwards Books* or *Multani* where the incidental and unintended effect of the law is to deprive the adherent of a meaningful choice as to the religious practice. The impugned regulation, in attempting to secure a social good for the whole of society -- the regulation of driver's licences in a way that minimizes fraud -- imposes a cost on those who choose not to have their photos taken: the cost of not being able to drive on the highway. But on the evidence before us, that cost does not rise to the level of depriving the Hutterian claimants of a meaningful choice as to their religious practice, or adversely impacting on other *Charter* values.

97 The Hutterian claimants argue that the limit presents them with an invidious choice: the choice between some of its members violating the Second Commandment on the one hand, or accepting the end of their rural communal life on the other hand. However, the evidence does not support the conclusion that arranging alternative means of highway transport would end the Colony's rural way of life. The claimants' affidavit says that it is necessary [page614] for at least some members to be able to drive from the Colony to nearby towns and back. It does not explain, however, why it would not be possible to hire people with driver's licences for this purpose, or to arrange third party transport to town for necessary services, like visits to the doctor. Many businesses and individuals rely on hired persons and commercial transport for their needs, either because they cannot drive or choose not to drive. Obtaining alternative transport would impose an additional economic cost on the Colony, and would go against their traditional self-sufficiency. But there is no evidence that this would be prohibitive.

98 On the record before us, it is impossible to conclude that Colony members have been deprived of a meaningful

choice to follow or not to follow the edicts of their religion. The law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver's licence must permit a photo to be taken for the photo identification data bank. Driving automobiles on highways is not a right, but a privilege. While most adult citizens hold driver's licences, many do not, for a variety of reasons.

99 I conclude that the impact of the limit on religious practice imposed by the universal photo requirement for obtaining a driver's licence is that Colony members will be obliged to make alternative arrangements for highway transport. This will impose some financial cost on the community and depart from their tradition of being self-sufficient in terms of transport. These costs are not trivial. But on the record, they do not rise to the level of seriously affecting the claimants' right to pursue their religion. They do not negate the choice that lies at the heart of freedom of religion.

[page615]

3. *Weighing the Salutary and Deleterious Effects*

100 Having considered the seriousness of the limit in terms of its impact on the claimants' freedom of religion, we must balance these deleterious effects against the salutary effects of the law, in order to determine whether the overall impact of the law is proportionate.

101 The law has an important social goal -- to maintain an effective driver's licence scheme that minimizes the risk of fraud to citizens as a whole. This is not a goal that should lightly be sacrificed. The evidence supports the conclusion that the universal photo requirement addresses a pressing problem and will reduce the risk of identity-related fraud, when compared to a photo requirement that permits exceptions.

102 Against this important public benefit must be weighed the impact of the limit on the claimants' religious rights. While the limit imposes costs in terms of money and inconvenience as the price of maintaining the religious practice of not submitting to photos, it does not deprive members of their ability to live in accordance with their beliefs. Its deleterious effects, while not trivial, fall at the less serious end of the scale.

103 Balancing the salutary and deleterious effects of the law, I conclude that the impact of the limit on religious practice associated with the universal photo requirement for obtaining a driver's licence, is proportionate.

(d) *Conclusion on Justification*

104 I conclude that the limit on the Colony members' freedom of religion imposed by the universal photo requirement for holders of driver's licences has been shown to be justified under s. 1 of the *Charter*. The goal of minimizing the risk of fraud associated with driver's licences is pressing [page616] and substantial. The limit is rationally connected to the goal. The limit impairs the right as little as reasonably possible in order to achieve the goal; the only alternative proposed would significantly compromise the goal of minimizing the risk. Finally, the measure is proportionate in terms of effects: the positive effects associated with the limit are significant, while the impact on the claimants, while not trivial, does not deprive them of the ability to follow their religious convictions.

B. *The Claim Under Section 15*

105 The s. 15 claim was not considered at any length by the courts below and addressed only summarily by the parties in this Court. In my view, it is weaker than the s. 2(*a*) claim and can easily be dispensed with. To the extent that the s. 15(1) argument has any merit, many of my reasons for dismissing the s. 2(*a*) claim apply to it as well.

106 Briefly, s. 15(1) is "aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds": *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 16. Religion is a ground enumerated in s. 15. As recently restated by this Court in *Kapp*, at para. 17, the test for discrimination under s. 15(1) is as follows:

(1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

107 The respondents claim that "[r]efusing to issue licences to the Wilson Members who otherwise qualify for such licences simply because they refuse to abandon their religious belief in the Second Commandment, but issuing licences to the comparator group simply because they do not share such religious belief, clearly demeans and infringes [page617] upon the human dignity of the Wilson Members" (Factum, at para. 39). However, photo licences are not issued to other drivers "simply because they do not share such religious belief", but rather because they meet the statutory requirements for issuance of a licence -- which include having a photo taken.

108 Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(*a*). There is no breach of s. 15(1).

VI. Conclusion

109 The impugned regulation is a reasonable limit on religious freedom, demonstrably justified in a free and democratic society. I would therefore allow the appeal. The constitutional questions stated in my order of January 16, 2008 should be answered as follows:

1. Does s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, as amended by Alta. Reg. 137/2003, infringe s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

[page618]

3. Does s. 14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002, as amended by Alta. Reg. 137/2003, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer this question.

The following are the reasons delivered by

ABELLA J. (dissenting)

110 Freedom of religion is a core, constitutionally protected democratic value. To justify its impairment, therefore, the government must demonstrate that the benefits of the infringement outweigh the harm it imposes. This was enunciated by Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103, where he developed the test under s. 1 for justifying limits to constitutional rights:

> Even if an objective is of sufficient importance, ... it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [p. 140]

And in *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (2008), Martha C. Nussbaum similarly observed that:

> Some such burdens to religion may have to be borne, if the peace and safety of the state are really at stake, or if there is some other extremely strong state interest. But it seems deeply wrong for the state to put citizens in such a tragic position needlessly, or in matters of less weight. And often matters lying behind [page619] laws of general applicability are not so weighty. [p. 117]

111 It may be, however, that the nature of the particular religious duty brings it into serious conflict with countervailing and compelling social values and imperatives. As Dickson J. stated in *R. v. Big M Drug Mart Ltd.*, *[1985] 1 S.C.R. 295*, religious freedoms are subject to such limitations

> as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others ... .
>
> ...
>
> ... The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided ... only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [pp. 337 and 346]

112 The issue in this case, therefore, is whether in balancing the benefits of the infringing measure against the harm to the right, the infringement is justified. With respect, unlike the Chief Justice, in my view it is not.

113 The government of Alberta has imposed a mandatory photo requirement for a driver's licence. The stated objective of the measure is to help reduce identity theft through the use of a facial recognition database. The province acknowledges that roadside safety and security are not at issue. Since the introduction of a photo requirement 29 years earlier, there had been, without incident, an exemption for those like the Hutterites whose religion prohibits them from being photographed.

114 The harm to the constitutional rights of the Hutterites, in the absence of an exemption, is dramatic. Their inability to drive affects them not only individually, but also severely compromises [page620] the autonomous character of their religious community.

115 Unlike the severity of its impact on the Hutterites, the benefits to the province of requiring them to be photographed are, at best, marginal. Over 700,000 Albertans do not have a driver's license and are therefore not in the province's facial recognition database. There is no evidence that in the context of several hundred thousand unphotographed Albertans, the photos of approximately 250 Hutterites will have any discernable impact on the province's ability to reduce identity theft.

116 This means that the serious harm caused by the infringing measure weighs far more heavily on the s. 1 scales than the benefits the province gains from its imposition on the Hutterites. The province has therefore not discharged its onus of justifying the imposition of a mandatory photo requirement on the members of the Wilson Colony.

Background

117 In 1974, the Province of Alberta introduced photographs on driver's licences. Until 2003, the Registrar required photos as a general rule, but could issue a non-photo Condition Code G licence if a person had a sincere religious objection or a temporary medical condition which affected their appearance. The Alberta *Operator Licensing and Vehicle Control Regulation*, *Alta. Reg. 320/2002*, under the *Traffic Safety Act*, *R.S.A. 2000, c. T-6*, governed these licences and gave the Registrar discretion to determine whether the exemption from a photograph requirement was justified.

118 The Hutterites of Wilson Colony believe that the Second Commandment, which prohibits idolatry, prohibits

them from being photographed. They also believe in communal property and live together in religious colonies. The colonies attempt [page621] to be self-sufficient, and members of the community operate motor vehicles in order to fulfill their responsibilities to the community. Specifically, the Wilson Colony members use motor vehicles to obtain medical services each week for the 48 children and 8 diabetics on the Colony, for community firefighting by volunteer firefighters, and in commercial activity to sustain their community.

119 In May 2003, Alberta amended the regulations to make a photograph mandatory for *all* driver's licences (*Operator Licensing and Vehicle Control Amendment Regulation*, Alta. Reg. 137/2003). At the time, there were 453 Condition Code G licences in Alberta. Of those, 56 percent, or about 250, were held by Hutterites (*2007 ABCA 160*, *77 Alta. L.R. (4th) 281*, *per* Conrad J.A., at para. 5).

120 The purpose of the mandatory photograph was primarily to reduce identity theft. Section 3(b) of the amended regulations allows the Registrar to use facial recognition software to verify the identity of all licence applicants. The photograph that is taken at the time of issuance of the licence is incorporated into the province's database. Facial recognition software compares this photograph to all the other photographs in the system, to help ensure that no one has more than one licence in his or her name.

121 As noted earlier, more than 700,000 Albertans do not have a driver's licence and are therefore not in the province's facial recognition database.

122 The Wilson Colony members objected to being photographed. Alberta then proposed two alternatives: first, that they have their photograph taken and printed on their licences. Each licence would then be placed in a special package which the licensee would never be required to open, preventing the licensee from ever coming into physical contact with the printed photo. The photographs would be stored in digital form in the database. [page622] The second proposal was that a photograph would be taken but not actually printed on their licences. Only the digital images would be stored in the facial recognition database.

123 The Wilson Colony members rejected these alternatives since they both required them to contravene the religious prohibition against having their photograph taken. Their proposal was that there be a photoless licence with a stamp indicating that the licence could not be used for identification purposes.

124 The failure to reach an agreement resulted in a constitutional challenge by the members of the Wilson Colony to the mandatory photo requirement. They were successful before the Alberta Court of Queen's Bench (*2006 ABQB 338*, *57 Alta. L.R. (4th) 300*) and the Court of Appeal.

Analysis

125 Alberta conceded that the photo requirement impairs the Wilson Colony members' freedom of religion. Nor did it dispute that the requirement places a distinctive burden on the Colony members, as the chambers judge noted:

> Nor does the Attorney General dispute that the requirement that people who wish to obtain or renew an operator's licence is a distinctive burden for those who hold those beliefs.
>
> In short, the Attorney General does not take issue with the proposition that the burden imposed upon the Applicants by Section 14(1)(b) of AR 137/2003 is a breach of the *Charter* Rights of the Applicants under both Section 2(a) and Section 15(1) of the *Charter*. Accordingly, there is no need to engage in an assessment of whether Section 14(1)(b) of AR 320/2002, as amended, violates the guaranteed *Charter* rights of the Applicants. [paras. 6-7]

126 The constitutional guarantee of freedom of conscience and religion is found in s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, which states:

> **2.** Everyone has the following fundamental freedoms:
>
> (*a*) freedom of conscience and religion;

[page623]

127 In both *Big M Drug Mart* and *R. v. Edwards Books and Art Ltd.*, *[1986] 2 S.C.R. 713* , Dickson C.J. explained the significance of the right, one that rests on the values of autonomy and dignity. In *Edwards Books*, he characterized freedom of religion as "profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices" (p. 759). In *Big M Drug Mart*, he wrote that

> [t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.
>
> ...
>
> ... an emphasis on individual conscience and individual judgment ... lies at the heart of our democratic political tradition. [pp. 336 and 346]

It is the centrality of the rights associated with freedom of individual conscience that

> underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.
>
> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [p. 346]

128 The European Court of Human Rights espoused a similarly liberal conception of freedom of religion in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A:

> ... freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up [page624] the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies ... freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> ... freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private" ... . [para. 31]

129 In *ahin v. Turkey* [GC], No. 44774/98, ECHR 2005-XI, the European Court of Human Rights compellingly wrote:

> Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. [para. 108]

(See also Jeremy Webber "The Irreducibly Religious Content of Freedom of Religion", in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (2006), 178, at p. 184; Charles Taylor, *Philosophical Arguments* (1995), at pp. 225 *et seq.*)

130 Moreover, it is important to recognize that freedom of religion has "both individual and collective aspects" (*Edwards Books*, at p. 781, *per* Dickson C.J.). Wilson J., in her partial dissent in *Edwards Books*, confirmed this dual nature of freedom of religion when she said:

> In his commentary on the *Canadian Charter of Rights and Freedoms* Professor Tarnopolsky ... points out that the *Charter* protects group rights as well as individual rights. He distinguishes between individual and group rights on the basis that the assertion of an individual right emphasises the proposition that everyone is to be treated the same regardless of his or her membership in a particular identifiable group whereas the assertion of a group right is based on the claim of [page625] an individual or group of individuals because of membership in a particular identifiable group: see "The Equality Rights", in *The Canadian Charter of Rights and Freedoms: Commentary* (1982), at p. 437.
>
> ... it seems to me that when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together. It is, in my opinion, an interpretation of the *Charter* expressly precluded by s. 27 which requires the *Charter* to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". [Emphasis in original; pp. 808-9.]

Both the individual and group aspects are engaged in this case.

131 The group, or "community", aspect of religious freedom was discussed by the European Court of Human Rights in *Metropolitan Church of Bessarabia and Others v. Moldova*, No. 45701/99, ECHR 2001-XII:

> [T]he right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection [of religious freedom] ... .
>
> In addition, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets ... . [para. 118]

132 This does not mean that the right to freedom of religion cannot yield to a state objective whose benefits outweigh the harm to the right. The assertion of a sincere religious belief or duty does not end the inquiry. As the European Court of Human Rights said in *ahin*:

[page626]

> [Freedom of religion] does not protect every act motivated or inspired by a religion or belief ... .
>
> In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected ... .
>
> ...
>
> ... Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society ... . [paras. 105, 106 and 108]

The nature of the religious right asserted will also be of relevance in balancing benefits and harms.

Section 1

133 Section 1 of the *Charter* states:

> 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.

134 It is against the scope of the particular constitutional right that the government has the onus of demonstrating that a limit is justified under s. 1 in accordance with the *Oakes* test. The purpose of the *Oakes* analysis is to balance the benefits of the objective with the harmful effects of the infringement. The stages of the *Oakes* test are not watertight compartments: the principle of proportionality guides the analysis at each step. This ensures that at every stage, the importance of the objective and the harm to the right are weighed.

135 Dickson C.J. stressed in *Oakes* that the evidence necessary to prove the constituent elements of the s. 1 inquiry "should be cogent and persuasive [page627] and make clear to the Court the consequences of imposing or not imposing the limit" (p. 138).

136 Where, as here, the benefit to the state of the infringing measure is of limited value and the infringement is a deeply harmful one, the overall requirement of proportionality is not met.

Pressing and Substantial Objective

137 At the first stage of the analysis, the government must demonstrate that it has a "pressing and substantial" objective that justifies the infringement of the right. In *RJR- MacDonald Inc. v. Canada (Attorney General)*, *[1995] 3 S.C.R. 199*, McLachlin J. cautioned that "[c]are must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure ... . If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised" (para. 144 (emphasis in original)).

138 Alberta acknowledged that it is not attempting to justify the photo requirement on the basis that it allows for quick and efficient driver identification at the side of the road. The exemption to the photograph requirement was in place for 29 years without any demonstrably negative effects on roadside enforcement.

139 Instead, Alberta stated that the purpose of the mandatory photo requirement was to ensure that every individual who has applied for a licence is represented in the Province's facial recognition database. This database helps prevent an individual from applying for a licence in another person's name. Driver's licences are a widely accepted form of identification. False licences can be used to gain other fraudulent documentation. The objective, therefore, is to protect the integrity of the licensing system and its consequential benefit is the minimization of the risk of identity theft.

140 I agree with the majority that this objective is an important one.

[page628]

Rational Connection

141 At the "rational connection" step in the proportionality analysis, the seemingly easiest hurdle in the *Oakes* analysis, the Government must demonstrate that the infringing measure is rationally connected to the legislative goal. The connection must be established on a balance of probabilities (*RJR-MacDonald*, at para. 153; see also Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (1996), at p. 27).

142 I agree with the majority that the Government has satisfied the rational connection aspect of the s. 1 analysis. As the chambers judge said (at para. 11): "The requirement of a photograph, coupled with facial recognition software, facilitates the government's objective of ensuring that no individual will hold multiple licences under different names." The regulations help prevent an applicant from fraudulently obtaining a licence in the name of another person whose photograph is already in the database.

Minimal Impairment

143 Where I start to part company with the majority, with respect, is at the minimal impairment stage of the

analysis. This aspect of the s. 1 analysis has attracted judicial approaches of some elasticity, reflecting an understandable desire both to be respectful of the complexity of developing public policy, while at the same time ensuring that the infringing measure meets its policy objectives no more intrusively than necessary.

144 As McLachlin J. wrote in *RJR-MacDonald*, at para. 160, if the option chosen by the government "falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement". However, "if the government fails to explain why a significantly less intrusive and equally [page629] effective measure was not chosen, the law may fail".

145 The government must therefore show that the measure impairs the right as little as reasonably possible in order to achieve the legislative objective. To be characterized as minimal, the impairment must be "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald*, at para. 160).

146 In assessing whether Alberta's regulation satisfies the minimal impairment stage, the majority rejects the Colony's alternative proposal of a photoless licence stamped with an indication that it not be used for identification purposes, on the grounds that "[t]he only way to reduce that risk [of misusing driver's licences for identity theft] as much as possible is through a universal photo requirement" and "the alternative proposed by the claimants would *significantly* compromise the government's objective" (paras. 59-60 (emphasis in original)). But as discussed later in these reasons, there is no cogent or persuasive evidence of any such dramatic interference with the government's objective.

147 It is not difficult for the state to argue that only the measure it has chosen will *maximize* the attainment of the objective and that all other alternatives are substandard or less effective. And there is no doubt that the wider the use of the photographs, the greater the minimization of the risk. But at the minimal impairment stage, we do not assess whether the infringing measure fulfills the government's objective more perfectly than any other, but whether the means chosen impair the right no more than necessary to achieve the objective.

148 In *RJR-MacDonald*, McLachlin J. rejected a complete ban on advertising on the grounds that a full prohibition will only be constitutionally [page630] acceptable at the minimal impairment stage of the analysis if the government can show that only a full prohibition will enable it to achieve its goal. In this case, all of the alternatives presented by the government involve the taking of a photograph. This is the very act that offends the religious beliefs of the Wilson Colony members. The requirement therefore completely extinguishes the right, and is, accordingly, analogous to the complete ban in *RJR-MacDonald*. It is therefore difficult to conclude that it minimally impairs the Hutterites' religious rights.

149 The minimal impairment stage should not, however, be seen to routinely end the s. 1 analysis. It is possible, for example, to have a law, which is not minimally impairing but may, on balance, given the importance of the government objective, be proportional. In my view, most of the heavy conceptual lifting and balancing ought to be done at the final step -- proportionality. Proportionality is, after all, what s. 1 is about.

Proportionality

150 It seems to me, with respect, that where the majority's s. 1 analysis fully flounders is in the final stage, where the negative effects of the infringement are balanced against the actual benefits derived from the legislative measure. This is the stage which "provides an opportunity to assess ... whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*" (*Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 125). The salutary effects that "actually result" from the implementation of the underlying objective must, therefore, be "proportional" to the harmful effects of the limitation on a constitutionally protected right (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 887-88; see also Jamie Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 [page631] *Osgoode Hall L.J.* 1, at p. 66, cited by Bastarache J. in *Thomson Newspapers*, at para. 125).

151 In *Edwards Books*, Dickson C.J. articulated the proportionality requirement as follows: the "effects [of the infringing measure] must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights" (p. 768). (See also Aharon Barak, "Proportional Effect: The Israeli Experience" *(2007), 57 U.T.L.J. 369*, at p. 375.)

152 At this proportionality stage, the "comparison is ... between the loss for the fundamental right, on the one hand, and the gain for the good protected by the law, on the other" (Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" *(2007), 57 U.T.L.J. 383*, at p. 393). It engages the following questions:

- How deeply is the right infringed?
- What is the degree to which the impugned limitation will advance its underlying objective?

153 Justice Bastarache wrote in *Thomson Newspapers* that the deleterious effects of the measure need to be assessed in light of the "values underlying the *Charter*" (para. 125). This was the approach, in fact, first enunciated by Dickson C.J. in *Oakes*:

> The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added; p. 136.]

154 Turning to the salutary effects in this case, in my view, the government has not discharged its evidentiary burden or demonstrated that the salutary effects in these circumstances are anything more than a web of speculation (Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two [page632] Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" *(2006), 34 S.C.L.R. (2d) 501*, at pp. 503-4).

155 The positive impact of the mandatory photo requirement and the use of facial recognition technology is that it is a way to help ensure that individuals will not be able to commit identity theft. But the facial recognition technology is hardly fool-proof. Joseph Mark Pendleton, Director of the Special Investigations Unit of the Alberta Ministry of Government Services, acknowledged in his affidavit on behalf of the Government of Alberta, that "facial recognition software is not so advanced that it can make a definitive determination of whether two photographs are of the same person". The software merely narrows down potentially similar faces to a manageable number. A human investigator must still "eyeball" the pictures to determine if they are the same person.

156 There is, in fact, no evidence from the government to suggest that the Condition Code G licences in place for 29 years as an exemption to the photo requirement, caused any harm at all to the integrity of the licensing system. As a result, there is no basis for determining why the exemption is no longer feasible, or so dramatically obstructs the government's objective that it cannot be re-instated.

157 In his affidavit, Mr. Pendleton noted that "[t]o date, we have been successful in making arrangements to accommodate the concerns of others who have religious reservations regarding a driver's licence photograph" (para. 42). The only example he provided of a problem involving a Condition Code G licence, was a "Caucasian man" who sought a Condition Code G licence, based upon his commitment to native spirituality. He was refused because he was not a member of any recognized organization or denomination that shared his beliefs. This singular example does not seem to me to represent "cogent and persuasive" evidence of the necessity of a mandatory photograph. (See also [page633] *Bothwell v. Ontario (Minister of Transportation) (2005), 24 Admin. L.R. (4th) 288* (Ont. Div. Ct.).)

158 Seven hundred thousand Albertans are without a driver's licence. That means that 700,000 Albertans have no photograph in the system that can be checked by facial recognition technology. While adding approximately 250 licence holders to the database will reduce some opportunity for identity theft, it is hard to see how it will make a significant impact on preventing it when there are already several hundred thousand unlicenced and therefore unphotographed Albertans. Since there are so many others who are not in the database, the benefit of adding the photographs of the few Hutterites who wish to drive, would be marginal.

159 It is worth noting too that in Alberta, numerous documents are used for identity purposes, including birth certificates, social insurance cards and health cards -- not all of which include a photograph. Nor has Alberta thought it necessary to introduce, for example, a universal identity card to prevent identity theft. This suggests that the risk is not sufficiently compelling to justify universality.

160 The fact that Alberta is seemingly unengaged by the impact on identity theft of over 700,000 Albertans being without a driver's licence, makes it difficult to understand why it feels that the system cannot tolerate 250 or so more exemptions.

161 The majority mentions two ancillary benefits of the mandatory photo requirement: the eventual harmonization of Alberta's licensing scheme with those of other jurisdictions, and assistance in roadside safety and identification. There is no reason to anticipate that any such harmonized scheme would eliminate, rather than protect, religious exemptions. And as for the benefits to roadside identification and safety, Alberta conceded that this was not [page634] the purpose of the photo requirement and that any such benefits were minimal, as evidenced by the fact that this exemption has existed for the last 29 years without incident.

162 The salutary effects of the infringing measure are, therefore, slight and largely hypothetical. The addition of the unphotographed Hutterite licence holders to the system seems only marginally useful to the prevention of identity theft.

163 On the other hand, the harm to the religious rights of the Hutterites weighs more heavily. The majority assesses the Wilson Colony members' freedom of religion as being a choice between having their picture taken or not having a driver's licence which may have collateral effects on their way of life. This, with respect, is not a meaningful choice for the Hutterites.

164 The chambers judge found that the mandatory photo requirement threatened the autonomous ability of the respondents to maintain their communal way of life, concluding that "it is essential to [the respondents'] continued existence as a community that some members operate motor vehicles" (para. 2). Conrad J.A. of the Alberta Court of Appeal similarly wrote that the "evidence shows that although the colonies attempt to be self-sufficient, certain members must drive regularly on Alberta highways in order to ... facilitate the sale of agricultural products, purchase raw materials from suppliers, transport colony members (including children) to medical appointments, and conduct the community's financial affairs" (para. 6).

165 This self-sufficiency was explained in *Hofer v. Hofer*, [1970] S.C.R. 958, where Ritchie J. wrote that "the Hutterite religious faith and doctrine permeates the whole existence of the members of any Hutterite Colony" (p. 968). Quoting the trial judge, [page635] he observed: "To a Hutterian the whole life is the Church... . The tangible evidence of this spiritual community is the secondary or material community around them. They are not farming just to be farming -- it is the type of livelihood that allows the greatest assurance of independence from the surrounding world" (p. 968). Justice Ritchie further noted that to the colonies, "the activities of the community were evidence of the living church" (p. 969).

166 Historians too have described the intensely self-sufficient and deeply religious nature of the Hutterian community:

> The Hutterites live an austere, religiously motivated existence. Divorce, birth control, and ... smoking and drinking are strictly forbidden. The Hutterite faithful do not bear arms, and they abstain from both voting and from holding public office... . But if they stand apart from the mainstream of Canadian society, by the same token they make very few demands upon it. Hutterites never become public charges: all colonies take care of their old and infirm, and most will not even accept family allowance cheques from the government. Hutterites apparently commit no serious crimes.

...

> ... The Hutterites maintain a private school within each colony, and comply with the minimum standards designated by the province ... [and pay] income tax, corporate tax, and public school tax ... .
>
> ...
>
> By presenting so low a profile to the outside world, the Hutterites reduce the attention they attract. Their isolationism, however, makes them easy targets for local fears and apprehensions... .
>
> Their separatism and their peculiarities have made the Hutterites handy scapegoats.

(Morris Davis and Joseph F. Krauter, *The Other Canadians: Profiles of Six Minorities* (1971), at pp. 89, 96, 98 and 99)

[page636]

167 To suggest, as the majority does, that the deleterious effects are minor because the Colony members could simply arrange for third party transportation, fails to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community. When significant sacrifices have to be made to practise one's religion in the face of a state imposed burden, the choice to practise one's religion is no longer uncoerced.

168 In *Edwards Books*, Dickson C.J. held that indirect but non-trivial burdens on religious practice are prohibited by the constitutional guarantee of freedom of religion (pp. 758-59). And in *Big M Drug Mart*, as previously noted, he highlighted "the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation" (p. 346). He also noted that

> [c]oercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. [pp. 336-37]

169 Jeremy Webber argues that the first strand of freedom of religion is freedom from coercion, including

> both freedom from coerced religious observance and freedom from interference with religious observance. This was the original ground on which freedom of religion was won. It remains the heartland of the freedom.

("Understanding the Religion in Freedom of Religion", in P. Cane, C. Evans and Z. Robinson, eds., *Law and Religion in Theoretical and Historical Context* (2008), 26, at p. 29)

170 The mandatory photo requirement is a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or giving up the self-sufficiency of their community, a community that has historically [page637] preserved its religious autonomy through its communal independence.

171 I also have some discomfort with the majority's approach to assessing the seriousness of a religious infringement. It appears to suggest that there is a difference between the constitutional scrutiny of a government program that is "compulsory", and one that is "conditional" or a "privilege". This approach, with great respect, is troubling. It is both novel and inconsistent with the principle enunciated in *Eldridge v. British Columbia (Attorney General)*, *[1997] 3 S.C.R. 624*, that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner" (para. 73).

172 The question, it seems to me, is whether the government has acted constitutionally. This should not depend on whether it does so through a law, a regulation, or a licence. Moreover, I have difficulty understanding what is meant by a "privilege" in the context of the provision of government services. As long ago as *Roncarelli v. Duplessis*, *[1959] S.C.R. 121*, this Court recognized the profound significance a licence may have on an individual's life or livelihood and that the government is required to exercise its power in administering the licensing system in a fair and constitutional manner.

173 The burden under s. 1 is squarely on the government. That is where it should rigorously remain throughout the *Oakes* analysis, without diminution for any reason. The majority's approach -- making the right dependent on a formalistic distinction and characterization of the nature of the law -- creates, even if inadvertently, a legal hierarchy attracting diminishing levels of scrutiny. This not only imperils and contradicts human rights jurisprudence, it risks presumptively shrinking the plenitude of what is captured by freedom of religion in s. 2(*a*) of the *Charter* by tethering its scope to an artificial stratum of government action. (See McLachlin C.J., "Freedom of Religion and the Rule of Law: A Canadian Perspective", in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays [page638] in Pluralism, Religion, and Public Policy* (2004), 12.)

174 The harm to the Hutterites' *Charter* right is substantial and easily ascertainable, but, as previously noted, the benefit of requiring the Hutterites to be photographed for the purposes of reducing identity theft, is not. Hundreds of thousands of Albertans have no driver's licence and their photographs, therefore, are not available in the facial recognition database, to help minimize identity theft. It is not clear to me how having approximately 250 additional Hutterites' photographs in the database will be of any significance in enhancing the government's objective, compared to the seriousness of the intrusion into the Hutterites' religious autonomy.

175 What we are left with is the desire to protect Albertans from the risks and costs associated with identity theft through a mandatory photo requirement, versus the cost to the Hutterites, religious and democratic, of not having their constitutional rights respected. Here, the constitutional right is significantly impaired; the "costs" to the public only slightly so, if at all.

176 Given the disproportion in this case between the harmful effects of the mandatory photo requirement on religious freedom, compared to the minimal salutary effects of requiring photographs from the Hutterites, the government has not discharged its burden of demonstrating that the infringement is justified under s. 1. This makes the mandatory photograph requirement for driver's licences, in the absence of the availability of an exemption on religious grounds, inconsistent with s. 2(*a*) of the *Charter*.

177 I would therefore dismiss the appeal, but would suspend a declaration of invalidity for one [page639] year to give Alberta an opportunity to fashion a responsive amendment.

The following are the reasons delivered by

LeBEL J. (dissenting)

I. Introduction

178 I have read the reasons of the Chief Justice and of my colleague Justice Abella. With respect for the other view, I agree with the comments of Justice Abella on the nature of the guarantee of freedom of religion under s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. I share her opinion that the impugned regulation that limits freedom of religion has not been properly justified by the appellant under s. 1 of the *Charter*. As a result, as she proposes, I would dismiss the appeal and uphold the declaration of invalidity of the regulation that requires the members of the Hutterite Colony to have their photos taken as a condition for the renewal or issuance of a driver's licence.

179 After a few short comments on freedom of religion, I will focus my analysis on the interpretation and application of s. 1 of the *Charter*. I have some concerns as to how the reasons of the Chief Justice structure and apply the method of justification of s. 1, in other words, the *Oakes* test, as it is now known.

A. *Freedom of Religion*

180 The constitutional guarantee of freedom of religion has triggered a substantial amount o f litigation since the coming into force of the *Charter*. The present appeal illustrates enduring difficulties in respect of its interpretation and application. Perhaps, courts will never be able to explain in a complete and satisfactory manner the meaning of

religion for the purposes of the *Charter*. One might have thought that the guarantee of freedom of opinion, freedom of conscience, freedom of expression and freedom of association could very well have been sufficient to protect freedom of religion. But [page640] the framers of the *Charter* thought fit to incorporate into the *Charter* an express guarantee of freedom of religion, which must be given meaning and effect.

181 That decision reflects the complex and highly textured nature of freedom of religion. The latter is an expression of the right to believe or not. It also includes a right to manifest one's belief or lack of belief, or to express disagreement with the beliefs of others. It also incorporates a right to establish and maintain a community of faith that shares a common understanding of the nature of the human person, of the universe, and of their relationships with a Supreme Being in many religions, especially in the three major Abrahamic faiths, Judaism, Christianity and Islam.

182 Religion is about religious beliefs, but also about religious relationships. The present appeal signals the importance of this aspect. It raises issues about belief, but also about the maintenance of communities of faith. We are discussing the fate not only of a group of farmers, but of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations. As Justice Abella points out, the regulatory measures have an impact not only on the respondents' belief system, but also on the life of the community. The reasons of the majority understate the nature and importance of this aspect of the guarantee of freedom of religion. This may perhaps explain the rather cursory treatment of the rights claimed by the respondents in the course of the s. 1 analysis. I will now turn to this aspect of the case.

B. *Section 1: The Oakes Test*

183 As set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, the *Oakes* test has stood at the core of Canadian constitutional law since the early days of the *Charter*. It has been the central issue of much *Charter* litigation. The outcome of complex cases has frequently turned on whether a limitation of a [page641] right was justified under s. 1. In *Oakes*, our Court sought to give meaning and structure to the broad and bald affirmation, in s. 1 of the *Charter*, that constitutional rights could be limited, provided that the limitation could be justified in a manner consistent with the democratic values of Canada. Although courts have struggled in applying or interpreting it, the *Oakes* test has stood the test of time and remains a critical component of the constitutional ordering of basic rights in Canada.

184 In the context of the values of the democratic society of Canada, courts were assigned the responsibility of final adjudication in the case of conflicts between public authorities and citizens, subject to the derogation or notwithstanding clause in s. 33 of the *Charter* (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 496-97). In its own way, the *Oakes* test is yet another attempt to determine why and how a law could be found to be just and whether it should be enforced. Many centuries ago, St. Thomas Aquinas put his mind to the same question. For him, a just law was one with a legitimate purpose which relied on reasonable or proportionate means to achieve it. Proportionate burdens should be imposed on citizens (see Thomas Aquinas, *Treatise on Law* (1991), at p. 96). In more modern times, the same idea informed the drafting of the *European Convention of Human Rights*. It inspired the approach of international law in domains like the laws of war (see D. M. Weinstock, "Philosophical Reflections on the *Oakes* Test", in L. B. Tremblay and G. C. N. Webber, eds., *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (2009), 115, at pp. 115-16; also T. Hurka, "Proportionality in the Morality of War" (2005), 33 *Phil. & Pub. Aff.* 34; G. Van der Schyff, *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (2005), at pp. 23-27; M.-A. Eissen, "The Principle of Proportionality in the Case-Law of the European Court of Human Rights", in R. St. J. Macdonald, F. Matscher and H. Petzold, eds., *The European System for the Protection of Human Rights* (1993), 125). The principle of proportionality can even be found in [page642] Canadian criminal law. Self-defence, in s. 34 of the *Criminal Code*, R.S.C. 1985, c. C-46, for example, is predicated on the legitimacy of the purpose and the proportionality of the means used to further that purpose.

185 The *Oakes* test belongs to this legal and philosophical tradition. In essence, it is about purpose and means: the legitimacy of the purpose and the proportionality of the means. The use of proportionate means in order to achieve legitimate purposes will justify a limitation of rights under s. 1.

186 As is well known, the *Oakes* test imposes on the state the burden of demonstrating a pressing and substantial objective. This is the purpose part of the test. Then, the state must meet the proportionality requirements. The first requirement of the proportionality test is that there be a rational connection between the purpose and the means. This part of the test is really about the necessity or usefulness of the means in connection with the objective. A law that does not somehow contribute to advancing the stated purpose will not pass constitutional muster. The courts must then review the means themselves by asking whether the means are minimally impairing of the right in question (the "minimal impairment" test). Finally, the court will engage in a balancing of the measure's salutary and deleterious effects (see P.W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.8; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 975-76). The reasons of the Chief Justice focus on the last part of this test in seeking to justify the impugned regulations under s. 1.

187 It has also been said, at times, that context should be considered at the outset of the analysis in order to determine the scope of the deference of courts to government when applying the *Oakes* test (*Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877). One part of this context should not be forgotten: the constitutional [page643] context itself. The *Charter* is designed to uphold and protect constitutional rights. The justification process under s. 1 is not designed to sidestep constitutional rights on every occasion. Rather, it seeks to define and reconcile these rights with other legitimate interests or even between themselves. The burden of justification rests on the state, although I will not attempt, within the limited scope of these reasons, to delve any further into the vexed question of what is sufficient evidence or demonstration of justification. The justification process also reflects the democratic life of a state like Canada, which operates under the rule of law, in the tradition of a parliamentary government, within the framework of a federal form of government. Section 1 and the *Oakes* test are designed to reach a proper equilibrium between the rule of law, the roles of courts, Parliament or legislatures, and executives, and the democratic life of our country. In the end, when conflict does arise and cannot be resolved, courts must try to strike a proper balance between competing demands, always mindful of their place within the constitutional and political sphere.

188 In general, courts have only rarely questioned the purpose of a law or regulation in the course of a s. 1 analysis. The threshold of justification remains quite low and laws have almost never been struck down on the basis of an improper purpose (Hogg, at section 38.9(b)). The pressing and compelling purpose test amounts to a *prima facie* review of the legitimacy of the law's objective. Its flexibility reflects the need to avoid too close questioning of the policy reasons underlying a law. Such a review would be better left to the political and parliamentary process. The flexibility of the analysis at this stage results also from the abstract nature of the purpose, which can be expressed by the courts at "various levels of generality" (Hogg, at section 38.9(a); *Thomson Newspapers*, at para. 125, *per* Bastarache J.). Since this objective is often not expressed with much clarity in the law or regulation, its identification and definition at this stage of the analysis often amount to a judicial construct based on such evidence as is available. The nature [page644] of this part of the *Oakes* test should caution courts against treating the purpose with undue emphasis on its sanctity throughout the proportionality analysis, when its nature and effects will have to be more closely questioned.

189 The first part of the *Oakes* test is closely connected to the proportionality analysis. The rational connection analysis requires the courts to determine, for a start, whether the means chosen will somehow advance the stated purpose of the law. At this stage too, courts have rarely found statutes and regulations wanting (Hogg, at section 38.10(a)).

190 This acknowledgment of the realities of constitutional adjudication does not mean that courts will or should never intervene at these earlier stages. However, this situation confirms that, after almost a quarter century of s. 1 jurisprudence, the crux of the matter lies in what may be called the core of the proportionality analysis, the minimal impairment test and the balancing of effects. It is at these stages that the means are questioned and their relationship to the law's purpose is challenged and reviewed. It is also where the purpose itself must be reassessed with regard to the means chosen by Parliament or the legislature.

191 A constitutional scholar, Peter Hogg, has observed that s. 1 litigation really revolves around minimal

impairment (at sections 38.11(a) and 38.12). There is more than a kernel of truth to this statement. It may reflect what is really happening in the course of constitutional litigation about s. 1 and the conduct of a proportionality analysis. Indeed, I believe that the proportionality analysis depends on a close connection between the final two stages of the *Oakes* test. The court's goal is essentially the same at both stages: to strike a proper balance between state action, the preservation of *Charter* rights and the protection of rights or interests that may not be guaranteed by the Constitution, but that may nevertheless be of high social value or [page645] importance (see *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, at paras. 65 and 72).

192 It may be tempting to draw sharp analytical distinctions between the minimal impairment and balancing of effects parts of the *Oakes* test. But determining whether a measure limiting a right successfully meets the justification test should lead to some questioning of the purpose in the course of the proportionality analysis, to determine not only whether an alternative solution could reach the goal, but also to what extent the goal itself ought to be realized. This part of the analysis may confirm the validity of alternative, less intrusive measures.

193 The pull toward a sharp distinction between the two steps of the proportionality analysis, minimal impairment and balancing of effects, is perhaps intensified by semantic difficulties with the minimal impairment test. Courts still use the word "minimal" to characterize the acceptable level of rights impairment, in keeping with the original language used in *Oakes*. This is a strong word that seemed to suggest that, in the justification process, the state would have to show that the measure taken was really the least intrusive possible. It would have to demonstrate that no less drastic measure could be adopted that would achieve the stated legislative purpose. A literal application of such a test might lead, in essence, to courts adopting a libertarian perspective that the state should be constrained and its powers narrowly defined and limited. This understanding of the Constitution might have put Parliament and the legislature in a straitjacket and would have crystallized constitutional arrangements essentially made up of negative rights.

194 In practical terms, the jurisprudence of this Court confirms that minimal does not really mean minimal in the ordinary sense of the word. The *Oakes* test was quickly reinterpreted, so that the question, in the minimal impairment analysis, became whether the right was infringed "as little [page646] as is reasonably possible", within a range of reasonable options (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 772, *per* Dickson C.J.). The analysis leaves a reasonable margin of action to the state (p. 795, *per* La Forest J.). This is where we now stand, using words that, sometimes, no longer reflect the legal nature of a test.

195 In order to determine whether the measure falls within a range of reasonable options, courts must weigh the purpose against the extent of the infringement. They must look at the range of options that are available within the bounds of a democratic Constitution. A deeper analysis of the purpose is in order at this stage of the proportionality analysis. The stated objective is not an absolute and should not be treated as a given. Moreover, alternative solutions should not be evaluated on a standard of maximal consistency with the stated objective. An alternative measure might be legitimate even if the objective could no longer be obtained in its complete integrity. At this stage of the proportionality analysis, the overall objective of the s. 1 analysis remains constant: to preserve constitutional rights, by looking for a solution that will reach a better balance, even if it demands a more restricted understanding of the scope and efficacy of the objectives of the measure. In this sense, courts must execute a holistic proportionality analysis with different legal and analytical components, which remain tightly woven.

196 The proportionality analysis reflects the need to leave some flexibility to government in respect of the choice of means. But the review of those means must also leave the courts with a degree of flexibility in the assessment of the range of alternatives that could realize the goal, and also in determining how far the goal ought to be attained in order to achieve the proper balance between the objective of the state and the rights at stake.

197 For all practical purposes, the reasons of the Chief Justice treat the law's objective as if it were unassailable once the courts engage in the [page647] proportionality analysis. No means that would not allow the objective to be realized to its fullest extent could be considered as a reasonable alternative. In this respect, the reasons appear inconsistent. First, para. 54 states: "*Less drastic means which do not actually achieve the government's objective*

are not considered at this stage", i.e. the minimal impairment stage. Such an approach would severely restrict the ambit of court review of government action and would reduce it to an analysis of the alignment of means with purposes. At other times, however, I note that the reasons seem more alive to this problem. Thus, one may find in the reasons suggestions that "*achieving the objective*" might actually mean looking into whether there exists an alternative means of reaching the objective "*in a real and substantial manner*" (para. 55). What that would actually mean in practical terms may not be as clear as one could wish. Nevertheless, these words appear to signal that, even at the minimal impairment stage, the objective might have to be redefined and circumscribed.

198 Indeed, one wonders how an objective could be satisfied in a real and substantial manner without being read down somewhat. A different approach to the interpretation and application of the *Oakes* test would seem hard to reconcile with previous pronouncements of our Court. Our recent judgment in *Charkaoui v. Canada (Citizenship and Immigration)*, *2007 SCC 9*, *[2007] 1 S.C.R. 350*, offers a fine example of a different understanding of the nature of the proportionality analysis.

199 In *Charkaoui*, our Court struck down in part, on s. 7 grounds, the security certificate regime set up under the *Immigration and Refugee Protection Act*, *S.C. 2001, c. 27*. It accepted that the security of Canada and the protection of intelligence sources were pressing and compelling objectives. Nevertheless, the Court found that alternative measures might give sufficient protection to confidential information. Important as they were, the objectives of the law were not treated as absolute goals, which had to be realized in their perfect integrity. The objectives were recast, in fact, at a [page648] lower level than the state might have wished. The Court assessed the objectives, the impugned means and the alternative means together, as necessary components of a seamless proportionality analysis (paras. 85-87).

II. Conclusion

200 As to the outcome of this case, I agree with the reasons of Justice Abella and with the substance of her views on the lack of justification for the regulation under s. 1. Religious rights are certainly not unlimited. They may have to be restricted in the context of broader social values. But they are fundamental rights protected by the Constitution. The Government of Alberta had to prove that the limitations on the religious right were justified. Like Justice Abella, I believe that the Government of Alberta has failed to demonstrate that the regulation is a proportionate response to the identified societal problem of identity theft.

201 Moreover, the driver's licence that it denies is not a privilege. It is not granted at the discretion of governments. Every would-be driver is entitled to a licence provided that he or she meets the required conditions and qualifications. Such a licence, as we know, is often of critical importance in daily life and is certainly so in rural Alberta. Other approaches to identity fraud might be devised that would fall within a reasonable range of options and that could establish a proper balance between the social and constitutional interests at stake. This balance cannot be obtained by belittling the impact of the measures on the beliefs and religious practices of the Hutterites and by asking them to rely on taxi drivers and truck rental services to operate their farms and to preserve their way of life. Absolute safety is probably impossible in a democratic society. A limited restriction on the Province's objective of minimizing identity theft would not unduly compromise this aspect of the security of Alberta residents and might lie within the range of reasonable and constitutional alternatives. Indeed, the Province's stated purpose is not set in stone and does not need to be achieved at [page649] all costs. The infringing measure was implemented in order to reach a hypothetical objective of minimizing identity theft, by requiring driver's licences with photos. But a small number of people carrying a driver's licence without a photo will not significantly compromise the safety of the residents of Alberta. On the other hand, under the impugned regulation, a small group of people is being made to carry a heavy burden. The photo requirement was not a proportionate limitation of the religious rights at stake.

202 For these reasons and those of my colleague, Justice Abella, I would dismiss the appeal with costs.

The following are the reasons delivered by

FISH J. (dissenting)

203 Like Justice LeBel, and for the reasons he has given, I agree with Justice Abella and would dispose of the appeal as they both suggest.

Solicitors

Solicitor for the appellant: Alberta Justice, Edmonton.

Solicitors for the respondents: Peterson & Purvis, Lethbridge.

Solicitor for the intervener the Attorney General of Canada: Department of Justice, Ottawa.

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

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

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

[page650]

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener the Ontario Human Rights Commission: Ontario Human Rights Commission, Toronto.

Solicitors for the interveners the Evangelical Fellowship of Canada and the Christian Legal Fellowship: Vincent Dagenais Gibson, Ottawa.

End of Document

Sherman Estate v. Donovan

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and M.J. Moldaver, A. Karakatsanis, R. Brown, M. Rowe, S.L. Martin and N. Kasirer JJ.

Heard: October 6, 2020;

Judgment: June 11, 2021.

File No.: 38695.

[2021] S.C.J. No. 25 | *[2021] A.C.S. no 25* | *2021 SCC 25* | *2021 CSC 25* | *458 D.L.R. (4th) 361* | *66 C.P.C. (8th) 1* | *67 E.T.R. (4th) 163* | *72 C.R. (7th) 223* | *2021 CarswellOnt 8339* | *490 C.R.R. (2d) 237* | *EYB 2021-391973* | *331 A.C.W.S. (3d) 489* | *2021EXP-1617*

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate, Appellants; v. Kevin Donovan and Toronto Star Newspapers Ltd., Respondents, and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee, Interveners

(108 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Civil litigation — Civil evidence — Documentary evidence — Publication bans and confidentiality orders — Sealed evidence — Appeal by estate trustees from Ontario Court of Appeal decision that lifted sealing orders dismissed û-Application judge had granted sealing orders over probate files of prominent couple whose death had generated intense public interest — Privacy could be important public interest under test for discretionary limits on court openness where it could be shown protection of human dignity was at serious risk — Estate trustees had failed to establish serious risk to important public interest that overcame strong presumption of court openness — Information contained in probate files did not reveal anything particularly private or highly sensitive and did not strike at core identity of affected individuals — Record did not disclose serious risk of physical harm to affected individuals.

Wills, estates and trusts law — Proceedings — Practice and procedure — Application judge had granted sealing orders over probate files of prominent couple whose death had generated intense public interest — Privacy could be important public interest under test for discretionary limits on court openness where it could be shown protection of human dignity was at serious risk — Estate trustees had failed to establish serious risk to important public interest that overcame strong presumption of court openness — Information contained in probate files did not reveal anything particularly private or highly sensitive and did not strike at core identity of affected individuals — Record did not disclose serious risk of physical harm to affected individuals.

Appeal by the estate trustees from a decision of the Ontario Court of Appeal that lifted sealing orders granted by the application judge. The unexplained deaths of a prominent couple in their home generated intense public interest.

The estate trustees obtained sealing orders of the probate files. The orders were challenged by a journalist. The application judge sealed the probate files, finding the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal lifted the sealing orders on the basis that the privacy interest advanced lacked a public interest quality and there was no evidence of a real risk to anyone's physical safety.
HELD: Appeal dismissed.

Privacy could be an important public interest under the test for discretionary limits on court openness where it could be shown that the protection of human dignity was at serious risk. It had to be demonstrated that the information was sufficiently sensitive such that it could be said to strike at the biographical core of the individual and that there was a serious risk that without an exceptional order, the affected individual would suffer an affront to their dignity. The estate trustees had failed to establish a serious risk to the important public interest in privacy, predicated on dignity, that overcame the strong presumption of openness. The information contained in the probate files did not reveal anything particularly private or highly sensitive and did not strike at the core identity of the affected individuals. Merely associating the affected individuals with the couple's unexplained deaths was not sufficient to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity. The record did not show a serious risk of physical harm to any affected individuals. Any inference of a serious risk of physical harm was speculative.

Statutes, Regulations and Rules Cited:

Bill C-11, An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts, 2nd Sess., 43rd Parl., 2020

Canadian Charter of Rights and Freedoms, 1982, s. 2(b), s. 8

Charter of Human Rights and Freedoms, *CQLR, c. C-12, s. 5*

Civil Code of Quebec <TREATMTENT/> Article 35 R Article 41 R

Code of Civil Procedure, *CQLR, c. C-25.01, Article 12*

Freedom of Information and Protection of Privacy Act, *R.S.O. 1990, c. F.31*

Personal Information Protection and Electronic Documents Act, *S.C. 2000, c. 5*

Privacy Act, *R.S.C. 1985, c. P-21*

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Courts -- Open court principle -- Sealing orders -- Discretionary limits on court openness -- Important public interest -- Privacy -- Dignity -- Physical safety -- Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files -- Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

Court Summary:

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness -- discouraging mischief and ensuring confidence in the administration of justice through transparency -- such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them. Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban -- less constraining on openness than the sealing orders -- would have likely been sufficient as a reasonable alternative to prevent this risk. As a final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

Cases Cited

By Kasirer J.

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R. (3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

Statutes and Regulations Cited

Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

Canadian Charter of Rights and Freedoms, ss. 2(b), 8.

Charter of Human Rights and Freedoms, CQLR, c. C-12, s. 5.

Civil Code of Québec, arts. 35 to 41.

Code of Civil Procedure, CQLR, c. C-25.01, art. 12.

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

Privacy Act, R.S.C. 1985, c. P-21.

Authors Cited

Ardia, David S. "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385.

Austin, Lisa M. "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53.

Bailey, Jane, and Jacquelyn Burkell. "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ott. L. Rev.* 143.

Cockfield, Arthur J. "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" *(2007), 40 U.B.C. L. Rev. 41*.

Eltis, Karen. *Courts, Litigants and the Digital Age*, 2nd ed. Toronto: Irwin Law, 2016.

Eltis, Karen. "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" *(2011), 56 McGill L.J. 289*.

Ferland, Denis, et Benoît Emery. *Précis de procédure civile du Québec*, vol. 1, 6e éd. Montréal: Yvon Blais, 2020.

Gewirtz, Paul. "Privacy and Speech", [2001] *Sup. Ct. Rev.* 139.

Guillemard, Sylvette, et Séverine Menétrey. *Comprendre la procédure civile québécoise*, 2e éd. Montréal: Yvon Blais, 2017.

Hughes, Kirsty. "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Modern L. Rev.* 806.

Matheson, David. "Dignity and Selective Self-Presentation", in Ian Kerr, Valerie Steeves and Carole Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society*. New York: Oxford University Press, 2009, 319.

McIsaac, Barbara, Kris Klein, and Shaun Brown. *The Law of Privacy in Canada*, vol. 1. Toronto: Thomson Reuters, 2000 (loose-leaf updated 2020, release 11).

McLachlin, Beverly. "Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003), 8 *Deakin L. Rev.* 1.

Paton-Simpson, Elizabeth. "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" *(2000), 50 U.T.L.J. 305*.

Perell, Paul M., and John W. Morden. *The Law of Civil Procedure in Ontario*, 4th ed. Toronto: LexisNexis, 2020.

Québec. Ministère de la Justice. *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01*. Montréal: SOQUIJ, 2015.

Rochette, Sébastien, et Jean-François Côté. "Article 12", dans Luc Chamberland, dir. *Le grand collectif. Code de procédure civile -- Commentaires et annotations*, vol. 1, 5e éd. Montréal: Yvon Blais, 2020.

Rossiter, James. *Law of Publication Bans, Private Hearings and Sealing Orders*. Toronto: Thomson Reuters, 2006 (loose-leaf updated 2020, release 2).

Solove, Daniel J. "Conceptualizing Privacy" (2002), 90 *Cal. L. Rev.* 1087.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rouleau and Hourigan JJ.A.), *2019 ONCA 376*, *47 E.T.R. (4th) 1*, *[2019] O.J. No. 2373* (QL), *2019 CarswellOnt 6867* (WL Can.), setting aside a decision of Dunphy J., *2018 ONSC 4706*, *417 C.R.R. (2d) 321*, *41 E.T.R. (4th) 126*, *28 C.P.C. (8th) 102*, *[2018] O.J. No. 4121* (QL), *2018 CarswellOnt 13017* (WL Can.). Appeal dismissed.

Counsel

Chantelle Cseh and *Timothy Youdan*, for the appellants.

Iris Fischer and *Skye A. Sepp*, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jacqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

Robert S. Anderson, Q.C., for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for the intervener the British Columbia Civil Liberties Association.

Khalid Janmohamed, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

The judgment of the Court was delivered by

N. KASIRER J. --

I. Overview

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press -- the eyes and ears of the public -- is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought -- for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order -- the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain

the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings -- the concerns for privacy of the affected individuals and their physical safety -- amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

9 Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

10 The couple's estates and estate trustees (collectively the "Trustees")[1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety.

The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").[2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. *Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

13 In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an order is necessary ... to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

14 The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and ... excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

16 Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. *Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)*

17 The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

18 The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their

loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

19 While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

20 The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. *Subsequent Proceedings*

21 The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

22 The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

23 First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club*. The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

24 Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

25 The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

26 The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Limited*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss -- resulting in inconvenience, even in upset or embarrassment -- is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither

individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar -- higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness -- for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order -- properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption -- albeit one that is rebuttable -- in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

43 The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" *(2016), 48 Ottawa L. Rev. 143*, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis (2004), 7 E.T.R. (3d) 221* (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness -- discouraging mischief and ensuring confidence in the administration of justice through transparency -- applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

45 It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession -- that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. *The Public Importance of Privacy*

46 As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important

public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

48 Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns -- even "without more" -- can coincide with important public interests within the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional ... harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

49 The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

50 In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy - - the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

51 Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local*

401, *2013 SCC 62*, *[2013] 3 S.C.R. 733* ("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. Ontario*, *2012 ONCJ 27*, *289 C.C.C. (3d) 549*, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, *2017 SCC 33*, *[2017] 1 S.C.R. 751*, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, *R.S.C. 1985, c. P-21*; *Personal Information Protection and Electronic Documents Act*, *S.C. 2000, c. 5* ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, *R.S.O. 1990, c. F.31*; *Charter of Human Rights and Freedoms*, *CQLR, c. C-12, s. 5*; *Civil Code of Québec*, arts. 35 to 41).[3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" *(2007), 40 U.B.C. L. Rev. 41*, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Modern L. Rev.* 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

53 The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because -- as this Court has made clear -- it is related to moral autonomy and dignity which are pressing and substantial concerns.

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson (1998), 102 B.C.A.C. 200*, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, *2020 QCCA 663*, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure

an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. *The Important Public Interest in Privacy Bears on the Protection of Individual Dignity*

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

57 Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants requires that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (p. 185).

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize -- in stating that openness is the rule and covertness the exception -- that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122 (Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

60 Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 *Cal. L. Rev.* 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

62 Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy ... . However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be

held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

64 How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

65 In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity ... namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

66 Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

67 The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* -- [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990 CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

68 The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile -- Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*'s notion of important public

interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

69 Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" *(2011), 56 McGill L.J. 289*, at p. 314).

70 It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy and dignity of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

71 Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals

little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual -- what this Court has described in its jurisprudence on s. 8 of the *Charter* as the "biographical core" -- if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity -- even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v. Marakah*, *2017 SCC 59*, *[2017] 2 S.C.R. 608*, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come

to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, *2014 SCC 46*, *[2014] 2 S.C.R. 390*, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" *(2000), 50 U.T.L.J. 305*, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*, *2012 SCC 47*, *[2012] 2 S.C.R. 584*, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's

emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. *The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest*

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be

at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned -- which will be true in every case -- but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical

inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. *There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy*

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban -- less constraining on openness than the sealing orders -- would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Solicitors:

Solicitors for the appellants: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

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, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: DMG Advocates, Toronto.

Solicitors for the intervener the Income Security Advocacy Centre: Borden Ladner Gervais, Toronto.

Solicitors for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.: Farris, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Toronto.

Solicitors for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee: HIV & AIDS Legal Clinic Ontario, Toronto.

---

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

End of Document

British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority

Supreme Court Reports

Supreme Court of Canada

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

Heard: January 14, 2016;

Judgment: June 24, 2016.

File No.: 36300.

[2016] 1 S.C.R. 587 | *[2016] 1 R.C.S. 587* | *[2016] S.C.J. No. 25* | *[2016] A.C.S. no 25* | *2016 SCC 25*

Workers' Compensation Appeal Tribunal, Appellant; v. Fraser Health Authority, Katrina Hammer, Patricia Schmidt and Anne MacFarlane, Respondents. And Katrina Hammer, Patricia Schmidt and Anne MacFarlane, Appellants; v. Workers' Compensation Appeal Tribunal and Fraser Health Authority, Respondents, and Attorney General of Canada, Attorney General of Ontario, Ontario Network of Injured Workers' Groups, Industrial Accident Victims' Group of Ontario, Community Legal Assistance Society and British Columbia Federation of Labour, Interveners.

(82 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Workers' compensation — Occupational disease — Causation — Evidence — Standard of proof — Hospital laboratory technicians diagnosed with breast cancer applying for compensation on basis that their cancers are occupational diseases — Compensation payable if employment is of causative significance in development of disease — Medical experts unable to find sufficient scientific basis to establish causal link between workers' cancers and employment — Whether Tribunal erred in its approach to causation in deciding that workers' cancer was occupational disease arising due to nature of employment — Workers Compensation Act, R.S.B.C. 1996, c. 492, ss. 6, 250(4).

Summary:

H, S and M (the "workers") were among seven technicians at a single hospital laboratory who were diagnosed with breast cancer. Each of them applied for compensation under the *Workers Compensation Act* on the basis that the cancer was an occupational disease. The *Act* provides that where a worker is disabled from an occupational disease that is due to the nature of his or her employment, compensation is payable as if the disease were a personal injury arising out of and in the course of that employment. In accordance with the applicable policy, the payment of benefits is conditional upon the employment having been of "causative significance" in the development of the worker's illness.

The medical experts who provided evidence concluded that there was a lack of a sufficient scientific basis to causally link the incidence of breast cancer to the workers' employment in the laboratory. A review officer of the Workers' Compensation Board denied each of the workers' claims. The workers each appealed the Board's decision to the Workers' Compensation Appeal Tribunal. A majority of the Tribunal found that the workers' breast cancers were indeed occupational diseases. Upon application by the employer to the Tribunal for reconsideration, a reconsideration panel upheld the original decision. The employer's application for judicial review of the Tribunal's original and reconsideration decisions was allowed: both decisions were set aside and the matter was remitted back to the Tribunal. On appeal by the workers, the majority of the Court of Appeal dismissed the appeal, holding that the Tribunal's reconsideration decision was a nullity and that the Tribunal's original decision was patently unreasonable. The workers now appeal to this Court, raising the issue of whether the Tribunal erred in its approach to causation. The Tribunal also appeals to this Court, raising the issue of whether it can, by way of [page589] a reconsideration decision, reopen an earlier decision to consider whether it was patently unreasonable.

Held (Côté J. dissenting in part): The appeal by the workers should be allowed. The appeal by the Tribunal should be dismissed.

Per McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner and Brown JJ.: The standard of review applicable to the Tribunal's original decision requires curial deference, absent a finding of fact or law that is patently unreasonable. Because a court must defer where there is evidence capable of supporting a finding of fact, patent unreasonableness is not established where the reviewing court considers the evidence merely to be insufficient.

The presence or absence of opinion evidence from an expert positing or refuting a causal link is not determinative of causation. Causation can be inferred -- even in the face of inconclusive or contrary expert evidence -- from other evidence, including merely circumstantial evidence. Subject to the applicable standard of review, the task of weighing evidence rests with the trier of fact. In the instant case, the Tribunal's original decision cannot be said to have been patently unreasonable. While the record on which that decision was based did not include confirmatory expert evidence, the Tribunal nonetheless relied upon other evidence which, viewed reasonably, was capable of supporting its finding of a causal link between the workers' breast cancers and workplace conditions.

In addition, according to the standard of proof set out in s. 250(4) of the *Act*, where the evidence is evenly weighed on causation, that issue must be resolved in the workers' favour. This standard of proof contrasts sharply with the scientific standards employed by the medical experts in the case at bar. The majority of the Tribunal was right to consider that the experts thus imposed a too stringent standard of proof. In relying upon the inconclusive quality of the experts' findings as determinative of whether a causal link was established between the workers' breast cancers and their employment, the chambers judge and the majority of the Court of Appeal erred in law.

[page590]

With respect to the appeal by the Tribunal, the employer agrees with the Court of Appeal's assessment that the Tribunal's reconsideration decision was a nullity. Accordingly, there is no reason to interfere with that aspect of the Court of Appeal's decision.

Per Côté J. (dissenting in part): There is agreement with the majority with respect to the Tribunal's appeal only. As for the workers' appeal, it should be dismissed since the original decision of the Tribunal is patently unreasonable and ought to be set aside. There is no evidence -- and certainly no positive evidence -- capable of supporting a causal link between the workers' employment and the development of their respective diseases.

Experts are responsible for providing decision-makers with precisely those inferences that decision-makers -- due to the technical nature of the issues -- are unable to formulate themselves. The Tribunal is not presumed to possess medical expertise. As a result, while the Tribunal is not bound by the medical experts' findings, it cannot simply disregard their uncontradicted conclusions. In this case, the expert reports before the Tribunal were unequivocal:

the available evidence could not establish any causal relationship between the workers' employment as laboratory technicians and the development of their breast cancer.

In the instant case, the medical experts did not seek to establish causation on a level of scientific certainty. Having undertaken a more limited investigation, the medical experts simply found no workplace exposure that could plausibly have increased the risk of developing breast cancer. As a result, even on the relaxed standard of proof applicable under s. 250(4) of the *Act*, there is still no positive evidence capable of establishing causative significance.

While drawing inferences is important in fact finding, the evidence in the record must still be capable of supporting the inferences drawn. Otherwise, the fact-finder is at risk of straying outside the realm of inference and reasonable deductions and into the wilderness of mere speculation or conjecture. Common sense or inferential reasoning cannot bridge insuperable gaps in the evidence, in either a standard civil action or in an administrative claim under the *Act*. In the case at bar, the only support for the Tribunal's original decision is the existence of a cluster of diagnosed cases of breast cancer. [page591] The Tribunal's findings of fact simply do not rise above the level of mere speculation. The Tribunal disregarded the consensus view of the medical experts, in spite of its own lack of expertise in medical matters. The Tribunal also ignored the applicable policy, which states that there must be sufficient positive evidence capable of supporting a finding of causative significance, failing which the only possible option is to deny the claim.

Cases Cited

By Brown J.

Referred to: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Sam v. Wilson*, 2007 BCCA 622, 78 B.C.L.R. (4th) 199; *Moore v. Castlegar & District Hospital* (1998), 49 B.C.L.R. (3d) 100; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; *Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98; *Speckling v. Workers' Compensation Board (B.C.)*, 2005 BCCA 80, 209 B.C.A.C. 86; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Kovach, Re* (1998), 52 B.C.L.R. (3d) 98, rev'd 2000 SCC 3, [2000] 1 S.C.R. 55; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Medwid v. Ontario* (1988), 63 O.R. (2d) 578; *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181.

By Côté J. (dissenting in part)

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal refused, [2010] 2 S.C.R. v; *Page v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 493; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2003] 1 A.C. 32; *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152; *Kozak v. Funk* (1997), 158 Sask. R. 283, aff'g in part (1995), 135 Sask. R. 81; *Meringolo v. Oshawa General [page592] Hospital* (1991), 46 O.A.C. 260, leave to appeal refused, [1991] 3 S.C.R. vii; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 58.

Workers Compensation Act, R.S.B.C. 1996, c. 492, ss. 6, 96, 96.2 to 96.4, 245.1(w), 250(2), (4), 253.1, 254, 255(1), 256(2), Sch. B.

Authors Cited

Anderson, Glenn R. *Expert Evidence*, 3rd ed. Markham, Ont.: LexisNexis, 2014.

British Columbia. Workers' Compensation Board. *Rehabilitation Services & Claims Manual*, vol. II (online: http://www.worksafebc.com).

Cheifetz, David. "The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark" (2005), 30 *Advocates' Q.* 1.

Haack, Susan. *Evidence Matters: Science, Proof, and Truth in the Law*. New York: Cambridge University Press, 2014.

Hill, Austin Bradford. "The Environment and Disease: Association or Causation?" (1965), 58 *Proc. R. Soc. Med.* 295.

Occupational Health and Safety Agency for Healthcare in British Columbia. *Cancer Cluster Investigation within the Mission Memorial Hospital Laboratory*, Final Report by George Astrakianakis et al. March 31, 2006 (online: http://www.phsa.ca).

Wright, Richard W. "Proving Causation: Probability versus Belief", in Richard Goldberg, ed., *Perspectives On Causation*. Oxford: Hart, 2011, 195.

History and Disposition:

APPEALS from a judgment of the British Columbia Court of Appeal (Newbury, Chiasson, Frankel, Bennett and Goepel JJ.A.), 2014 BCCA 499, 364 B.C.A.C. 241, 82 Admin. L.R. (5th) 246, 67 B.C.L.R. (5th) 213, 380 D.L.R. (4th) 204, 625 W.A.C. 241, [2015] 4 W.W.R. 1, [2014] B.C.J. No. 3111 (QL), 2014 CarswellBC 3824 (WL Can.), affirming a decision of Savage J., 2013 BCSC 524, [2013] B.C.J. No. 605 (QL), 2013 CarswellBC 795 (WL Can.). Appeal by the Workers' Compensation Appeal Tribunal dismissed. Appeal by Katrina Hammer, Patricia Schmidt and Anne MacFarlane allowed, Côté J. dissenting.

[page593]

Counsel

Timothy J. Martiniuk and *Jeremy Thomas Lovell*, for the appellant/respondent the Workers' Compensation Appeal Tribunal.

Tonie Beharrell, *Randall J. Noonan* and *Kaity Cooper*, for the appellants/respondents Katrina Hammer, Patricia Schmidt and Anne MacFarlane.

Nazeer T. Mitha, *Dianne D. Rideout* and *Erin Cutler*, for the respondent Fraser Health Authority.

Christine Mohr and *Alexander Pless*, for the intervener the Attorney General of Canada.

Sara Blake and *Sandra Nishikawa*, for the intervener the Attorney General of Ontario.

Ivana Petricone, for the interveners the Ontario Network of Injured Workers' Groups and the Industrial Accident Victims' Group of Ontario.

Monique Pongracic-Speier, for the interveners the Community Legal Assistance Society and the British Columbia Federation of Labour.

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

BROWN J.

I. Introduction

1 These appeals call upon the Court to consider (1) whether the British Columbia Workers' Compensation Appeal Tribunal can, by way of a "reconsideration" decision, reopen an earlier decision to consider whether it was patently unreasonable (the "WCAT Appeal"); and (2) whether, in the circumstances of this case, the Tribunal erred in its approach to causation[1] in deciding that each of three workers' cases of breast cancer was an "occupational disease" [page594] arising "due to the nature of [their] employment" (the "Workers' Appeal"). A majority of the British Columbia Court of Appeal held that the Tribunal's reconsideration decision (which simply affirmed its original decision) was a nullity, and that the Tribunal erred in its original decision in finding a causal link between the workers' breast cancers and their employment.

2 I would allow the Workers' Appeal and dismiss the WCAT Appeal. As to the WCAT Appeal, as I will explain, the respondent Fraser Health Authority agrees with the Court of Appeal's assessment that the Tribunal's reconsideration decision was a nullity. I therefore see no reason to interfere with that aspect of the Court of Appeal's decision. On the issue of causation raised by the Workers' Appeal, however, for the reasons that follow I am of the view that, in light of the applicable standard of review, the Tribunal's finding of a causal link between the workers' breast cancers and their employment should not have been upset.

II. Overview of Facts and Proceedings

A. *Background and Statutory Provisions*

3 Katrina Hammer, Patricia Schmidt and Anne MacFarlane were among seven technicians at a single hospital laboratory who were diagnosed with breast cancer. Each of them applied for compensation under the *Workers Compensation Act, R.S.B.C. 1996, c. 492*, on the basis that the cancer was an "occupational disease".

4 The *Act* establishes a comprehensive no-fault insurance scheme for workers who sustain workplace injuries or suffer from occupational diseases. More specifically, s. 6 of the *Act* provides that where a worker is disabled from an occupational disease that is due to the nature of his or her employment, compensation is payable "as if the disease were a [page595] personal injury arising out of and in the course of that employment".

5 Upon receiving a claim, the Workers' Compensation Board inquires into, hears and determines all matters and questions of fact and law (s. 96). Certain decisions of the Board can be reviewed by a review officer (ss. 96.2 to 96.4) and, further, can be appealed to the Tribunal. Section 254 confers upon the Tribunal "exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined [on appeals under the *Act*]". Further, the Tribunal may amend its own decisions to cure a clerical or typographical error, an "accidental or inadvertent error, omission or other similar mistake" or an arithmetical error (s. 253.1), or it may reconsider a decision to cure a jurisdictional defect or if new evidence has become available or has been discovered (ss. 253.1(5) and 256(2)).

6 As to whether a worker suffers from an occupational disease due to the nature of his or her employment, the

Board's *Rehabilitation Services & Claims Manual*, vol. II ("*RSCM II*") (online), the relevant policy which must be applied by the Tribunal to decide these appeals (s. 250(2) of the *Act*), conditions payment of benefits upon the employment having been of "causative significance" in the development of the worker's illness. This means "more than a trivial or insignificant aspect of the injury or death" (*RSCM II*, Chapter 3, policy item #14.00), and entails consideration of whether:

* there is a physiological association between the injury or death and the employment activity, including whether the activity was of sufficient degree and/or duration to be of causative significance in the injury or death;

[page596]

* there is a temporal relationship between the work activity and the injury or death; and
* any non-work related medical conditions were a factor in the resulting injury or death.

7 Section 250(4) of the *Act* provides that, where the Tribunal is hearing an appeal respecting the compensation of a worker and the evidence is "evenly weighted" on an issue, the Tribunal must resolve that issue "in a manner that favours the worker". In other words, the applicable burden of proof is not the civil burden of "balance of probabilities". Where the evidence leads to a draw, the finding must favour the worker. This extends to deciding whether the occupational disease is "due to" the nature of employment - that is, to the issue of causation: "... if the weight of the evidence suggesting the disease was caused by the employment is roughly equally balanced with evidence suggesting non-employment causes, the issue of causation will be resolved in favour of the worker" (*RSCM II*, Chapter 4, policy item #26.22).

8 By joint operation of s. 245.1(w) of the *Workers Compensation Act* and s. 58(2)(a) of the *Administrative Tribunals Act*, *S.B.C. 2004, c. 45*, a reviewing court may not interfere with a finding of fact or law made by the Tribunal in respect of a matter over which it has exclusive jurisdiction unless it is patently unreasonable.

B. *Evidence on Causation*

9 The causal issue before the Board, the Tribunal and the courts below was the etiology of the workers' breast cancers.[2] The evidence on that question comprised three expert reports:

[page597]

(a) the final report of the Occupational Health and Safety Agency for Healthcare in British Columbia ("OHSAH") regarding the incidence of cancer in the laboratory where the workers were employed (*Cancer Cluster Investigation within the Mission Memorial Hospital Laboratory*, Final Report, March 31, 2006, at p. 35 (online)) and two earlier draft reports, each produced by various OHSAH staff, consultants and trainees (collectively the "OHSAH reports");

(b) the report of Dr. Jeremy R. Beach, a specialist in occupational medicine; and

(c) the report of Dr. M. W. Yamanaka, a medical advisor to the Board specializing in occupational medicine.

10 The OHSAH reports contained a review of the scientific literature on factors associated with the risk of breast cancer, an epidemiological analysis of the cancer cluster among workers in the laboratory, and a field investigation into possible exposure among laboratory technicians to potentially carcinogenic substances. They confirmed that the number of diagnoses of breast cancer (7 of the 63 workers studied were so diagnosed) represented a statistically significant cluster, with a "standardized incidence ratio" for breast cancer approximately eight times the rate that would have been expected in the general population. As to potential causes, the authors of these reports observed no current occupational chemical exposures, but noted that past exposures were "likely much higher", and included one known human carcinogen (Final Report, at p. 35).

11 Ultimately, the authors of the OHSAH reports did not reach "scientific conclusions to support the association

between work-related exposures [page598] and breast cancer in this cluster" (Final Report, at p. iii). More particularly, they explained that "[o]ur review of the literature was unable to establish the basis for [an etiological hypothesis based on scientific evidence of causal mechanisms for breast cancer], as we did not find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer" (p. iv). The authors speculated that the increased incidence of breast cancer among laboratory employees may have been due to "(1) a cluster of reproductive and other known, non-occupational, risk factors, (2) past exposures to chemical carcinogens and less likely to ionizing radiation, and (3) a statistical anomaly" (p. 39 (emphasis added)).

12 Dr. Beach's report and Dr. Yamanaka's report were each in substantial agreement with the OHSAH reports. In particular, Dr. Beach and Dr. Yamanaka shared the OHSAH reports' conclusion regarding the lack of a sufficient scientific basis to causally link the incidence of breast cancer to the workers' employment in the laboratory. Dr. Yamanaka went somewhat further than Dr. Beach, saying (without elaboration) that he "would prefer to refute than support" that posited link, and that he "would favor the opinion that non-occupational factors were the cause of [the] breast cancer" (J.R., vol. 4, at p. 230).

C. *The Decisions Below*

(1) The Workers' Compensation Board

13 A review officer of the Board denied each of the claims, finding that "there is insufficient evidence ... to conclude that [each worker's] years of employment as a medical lab technician has played a significant role in causing breast cancer", and [page599] pointing to various non-occupational risk factors for breast cancer (J.R., vol. 3, at p. 21).

(2) The Tribunal's Original Decisions

14 The workers each appealed the Board's decision to the Tribunal. At the Tribunal, a majority of two members found that the workers' breast cancers were indeed occupational diseases. In doing so, the majority acknowledged the need for "positive evidence linking the disease to employment" (J.R., vol. 1, at p. 16) and cited the decision of this Court in *Snell v. Farrell*, *[1990] 2 S.C.R. 311*, as authority for a fact-finder's ability to draw a "common sense" inference of causation in the absence of scientific proof of causation - scientific standards being more rigorous than the "lesser standard ... demanded by the law" (J.R., vol. 1, at p. 17). The authors of the OHSAH reports, in seeking "to reach scientific conclusions to support the association between work-related exposures and breast cancer in this cluster" (Final Report, at p. iii), therefore applied a too stringent standard of proof. The applicable standard was not that which is necessary to support a scientific conclusion, but rather the standard set out in s. 250(4) of the *Act*.

15 The majority then analysed the evidence with reference to the indicia described by A. Bradford Hill ("The Environment and Disease: Association or Causation?" (1965), 58 *Proc. R. Soc. Med.* 295) for weighing epidemiological evidence of causation. In this case, the criteria of "strength of association" (the ratio of the incidence of disease among exposed workers when compared to the incidence within the general population) and "temporal relationship" (the proximity in time between exposure and the onset of the disease) were clearly satisfied, although other criteria were not. The majority concluded, however, that it was not necessary to identify a specific causal agent, it being sufficient for the evidence merely to point to a causal link between a disease and an occupation. Here, the evidence of past carcinogenic exposure, coupled [page600] with the statistically significant cluster of breast cancer cases among laboratory workers, comprised "positive evidence" supporting a conclusion that it was as likely as not that the workers' breast cancers were caused by workplace exposure.

16 The dissenting member explained that, while she agreed that scientific certainty was not required, the expert reports provided no "positive evidence" of a causal link. Without more, they were therefore insufficient to support a conclusion that workplace exposures were of causal significance.

(3) The Tribunal's Reconsideration Decisions

17 Fraser Health applied under s. 253.1(5) of the *Workers Compensation Act* for reconsideration[3] of the Tribunal's original decisions. While s. 253.1 permits the Tribunal to amend its decisions to correct clerical, typographical or mathematical errors, or to clarify its decisions, subs. (5) provides that "[t]his section must not be construed as

limiting the appeal tribunal's ability, on request of a party, to reopen an appeal in order to cure a jurisdictional defect." Fraser Health's argument was that a "jurisdictional defect" arose here, since the Tribunal's finding in the original decisions of a causal link between the workers' breast cancers and their employment lacked supporting evidence and was, as such, patently unreasonable.

18 The reconsideration panel (comprising a single member) reviewed the original decisions for [page601] patent unreasonableness and determined that, given the elevated standard incidence ratio and the past exposure to carcinogens, the original panel had sufficient evidence to support its conclusions regarding causation.

(4) British Columbia Supreme Court, *2013 BCSC 524*

19 Fraser Health sought judicial review of the Tribunal decisions - the original decisions and the reconsideration decisions. Savage J. (as he then was) explained that he would review the original decision for patent unreasonableness and the reconsideration decision for correctness. He observed that the Tribunal's decisions are entitled to the highest level of curial deference and, in particular, that "the [Tribunal] has a right to be wrong provided that there is some evidence capable of supporting its conclusion" (para. 11 (CanLII), citing *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, *[1997] 1 S.C.R. 487*, at para. 44).

20 That said, the chambers judge observed, the Tribunal "was not entitled to ignore the expert evidence in favour of its own expertise or common sense, and it was patently unreasonable [for it] to do so" (para. 34). Here, he relied on British Columbia Court of Appeal authority - specifically, *Sam v. Wilson*, *2007 BCCA 622*, *78 B.C.L.R. (4th) 199*, at para. 41, citing *Moore v. Castlegar & District Hospital* *(1998), 49 B.C.L.R. (3d) 100* (C.A.), at para. 11 - which holds that, "where there is affirmative medical evidence leading to a medical conclusion it is not open to the court to apply 'the common sense reasoning urged in *Snell v. Farrell*'". This precluded "the purported application of common sense on matters of causation where there is contrary expert opinion" (chambers judge's reasons, at para. 40). Here, the experts clearly and unambiguously concluded that there was no evidence that workplace factors caused the workers' breast cancers. Given "the absence of any evidence and in the face of expert opinion to the contrary" [page602] (para. 49), the Tribunal's original decision was patently unreasonable and the reconsideration decision was incorrect. He set aside both decisions and remitted the matter back to the Tribunal.

(5) British Columbia Court of Appeal, *2014 BCCA 499, 67 B.C.L.R. (5th) 213*

21 The workers appealed Savage J.'s decision, and the Court of Appeal invited the parties to make submissions as to, *inter alia*, the jurisdiction of the Tribunal to reconsider its original decision in this matter. Chiasson J.A., joined by Frankel and Goepel JJ.A., held that s. 253.1(5) of the *Workers Compensation Act* merely preserves the Tribunal's common law power to reopen a proceeding to complete its statutory task, and therefore does not permit it to correct errors made within its jurisdiction. The Tribunal's interpretation of s. 253.1(5) as permitting it to review its own decisions to identify and correct patently unreasonable errors is supported neither by that common law power to reopen nor by the *Act*'s legislative history. Since no true jurisdictional defect had been alleged, the Tribunal's reconsideration decision was a nullity. Chiasson J.A. therefore dismissed the appeal of the chambers judge's order setting aside the reconsideration decision.

22 Newbury J.A., joined by Bennett J.A., disagreed. The meaning of "jurisdictional defect" in s. 253.1, having been drafted prior to the decision of this Court in *Dunsmuir v. New Brunswick*, *2008 SCC 9*, *[2008] 1 S.C.R. 190*, should not be confined to permitting the Tribunal to review for errors of "true" jurisdiction as that term was described in *Dunsmuir*. Rather, it should be understood in light of the common law power to reopen which, in her view, included the power of a tribunal to determine whether an original decision was patently [page603] unreasonable. As a practical matter, limiting the Tribunal's scope to reconsider its own decisions for patent unreasonableness would mean more court proceedings, contrary to the purpose of the *Act* and to the principles of administrative law generally.

23 On the issue of causation, Chiasson J.A., joined by Frankel J.A., held that, while there was "some evidence" to support the Tribunal's finding of causation (specifically, the "statistical anomaly" of elevated breast cancer rates

among laboratory workers), "something more" was required (paras. 198-99). The Tribunal's finding of causation was, therefore, patently unreasonable.

24 Goepel J.A., writing separately, agreed that the chambers judge did not err in setting aside the original decision as patently unreasonable. Resolving issues of causation in this case required expert "medical" and "scientific" evidence (para. 209). Lacking such expertise, the Tribunal cannot disregard uncontradicted expert evidence in order to substitute its own opinion. In the absence of "positive evidence linking the disease to employment" (para. 211), and in the face of expert evidence to the contrary, the Tribunal's decision was patently unreasonable.

25 Newbury J.A., again joined by Bennett J.A., observed that the standard of review of "patent unreasonableness" denotes the highest level of deference, permitting curial interference only where there is "*no* evidence" to support the Tribunal's findings or where its decision was "openly, clearly, or evidently unreasonable" (para. 70 (emphasis in original)). Here, the experts did not rule out a causal connection between laboratory conditions and the workers' cancers. While the experts [page604] acknowledged that present chemical exposures were minimal, past exposures had likely been much higher and included at least one known human carcinogen. The Tribunal's conclusion that the likelihood of a statistical anomaly did not exceed the likelihood that breast cancers in these cases were occupational diseases was reached appropriately, after a careful review of all the evidence. Viewed through the scheme and underlying objectives of the workers' compensation system, which requires the Tribunal to resolve issues in favour of a worker where the evidence supporting different findings on an issue is evenly weighted, the Tribunal's original decision was not patently unreasonable and should not have been upset by the chambers judge.

III. Analysis

A. *The Tribunal's Jurisdiction to Reconsider Its Own Decision*

26 Fraser Health, having sought reconsideration by the Tribunal, now takes the position that the majority at the Court of Appeal correctly characterized the reconsideration decision as a nullity. The Tribunal's power to reconsider a decision under s. 253.1(5) of the *Workers Compensation Act* "to cure a jurisdictional defect" is, it says, limited to the common law power to reopen as stated by the Court in *Chandler v. Alberta Association of Architects*, *[1989] 2 S.C.R. 848*, at p. 861: "... [a final] decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances".

27 Conversely, the Tribunal submits that s. 253.1(5)'s language of "cur[ing] a jurisdictional defect" is sufficiently broad to permit reconsideration for patent unreasonableness. In the Tribunal's view, when it undertakes to reconsider its own decision, it effectively operates as a court on judicial review by applying the standard of review of patent [page605] unreasonableness stated in s. 58(2)(a) of the *Administrative Tribunals Act*.

28 In light of the position taken by Fraser Health - that it should not have been able to obtain reconsideration of the Tribunal's original decision and that the reconsideration decision is a nullity - I see no basis for interfering with the decision of the Court of Appeal on this issue.

B. *Causation*

(1) Standard of Review

29 As already noted, and as the parties agree, the applicable standard of review requires curial deference, absent a finding of fact or law that is patently unreasonable (*Administrative Tribunals Act*, s. 58(2)(a)).

30 The Tribunal's conclusion that the workers' breast cancers were occupational diseases caused by the nature of their employment was a finding on a question of fact (*Ediger v. Johnston*, *2013 SCC 18*, *[2013] 2 S.C.R. 98*, at para. 29). That finding is therefore entitled to deference unless Fraser Health demonstrates that it is patently unreasonable - that is, that "the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact" (*Toronto (City) Board of Education*, at para. 45). Because a court must defer where there is evidence *capable of supporting* (as opposed to *conclusively demonstrating*) a finding of fact, patent unreasonableness is not established

where the reviewing court considers the evidence merely to be insufficient (*Speckling v. Workers' Compensation Board (B.C.)*, 2005 BCCA 80, 209 B.C.A.C. 86, at para. 37). Simply put, this standard precludes curial re-weighing of evidence, or rejecting the inferences drawn by the fact-finder from that evidence, or substituting the reviewing court's preferred inferences for those drawn by the fact-finder.

[page606]

(2) The Tribunal's Finding on Causation

31 Understandably, the workers stress s. 250(4) of the *Workers Compensation Act* which signifies that, where the evidence is evenly weighted on causation, that issue must be resolved in their favour. We agree that this represents an important distinction from civil tort claims, where causation must always be established on a balance of probabilities (*F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 49; *Ediger*, at para. 28; *Kovach, Re (1998), 52 B.C.L.R. (3d) 98* (C.A.), at para. 30 (per Donald J.A., dissenting), rev'd 2000 SCC 3, [2000] 1 S.C.R. 55). This less stringent burden of proof, like the *RSCM II*'s direction that the workplace need only be of "causative significance" or "more than a trivial or insignificant aspect" in the development of a worker's illness, furthers at least one of the core policy goals of workers' compensation schemes identified by the Court in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 27, citing *Medwid v. Ontario (1988), 63 O.R. (2d) 578* (H.C.), at p. 586, being to have "compensation to injured workers provided quickly without court proceedings". Section 250(4) therefore reflects the legislature's intention that workers should obtain compensation for occupational diseases without having to satisfy the requirements of a civil tort claim.

32 Section 250(4)'s standard of proof contrasts sharply with the "scientific" standards employed by the authors of the OHSAH reports. Their inability "to reach scientific conclusions" (Final Report, at p. iii) to support the causal association between workplace conditions and the workers' breast cancers, or to "find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer" (p. iv), spoke *not* to the burden imposed upon the workers by s. 250(4), nor even to the burden imposed upon plaintiffs in a civil tort claim (*Ediger*, at para. 36; [page607] *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 9; *Snell*, at pp. 328-30), but to a standard of scientific certainty. The majority of the Tribunal considered that the OHSAH reports thus imposed a too stringent standard of proof. I agree. This standard is wholly inapplicable to determining causation in the workers' claims (R. W. Wright, "Proving Causation: Probability versus Belief", in R. Goldberg, ed., *Perspectives On Causation* (2011), 195; S. Haack, *Evidence Matters: Science, Proof, and Truth in the Law* (2014), at p. 22). In my respectful view, therefore, in relying upon the inconclusive quality of the OHSAH reports' findings as determinative of whether a causal link was established between the workers' breast cancers and their employment, the chambers judge and the majority of the Court of Appeal erred in law.

33 All that said, the central problem in the handling of causation in the courts below arose not in their failure to have appropriate regard to the less stringent standard of proof required by s. 250(4), but from their fundamental misapprehension of how causation - irrespective of the standard of proof - may be inferred from evidence.

34 As I have recounted, the evidence before the Tribunal on causation comprised, principally, the OHSAH reports (supported by the reports of Dr. Beach and Dr. Yamanaka), which (1) confirmed a "statistically significant cluster" of breast cancer, with a standard incidence ratio approximately eight times the rate of breast cancer in the general population; and (2) noted that past occupational chemical exposures were likely "much higher" than current exposures, and included one known carcinogen; but also (3) reported that they were unable "to reach scientific conclusions to support the association between work-related exposures and breast cancer in this cluster" (Final Report, at p. iii). Consequently, the OHSAH reports would only speculate that the increased incidence of breast cancer [page608] among the laboratory workers may have been due to non-occupational risk factors, to occupational risk factors such as chemical carcinogens or ionizing radiation, or to a statistical anomaly.

35 The Tribunal, in lengthy and comprehensive reasons explaining why it found "causative significance" in the evidence of past carcinogenic exposure and in the statistically significant cluster of breast cancer cases, gave careful consideration to the OHSAH reports. It correctly noted that the OHSAH reports "did not exclude the

possibility of occupational causation", and that the Tribunal did not have before it "much detailed evidence as to historical exposures" (J.R., vol. 1, at p. 47). And, it acknowledged that "it is possible that the breast cancer cluster is a statistical anomaly", and that "this matter is not without some uncertainty" (p. 48). The Tribunal chose, however, to "attach weight" to the reports' observations that past exposures were "likely much higher" (p. 47), leading it to find that the likelihood of a statistical anomaly did not exceed the likelihood that the workers' breast cancers were an occupational disease caused by the nature of their employment. As it explained:

> Perhaps the most compelling evidence for us involves the fact that the workers with breast cancer were exposed to carcinogens and there is a very elevated statistically significant [standardized incidence ratio] for breast cancer. Our decision does not simply rest on the occurrence of a very elevated statistically significant [standardized incidence ratio] for breast cancer.
>
> That [standardized incidence ratio] occurs against the backdrop of the particular standard of proof employed by us, the workers' exposure to carcinogens, and the [page609] comments of [the Final Report] to the effect that all cancer causing agents have the potential to initiate and promote cancer, little is known about the possible synergistic, additive or antagonistic effects of multiple chemical exposures, and past exposures were likely much higher. [J.R., vol. 1, at p. 48]

36 The chambers judge, seeing "no evidence that workplace factors caused [the workers'] cancers" (para. 44), viewed the Tribunal as having impermissibly "ignore[d] the expert evidence in favour of its own expertise or common sense" (para. 34). Similarly, at the Court of Appeal, having found there to be no "positive evidence linking the disease to employment" (para. 211), Goepel J.A. (for the majority on this point) agreed that "[t]he issue for determination is one that required expert scientific evidence" (para. 209), which expertise the Tribunal could not be presumed to have.

37 With respect, the issue that the Tribunal decided was precisely the sort of issue that the legislature intended that it should decide. Section 254 of the *Act* provides that, on appeals from decisions of the Board, the *Tribunal* has *exclusive* jurisdiction to determine *all* questions of fact. While, in doing so, the Tribunal may choose to draw from the expert evidence put before it (as it drew here from expert evidence of historical exposures and of a statistically significant cluster of breast cancer cases among laboratory workers), the decision remains the Tribunal's to make.

38 The presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not, therefore, determinative of causation (e.g. *Snell*, at pp. 330 and 335). It is open to a trier of fact to consider, as this Tribunal considered, other evidence in determining whether it supported an inference that the workers' breast cancers were caused [page610] by their employment. This goes to the chambers judge's reliance upon the Court of Appeal's decisions in *Sam* and *Moore* and to Goepel J.A.'s statement that there must be "positive evidence" linking their breast cancers to workplace conditions. Howsoever "positive evidence" was intended to be understood in those decisions, it should not obscure the fact that causation can be inferred - even in the face of inconclusive or contrary expert evidence - from other evidence, including merely circumstantial evidence. This does not mean that evidence of relevant historical exposures followed by a statistically significant cluster of cases will, on its own, always suffice to support a finding that a worker's breast cancer was caused by an occupational disease. It does mean, however, that it may suffice. Whether or not it does so depends on how the trier of fact, in the exercise of his or her own judgment, chooses to weigh the evidence. And, I reiterate: Subject to the applicable standard of review, that task of weighing evidence rests with the trier of fact - in this case, with the Tribunal.

39 In light of the foregoing, the Tribunal's original decision cannot be said to have been "patently unreasonable". While the record on which that decision was based did not include confirmatory expert evidence, the Tribunal nonetheless relied upon other evidence which, viewed reasonably, was capable of supporting its finding of a causal link between the workers' breast cancers and workplace conditions.

IV. Conclusion

40 I would allow the Workers' Appeal, with costs to Katrina Hammer, Patricia Schmidt and Anne MacFarlane in this Court and in the courts below as against Fraser Health Authority. The Tribunal's [page611] original decisions are restored. I would dismiss the WCAT Appeal, without costs.

The following are the reasons delivered by

CÔTÉ J. (dissenting in part)

41 I part ways with my colleague Justice Brown with respect to the appeal by Katrina Hammer, Patricia Schmidt and Anne MacFarlane (the "Workers' Appeal") because, in my view, the original decision of the Workers' Compensation Appeal Tribunal is patently unreasonable. On my reading, there is no evidence - and certainly no positive evidence - capable of supporting a causal link between the workers' employment and the development of their respective diseases. The three expert reports before the Tribunal only established the existence of a cluster of diagnosed cases of breast cancer, and nothing more. In my view, the Tribunal relied on what it called "ordinary common sense" to speculate about a possible causal link, while openly disregarding the medical experts' consensus view. As such, the Tribunal's decision is "openly, evidently, clearly" wrong and ought to be set aside: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 57.

42 Regarding the appeal by the Tribunal (the "WCAT Appeal"), raising the issue of the nullity of the Tribunal's reconsideration decision, I agree with my colleague Brown J. that it should be dismissed. The conclusion of the majority of the British Columbia Court of Appeal should not be disturbed.

A. *Background*

43 The issue before the Tribunal was whether each of the three workers' breast cancer was "due to" her employment as a laboratory technician at the Mission Memorial Hospital, a causal link required [page612] by s. 6(1)(b) of the *Workers Compensation Act, R.S.B.C. 1996, c. 492* ("*WCA*").

44 While Schedule B of the *WCA* lists a number of occupational diseases which are deemed to be "due to the nature of [the] employment" in the context of specific processes or industries, breast cancer is not listed among them. As a result, a causal link must be established on the basis of the evidence before the Tribunal.

45 A policy of the Workers' Compensation Board, the *Rehabilitation Services & Claims Manual*, vol. II ("*RSCM II*") (online), specifies that in order for the disease to be "due to" the nature of the employment, the employment "has to be of causative significance, which means more than a trivial or insignificant aspect of the injury or death": c. 3, policy item #14.00 (emphasis added).

46 The Board's policy goes further, however, and requires that there be sufficient *positive* evidence to ground a finding of causative significance. The *RSCM II* states that "[i]f the Board has no or insufficient positive evidence before it that tends to establish that the disease is due to the nature of the worker's employment, the Board's only possible decision is to deny the claim": c. 4, policy item #26.22 (emphasis added). As my colleague Brown J. has observed, policies of the Board must be applied by the Tribunal in making its decisions: s. 250(2) of the *WCA*. The Tribunal also recognized this requirement: WCAT-2010-03503 (the "Original Decision"), at paras. 46-47.

47 In this case, the workers' claims were initially denied by the Board. A review officer with the Board's Review Division confirmed these decisions, finding that there was insufficient evidence to conclude that each worker's years of employment as a laboratory technician had played a significant role in causing breast cancer. On appeal, a two-member majority of the Tribunal concluded that there was [page613] sufficient positive evidence to establish that the workers' breast cancer was due to their employment, but a dissenting member disagreed, finding that the expert reports had provided insufficient positive evidence of a causal link. That dissenting member's conclusion was later vindicated, as the British Columbia Supreme Court set the Tribunal's decision aside, an order which was upheld by a majority of the British Columbia Court of Appeal.

48 It is common ground that a reviewing court can only interfere with the Tribunal's decision if it is patently unreasonable: s. 58 of the *Administrative Tribunals Act, S.B.C. 2004, c. 45*; s. 255(1) of the *WCA*. On the authority of jurisprudence pre-dating *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, a decision is patently unreasonable if it is "openly, evidently, clearly" wrong: *Southam*, at para. 57. More specifically, findings of fact will be "patently unreasonable" where they are either based on "no evidence" or where "the evidence, viewed

reasonably, is incapable of supporting" the finding of fact in question: *Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487*, at paras. 44-45; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644*, at p. 669.

49 Neither the British Columbia Supreme Court nor the majority of the Court of Appeal sought to reweigh the evidence before the Tribunal. The lower courts did not, in other words, depart from this highly deferential standard of review. Rather, Chiasson, Frankel and Goepel JJ.A. of the Court of Appeal and Savage J. of the Supreme Court were of the view that there was no evidence before the Tribunal capable of supporting an inference of causative significance. I agree. Even on this highly [page614] deferential standard of review, the Tribunal's decision should be set aside.

B. *The Expert Reports Before the Tribunal*

50 All three of the expert reports before the Tribunal were unequivocal. In the experts' collective view, expressed in clear, unambiguous language, the available evidence could not establish any causal relationship between the workers' employment as laboratory technicians and the development of their breast cancer.

51 Speaking of one of the workers, Ms. Katrina Hammer, the Board's medical advisor Dr. Yamanaka concluded that "there is insufficient medical evidence to support that the work environment caused or significantly contributed to the development of Ms. Hammer's breast carcinoma left side": J.R., vol. 4, at p. 226. That conclusion was stated more forcefully in the final version of a report titled *Cancer Cluster Investigation within the Mission Memorial Hospital Laboratory*, prepared by seven authors for the Occupational Health and Safety Agency for Healthcare in British Columbia (the "OHSAH Final Report") (online). The authors noted that they "did not find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer": p. iv (emphasis added). Finally, Dr. Beach, an expert in occupational medicine who was tasked with reviewing the OHSAH Final Report, largely supported its findings.

52 The importance of these unanimous expert opinions cannot be overstated. Experts are responsible for providing decision-makers with precisely those inferences that decision-makers - due to the technical nature of the issues - are unable to formulate themselves: *R. v. Abbey, [1982] 2 S.C.R. 24*, at p. 42; *R. v. Abbey, 2009 ONCA 624, 97 O.R. (3d) 330*, [page615] at para. 71, leave to appeal refused, [2010] 2 S.C.R. v; see also G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 625.

53 I would note here that the Tribunal is not presumed to possess medical expertise: *Page v. British Columbia (Workers' Compensation Appeal Tribunal), 2009 BCSC 493*, at paras. 62-66 (CanLII). As a result, while the Tribunal is not bound by the medical experts' findings, it cannot simply disregard their uncontradicted conclusions. In the absence of any other evidence to the contrary, one may wonder how the Tribunal could find a causal link where the experts, together, could see none.

54 In the case at bar, the Tribunal's two-member majority was of the view that the experts had sought to establish a causal link on a level of scientific certainty, rather than on the ostensibly lower standard of proof prescribed by s. 250(4) of the *WCA*: Original Decision, at paras. 180-82. If this were true, it would certainly justify the Tribunal's rejection of the experts' common findings. Indeed, the Tribunal's analysis echoes the principle established in *Snell v. Farrell, [1990] 2 S.C.R. 311*, to the effect that causation need not be determined by scientific precision. This principle applies with even greater force in the context of claims made under the *WCA*.

55 However, the instant case differs from *Snell*. The authors of the three expert reports did not seek to establish causation on a level of scientific certainty. Rather, they question repeatedly whether certain workplace exposures "could" or "may" have been related to an "increase in risk", "contribute measurably", or have been of "causative significance".

56 Having undertaken this more limited investigation, the medical experts could not even make out a *plausible* basis for establishing a causal link [page616] between the workers' employment and their respective diseases.

57 The OHSAH Final Report, which constituted the main piece of medical evidence before the Tribunal, is a good illustration. That report was simply a "preliminary epidemiological study". Its authors were tasked with identifying *any* "exposures that may be associated with excess cases in a workplace": p. 32 (emphasis added). In the event such exposures were identified, the authors would then recommend proceeding to a "full-scale epidemiological study" which could "determine the association between the exposure and [the] increased risk" of developing breast cancer: p. 32. Thus, in their executive summary, the authors of the OHSAH Final Report spoke not of whether certain workplace exposures *caused* the workers' breast cancer *on a level of scientific certainty*, but rather whether exposure to certain chemicals "could be related to the increase in risk": p. iii (emphasis added).

58 Ultimately, the authors of the OHSAH Final Report did not recommend proceeding to a full-scale epidemiological study, on the basis that they "did not find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer": p. iv (emphasis added). The authors went on to state in their conclusion that "no current occupational chemical exposures, or records of past occupational exposures were found that might relate working in the [Mission Memorial Hospital] laboratory environment to elevated breast cancer risk, or cancer in general": p. 38 (emphasis added).

59 In short, these are not the words of medical experts seeking "but for" causation on a standard of scientific certainty. Rather, the authors simply found no workplace exposure that could plausibly have increased the risk of developing breast cancer. On my reading of the OHSAH Final Report, even [page617] on the relaxed standard of proof applicable to the workers' compensation regime under s. 250(4) of the *WCA*, there is still no evidence capable of establishing "causative significance".

C. *The Bases on Which the Tribunal Inferred Causative Significance*

60 In spite of overwhelming expert evidence to the contrary, a two-member majority of the Tribunal nevertheless saw in the expert reports sufficient evidence of a causal link.

61 The key passages of the Tribunal's majority decision read as follows:

> As noted above, we have considered the factors in the Protocol. Perhaps the most compelling evidence for us involves the fact that the workers with breast cancer were exposed to carcinogens and there is a very elevated statistically significant [standardized incidence ratio] for breast cancer. Our decision does not simply rest on the occurrence of a very elevated statistically significant [standardized incidence ratio] for breast cancer.
>
> That [standardized incidence ratio] occurs against the backdrop of the particular standard of proof employed by us, the workers' exposure to carcinogens, and the comments of [the authors of the OHSAH Final Report] to the effect that all cancer causing agents have the potential to initiate and promote cancer, little is known about the possible synergistic, additive or antagonistic effects of multiple chemical exposures, and past exposures were likely much higher.

(Original Decision, at paras. 192-93)

[page618]

62 It does not take much probing to see that there is little to no support for these statements in the evidence before the Tribunal.

(1) The Cluster of Diagnosed Cases of Breast Cancer

63 First, the presence of a cluster of diagnosed cases of breast cancer does not, on its own, constitute evidence of causative significance.

64 As the OHSAH Final Report explains, clusters can occur naturally as a result of an uneven distribution of non-occupational risk factors amongst the general population. For breast cancer, these factors can include age, weight,

family history, age of first menstruation, age at pregnancy and first birth, and certain lifestyle factors. As the authors of the OHSAH Final Report explained:

> Cluster research has shown that elevated rates occur by chance at some geographic locations and times. In fact, clusters always occur and it is a statistical phenomenon - even when there is no causal factor that is responsible for the increased incidence (this is why so few cluster investigations uncover any new risk factors). So, if we look around at many geographic areas and times we will find some clusters; if a specific cluster is related to statistics and not an etiologic agent, it is most likely that in the next time period at this location the rate will not be significantly elevated. Thus, it would be very prudent to continue to evaluate the incidence of breast cancer in [Mission Memorial Hospital] Laboratory employees to see if the rate comes closer to what is expected. [Emphasis added; p. 39.]

65 A cluster might also represent a statistical anomaly. Indeed, since only a total of seven diagnosed cases of breast cancer were identified at the Mission Memorial Hospital laboratory over a period of 34 years, the possibility that this cluster represents such an anomaly is significant.

[page619]

66 It is clear that, on its own, correlation is no proof of causation. On that same logic, I am of the view that, without more, the mere presence of a cluster of diagnosed cases within a workplace is not sufficient evidence of any causal link between the disease and the nature of the employment.

(2) Exposure to Chemical Substances

67 Second, on the question of exposure to chemical substances, Dr. Yamanaka and the authors of the OHSAH Final Report were unwavering. In their view, the available evidence regarding the workers' exposure to chemical substances like formaldehyde, xylene, *o*-toluidine or ethylene oxide could not be related to an increase in the workers' risk of developing breast cancer.

68 Among these chemical substances, ethylene oxide is the only one that has a recognized association with the development of breast cancer in human beings and, according to the evidence, this association is weak. Dr. Yamanaka's report, drawing on research from the U.S. National Institute for Occupational Safety and Health, stated that only women exposed to "very high levels" of ethylene oxide would be at an increased risk of developing breast cancer. There is no evidence in the record capable of supporting a conclusion that any of the workers were exposed to such "high levels" at Mission Memorial Hospital.

69 Indeed, the OHSAH Final Report concluded that current exposure to chemical substances was minimal "because liquid volumes are small and handling is often minimized through the use of 'lock and load' systems": p. 36. Dr. Yamanaka noted in a May 31, 2007 log entry that, even in the past, high levels of exposure to ethylene oxide were "highly unlikely".

[page620]

70 The OHSAH Final Report did note that past exposures to certain chemicals were "likely much higher", but this statement must be read in context. For one, the mention of "past exposures" does not seem to refer to ethylene oxide, the only carcinogenic substance with a recognized association with the development of breast cancer in humans.

71 More importantly, a passing reference to "likely much higher" past exposures says nothing about whether these past exposures are "as likely as not" to have increased the workers' risk of developing breast cancer. Rather, in their executive summary, the authors of the OHSAH Final Report observed that a "chemical assessment of carcinogens in the workplace also did not show any obvious and extreme exposures in the past (based on current scientific literature), which could be related to the increase in risk": p. iii (emphasis added). This point was restated in their conclusion, where the authors explained that "no current occupational chemical exposures, or records of

past occupational exposures were found that might relate working in the [Mission Memorial Hospital] laboratory environment to elevated breast cancer risk, or cancer in general": p. 38 (emphasis added). Ultimately, as I have said, in spite of this "likely much higher" exposure to certain chemicals in the past, the authors of the OHSAH Final Report nevertheless concluded that they "did not find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer": p. iv (emphasis added).

72 Finally, rather than suggest that multiple exposures can have a "synergistic" or "additive" effect, as the Tribunal seems to imply, the OHSAH Final Report indicated that no synergistic or additive effect has been identified in the literature.

[page621]

73 Respectfully, there is simply no basis for inferring "causative significance" from these passages of the Final Report.

74 It is true, as my colleague Brown J. notes, that the OHSAH Final Report did not *exclude* the possibility that past exposures to certain chemicals could have contributed to the development of the workers' breast cancer. At the conclusion of their report, the authors stated that

> [i]n summary, this study confirmed that the perceived cluster was an observed cluster and that [Mission Memorial Hospital] Laboratory employees were experiencing an elevated rate of breast cancer. The factors associated with this increased incidence could not be determined but may have been due to: (1) a cluster of reproductive and other known, non-occupational, risk factors, (2) past exposures to chemical carcinogens and less likely to ionizing radiation, and (3) a statistical anomaly. [p. 39]

75 This statement, however, should not be mistaken for evidence, and certainly not *positive* evidence. The authors of the OHSAH Final Report only meant to set out an exhaustive list of what could *possibly* explain the higher incidence of breast cancer in laboratory technicians at Mission Memorial Hospital. The inability to rule out a possible explanation simply does not transform that explanation into positive evidence of a causal link. Moreover, a list of three exhaustive possibilities says nothing about the likelihood of "causative significance". Put simply, this passage provides no basis for inferring such a causal link, especially when the OHSAH Final Report otherwise goes to great lengths to refute the proposition that exposure to workplace chemicals could have increased the workers' risk of developing breast cancer.

[page622]

D. *The Tribunal's Findings of Fact Amount to Mere Speculation*

76 I am left with the view that the only support for the Tribunal's original decision is the existence of a cluster of diagnosed cases of breast cancer. The Tribunal's findings of fact simply do not rise above the level of mere speculation. The Tribunal is even candid about the speculative nature of its own conclusion. For instance, the two-member majority stated as follows:

> ... we acknowledge that the amount of exposure is not known and the specific carcinogens which contributed to their development of breast cancer are not known. As part of that exercise of "ordinary common sense", we reiterate we are weighing the evidence using a standard of proof as set out by subsection 250(4) of the [*WCA*].

(Original Decision, at para. 179)

77 In speculating in this way, the Tribunal disregarded the consensus view of the medical experts, in spite of the Tribunal's own lack of expertise in medical matters. The Tribunal also ignored the Board's policy, set out in the *RSCM II*, which states that there must be sufficient *positive* evidence capable of supporting a finding of causative significance, failing which the only possible option is to deny the claim. I would add that, in giving effect to so low a standard of proof, the Tribunal failed to respect the legislature's wish not to include breast cancer among the list of

occupational diseases which are deemed to have been caused by the nature of certain types of employment in Schedule B of the *WCA*.

78 Furthermore, while s. 250(4) of the *WCA* relaxes the burden of proof to a limited extent, it is of no assistance to the workers here. Section 250(4) provides that where the "evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker". On a literal reading of these words, before s. 250(4) can apply, [page623] there must be evidence capable of supporting two different findings, with each being equally plausible. In the present case, there is simply *no* evidence capable of supporting a finding of "causative significance". Section 250(4) simply cannot serve to bridge such a major gap in the evidence.

79 My colleague Brown J. has emphasized the importance of drawing inferences in fact finding. While this may be so, I must insist that the evidence in the record must still be capable of supporting the inferences drawn. Otherwise, the fct-finder is at risk of straying outside the realm of inference and reasonable deductions, and into the "wilderness of 'mere speculation or conjecture'": *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2003] 1 A.C. 32, per Lord Rodger, at para. 150, citing *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152, per Lord Wright, at pp. 169-70; see also D. Cheifetz, "The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark" (2005), 30 *Advocates' Q.* 1, at pp. 46-47.

80 This kind of "common sense" or inferential reasoning simply cannot bridge insuperable gaps in the evidence - in either a standard civil action or in an administrative claim under the *WCA*: see e.g. *Kozak v. Funk (1997), 158 Sask. R. 283* (C.A.), at para. 22, aff'g in part *(1995), 135 Sask. R. 81* (Q.B.); *Meringolo v. Oshawa General Hospital (1991), 46 O.A.C. 260*, at para. 89, leave to appeal refused, *[1991] 3 S.C.R. vii*.

81 In this case, as I have said, there is simply no evidence - and certainly no positive evidence - capable of supporting a finding of causative significance. Having allowed mere speculation to suffice, the Tribunal's decision is "openly, evidently, clearly" wrong and therefore ought to be set aside: *Southam*, at para. 57; *Toronto (City) Board of Education*, at [page624] para. 44; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, *[1979] 2 S.C.R. 227*.

E. *Disposition*

82 For these reasons, I would dismiss the Workers' Appeal and the WCAT Appeal.

Appeal by the Workers' Compensation Appeal Tribunal dismissed. Appeal by Katrina Hammer, Patricia Schmidt and Anne MacFarlane allowed with costs, CÔTÉ J. *dissenting.*

Solicitors:

Solicitor for the appellant/respondent the Workers' Compensation Appeal Tribunal: Workers' Compensation Appeal Tribunal, Richmond.

Solicitors for the appellants/respondents Katrina Hammer, Patricia Schmidt and Anne MacFarlane: Health Sciences Association of British Columbia, New Westminster; Hospital Employees' Union, New Westminster.

Solicitors for the respondent Fraser Health Authority: Harris & Company, Vancouver; Health Employers Association of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

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

Solicitors for the interveners the Ontario Network of Injured Workers' Groups and the Industrial Accident Victims' Group of Ontario: IAVGO Community Legal Clinic, Toronto.

Solicitors for the interveners the Community Legal Assistance Society and the British Columbia Federation of Labour: Ethos Law Group, Vancouver.

---

1 Tort law recognizes two dimensions of causation: factual (cause-in-fact) and legal (cause-in-law/remoteness) (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3). In these reasons, where I refer to "causation" I mean *factual* causation.

2 Although the parties to the judicial review agreed to proceed solely in respect of Ms. Hammer, they did so on the basis that the outcome of her case will govern the outcome of the other two workers' cases (as the Tribunal decisions in respect of each of the three workers were substantially identical): 2013 BCSC 524, at para. 8 (CanLII).

3 The Tribunal interprets s. 253.1(5) as permitting it to review its own decisions for patent unreasonableness. Although it is more accurate to say that the Tribunal is "reopening" a decision, for clarity I adopt the language ("reconsideration") used by the Tribunal.

End of Document

UNIVERSITY OF VICTORIA
PO BOX 2400 STN CSC VICTORIA BC V8W 3H7 CANADA
TELEPHONE (250) 721-8777, FAX (250) 721-6607
EMAIL: SOWEN@UVIC.CA

STEPHEN OWEN, Q.C.
LAM PROFESSOR OF LAW & PUBLIC POLICY
DIRECTOR, INSTITUTE FOR DISPUTE RESOLUTION

December 31, 1999

Wendy Stephen
President
British Columbia Crown Counsel Association
Regional Crown Counsel Office
The Law Courts, Begbie Square
New Westminster, BC V3M 1C9

Philip M. Topalian
Senior Labour Relations Officer
Labour Relations Branch
PO Box 9494 Stn Prov. Govt.
Victoria, BC V8W 9V1

Dear Ms. Stephen and Mr. Topalian:

RE: Crown Counsel Association - Provincial Government Mediation

Mediator's Report

Introduction

By terms of reference set out in a letter dated March 25, 1999 from the Attorney General to the Assistant Deputy Attorney General for Criminal Justice (Appendix A), I was asked to assist the parties in reaching an agreement on all issues in dispute between the Crown Counsel Association (CCA) and the Public Service Employee Relations Commission (PSERC). Where agreement was not possible, I was empowered to make non-binding recommendations to the parties as to the disposition of those issues remaining in dispute. While it was acknowledged that I could not immediately undertake this task because of other commitments, the CCA called off the job action planned to take place on March 11 and 12, 1999, and both parties expressed the intention that the reporting process be completed as soon as possible. This report completes that process.

This report supplements my Interim Report dated October 31, 1999 (Appendix B). In the Interim Report, I stated my opinion that the relationship between Crown Counsel and the provincial government would not be improved by in independent mediator reporting out, ad hoc, on the substantive employment issues in dispute. Rather, I made tentative recommendations for a formal, multi-layered and permanent set of processes which respects both government responsibility and the high level of professionalism of Crown Counsel.

Since the Interim Report, I have had the opportunity to meet separately with each of the CCA and

PSERC, to hold a mediation session with them together, and to receive their further considered views separately. I committed myself to report out the parties on issues of process by December 31, 1999.

Issues

1. Processes

The set of processes described in the Interim Report have, generally, been favourably received by the CCA and PSERC. In particular, it is accepted that the *Public Service Labour Relations Act (PSLRA)* should be amended to remove the exclusion of persons practising law under the *Legal Professions Act* so as to permit formal certification and collective bargaining by Crown Counsel.

The CCA has proposed that the *PSLRA* also be amended to provide that the appropriate bargaining unit includes only Crown Counsel and that the bargaining agent be the CCA. The CCA says that it is inappropriate for Crown Counsel to be part of a wider bargaining unit or to be represented by the Professional Employees Association (PEA) because of the distinct role that Crown Counsel play compared to other professional public servants. PSERC, on the other hand, says that appropriate bargaining agent is the PEA, to which lawyers working for the Legal Services Society (LSS) belong.

Crown Counsel exercise prosecutorial discretion under the authority of the Attorney General in his independent role as chief law officer of the Crown. As such, Crown Counsel must act in a quasi-judicial manner outside of political direction from government, which is quite different than other public servants. In addition, LSS lawyers often represent accused persons being prosecuted by Crown Counsel. Being a part of the same union could both create at least an appearance of conflict of interest and threaten the essential operations of the criminal courts and the rights of accused persons should job action by either group occur. In these special circumstances, it is my recommendation that Crown Counsel be represented by a discrete bargaining unit, not withstanding the generally favoured trend in British Columbia of limiting the number of public sector unions.

Regarding other process issues addressed in my interim report, I have heard nothing from the parties to suggest that they are inappropriate. In my opinion, the recommendation of mandatory non-binding arbitration to resolve interest disputes arising from collective bargaining, followed by a reasoned response tabled in the Legislature by the Attorney General, remains the best approach. This provides for a focussed presentation of evidence and argument at a formal adjudicative process which is better able to determine and distinguish issues of fact, law and policy, than a mediated negotiation and report out. Appropriate amendments to the CCA will be required to implement this recommendation.

Regarding my recommendation that the Attorney General commission independent, expert comparative studies of financial terms of employment, classification and workload for Crown

Counsel every five years, I remain convinced that these are required to properly inform collective bargaining, dispute resolution and collaborative management.

absolutely contrary to notion of free bargaining

A workload study was completed in February 1999, has been accepted by government, and should be implemented as soon as possible.

2. Classification

Classification remains a major point of frustration, with many Crown Counsel having reached the maximum "working level" salary increases of ten years, and being barred from promotion to "merit" positions by the restricted number of these.

While the frustration of Crown Counsel is understandable given the apparently arbitrary distinctions between many in the working and merit levels, this must be distinguished from what are merely financial issues. The classification structure should not be a historical accident, but a conscious, professional decision based on the most effective composition of the public prosecution service.

If the intention of the Criminal Justice Branch is to attract or develop and retain as many as possible senior, experienced Crown Counsel to prosecute the most complex and serious cases, then the structure of the system should properly reward this. Merit positions in this sense must be distinguished from the public sector management structure, where there are limited numbers of senior positions which logically decrease as seniority increases. If the number and proportion of cases that require senior counsel to prosecute them is increasing, then the number of Crown Counsel in that category must also increase. If not, then either morale or quality, or both, will decrease.

maybe it should not be we need senior for these only

It is evident that changes in the criminal law, criminal justice policy on dangerous offenders, *Charter* implications, justice reform and case volumes all contribute to increased pressure on the prosecution service. The structural question is whether the Criminal Justice Branch intends these difficult cases to be handled in-house, or whether it wants to use senior counsel from the private Bar. Both are legitimate policy decisions, but the classification system should fit the choice. At present, it appears not to do so.

However, changes to the classification system should not be merely a way to circumvent government policy on wage increases. While an increase in the total salary budget may be appropriate to deal with systemic inequities and changing circumstances, restructuring itself will likely cause some winners and some losers within a largely static budget. Those who may lose position should be "grandfathered" and this is an appropriate transitional cost for government to bear.

Stephen - a separate consideration from 0-0-2 etc.

The best result in restructuring the classification system will come from a genuine collaboration between Criminal Justice Branch management and the CCA, informed by their own professional experience, criminal justice policy on ad hoc counsel, and a comparative

study of other processes. The Criminal Justice Branch management and the CCA should undertake this as a collaborative management task, and make joint recommendations to the Attorney General and PSERC for restructuring.

3. Expedited Process
The CCA has suggested a three year collective agreement with the comparative salary study being prepared in time to inform the collective bargaining process, and the arbitration process, if necessary. These are details that can properly await the collective bargaining process to resolve.

However, given the time elapsed since the expiry of the last agreement (March 31, 1998), and the time necessary to amend legislation, constitute a bargaining unit and commence and conclude collective bargaining, it essential to achieve an interim resolution of the major financial interest issues such as salaries, pensions, vacation and professional benefits. A formal, non-binding arbitration process as discussed above, convened on an expedited basis, is the most appropriate way to hear evidence and adjudicate on these issues, given the wide differences in the current position of the parties. This expedited, non-binding arbitration should determine with accuracy the comparative total financial benefits of Crown Counsel to Legal Services Society lawyers in British Columbia, and to Crown Counsel in other Canadian jurisdictions, and report out in time for any recommended adjustment to be included in the Spring 2000 provincial budget.

I have had discussions with the CCA and PSERC on acceptable arbitrators that might be available to hold hearings and report out during February 2000, and I believe this is an achievable time frame.

I remain available to discuss the issues addressed in this report, if that should prove helpful.

Sincerely,

Stephen Owen

Stephen Owen

cc. Austin Cullen

Vancouver Shipyards Co. (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: Jennifer Glougie, Chair; Brett Matthews, Associate Chair; J. Najeeb Hassan, Registrar and Vice-Chair

Heard: October 3, 2022.

Decision: December 30, 2022.

Case No.: 2022-001260

[2022] B.C.L.R.B.D. No. 146 | 2022 BCLRB 146

Vancouver Shipyards Co. Ltd., ("VSY" or "the Employer"), and Construction, Maintenance and Allied Workers Bargaining Council, Local Unit Number 506 of Marine & Shipbuilders, International Association of Machinists and Aerospace Workers, Lodge No. 692; Local 213 of The International Brotherhood of Electrical Workers; The United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local Union No. 170; and Canadian Office and Professional Employees Union, Local 378 (the "Poly-Party Unions"), and BC FEderation of Labour (the "BC Fed"), and Business Council of British Columbia, (the "Business Council"), and International Longshore and Warehouse Union Canada ("ILWU")

(137 paras.)

Case Summary

Appeal From:

Leave for Reconsideration of 2022 BCLRB 108, *[2022] B.C.L.R.B.D. No. 108*.

Appearances

Donald J. Jordan, K.C. and Chris E. Leenheer, for VSY.

Tamara Ramusovic, Daniel McBain, and Melissa VanderHouwen, for the Poly-Party Unions.

Craig D. Bavis, for the BC Fed Ryan Copeland, for the Business Council.

Rebecca Kantwerg, for ILWU.

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Employer applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of *Vancouver Shipyards Co. Ltd.*, 2022 BCLRB 108 (the "Original Decision"). The Original Decision dismisses the Employer's application for a declaration that the Poly-Party Unions, in refusing to cross a picket line, are engaging in an illegal strike. The Employer seeks reconsideration of the Original Decision on the basis that it is inconsistent with principles expressed or implied in the Code.

II. PROCEDURAL MATTERS

2 The Business Council, BC Fed, and ILWU applied for intervenor status to make submissions on the reconsideration application. We granted their intervenor applications and have considered their written submissions. We also received and considered the written submissions of the Employer and the Poly-Party Unions.

3 In addition, we held a day-long hearing at which the parties and intervenors made oral submissions to this panel.

III. BACKGROUND AND ORIGINAL DECISION

4 No issue was taken with the summary of the factual background to this matter set out in paragraphs 5-11 of the Original Decision.

5 In brief, the Employer is a provincially regulated shipbuilding operation located in North Vancouver. The Poly-Party Unions are certified under the Code as a council to represent a bargaining unit of its employees. The Employer is owned by an entity which also owns a federally regulated marine transportation operation, Seaspan ULC ("Seaspan"). The Canadian Merchant Service Guild (the "Guild") is federally certified to represent a bargaining unit of Seaspan's employees.

6 When the matter was argued, the Guild was on strike against Seaspan, and its members were picketing at the entrance to Seaspan's operation in North Vancouver. That entrance is also the entrance to the Employer's operations: there is only one entrance to both workplaces. Members of the Poly-Party Unions have refused to cross the picket line at that entrance and report for work.

7 The Employer asserts the Poly-Party Unions and their members were thereby engaging in a concerted refusal to work within the meaning of the definition of "strike" in Section 1(1) of the Code. The Poly-Party Unions rely on the exception in subsection (b) of the definition of "strike": a concerted refusal to work "that occurs as a direct result of and for no other reason than picketing that is permitted under this Code".

8 The Original Decision notes the dispute turns on how the phrase "picketing that is permitted under this Code" in subsection (b) of the strike definition in the Code (the "Phrase") is interpreted (para. 46). It notes the principles of statutory interpretation include considering the words at issue contextually and purposively (para. 49), and it holds that when the Phrase is so considered, it is ambiguous as to whether the Phrase means only provincially regulated picketing or also includes federally regulated picketing (paras. 50-52). The Original Decision notes that, where there is ambiguity, an interpretation consistent with *Charter* values is to be preferred (para. 54).

9 The original panel was satisfied that honouring a picket line is *Charter*-protected activity (para. 56). It further stated that respecting a picket line is "fundamental to union solidarity and has long been recognized and enshrined in the Code as an exception to the definition of strike" (para. 57). The original panel held the Legislature intended the Phrase "to create an exception for honouring lawful picket lines, regardless of whether that picket line is federally or provincially regulated" (para. 57). It found this interpretation "is consistent with the purpose and context of the language in the Code, labour relations principles, and *Charter* values" (para. 57). Accordingly, the Original Decision dismissed the Employer's illegal strike application.

IV. SUBMISSIONS ON RECONSIDERATION

10 The written and oral submissions of the parties and intervenors on reconsideration were extensive, and we have considered them carefully. However, we have summarized them only to the extent we find necessary for the purpose of rendering this decision.

1. The Employer

11 The Employer submits the original panel erred in its interpretation of the Phrase. The Employer submits the meaning of the Phrase is clear and unambiguous and there is only one possible interpretation: "picketing that is permitted under this Code" means picketing that meets the Code's prerequisites for picketing to be permitted under the Code. Those statutory prerequisites for picketing to be permitted under the Code cannot apply to federal

picketing, which is beyond the jurisdiction of the province to regulate. Accordingly, the Phrase cannot be interpreted to include federal picketing.

12 The Employer submits the Original Decision is also inconsistent with Code principles because it fails to consider Section 2(f) of the Code, which requires the Board to exercise its powers and perform its duties so as to minimize the effects of labour disputes on uninvolved persons. It submits the original panel focused solely on the importance to the labour movement of honouring picket lines and ignored the impact of its interpretation of the Phrase on uninvolved provincially regulated employers and their suppliers and customers.

13 The Employer further submits the phrase "permitted under this Code" also appears in Section 66 of the Code, which prohibits certain tort actions "arising out of strikes, lockouts or picketing permitted under this Code". The Employer submits that if picketing "permitted under this Code" includes federal picketing as the Original Decision finds, then Section 66 would prohibit a provincially regulated employer from going to court to seek injunctive relief from picketing by a federally regulated trade union. The Employer submits the Poly-Party Unions and the original panel accept that it can go to court to seek injunctive relief (Original Decision, para. 53).

14 The Employer submits the Original Decision's interpretation of the Phrase as including federal picketing amounts to a finding that federal picketing is within the jurisdiction of the Code, which is wrong in law. The Board's jurisdiction under the Code only applies to provincially regulated employers and trade unions: *The Governor and Company of Adventurers of England Trading into Hudson's Bay doing business as The Bay*, BCLRB No. B102/95 (Leave for Reconsideration of BCLRB No. B429/94) ("*The Bay*").

15 The Employer submits the original panel erroneously applied *Charter* values to a clear and unambiguous phrase in the Code. It further submits that while picketing is *Charter*-protected expressive activity, the original panel incorrectly concluded that "the act of honouring a picket line is also *Charter*-protected expressive activity" (Original Decision, para. 56). This conclusion is contrary to the decision of the Federal Court of Appeal in *Grain Workers' Union, Local 333 v. B.C. Terminal Elevator Operators' Association*, 2009 FCA 201, leave to appeal denied [2009] S.C.C.A. No. 352 ("*Terminal Elevator*"), which the Employer submits the Original Decision declined to follow without proper reason.

16 The Employer submits the Original Decision misinterprets the Phrase as applying to federally regulated picketing. It submits the Phrase provides an exception to the definition of strike in the Code to allow for the honouring of picketing "that is permitted under this Code" - that is to say, lawful provincially regulated picketing. It submits the Original Decision should be set aside, and the remedies it sought in its illegal strike application granted.

2. Business Council

17 The Business Council supports the Employer's application for reconsideration of the Original Decision. It submits that when the Phrase is considered using the accepted framework for statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 ("*Rizzo*"), there is no ambiguity with respect to whether the Phrase applies to federal picketing.

18 The Business Council submits that, beginning with the plain meaning of the Phrase, the dictionary meaning of the word "permitted" is authorized or allowed, and "under this Code", a phrase which is used throughout the Code, means the set of rules or processes that are stipulated in the Code itself. Therefore, the Business Council submits, the plain and ordinary meaning of "picketing permitted under this Code" is picketing that the Code expressly authorizes or allows, from a purpose, timing, and location perspective. That is, to be "permitted under this Code", the picketing must be permissible by operation of Section 65 of the Code (and not prohibited by Section 67), in a provincially regulated labour dispute.

19 The Business Council notes the phrase "permitted under this Code" is found in only two locations in the Code: in the Phrase and in Section 66 of the Code, which states that no action or proceeding may be brought for certain torts "arising out of strikes, lockouts or picketing permitted under this Code". It says the language of Section 66 has

been judicially interpreted to express a legislative intent to take away common law rights of employers and others affected by picketing to sue for those torts. It submits, however, the Code can only take away those rights from provincial employers; the legislature has no constitutional jurisdiction to affect the rights of federal employers.

20 The Business Council submits that if the phrase "arising out of... picketing permitted under this Code" in Section 66 is interpreted as including federal picketing, then other federally regulated employers would be prohibited by Section 66 from bringing the types of tort claims set out in that provision, and this would be an overreach of provincial constitutional authority for the reasons set out in *The Bay*. The Business Council submits that such an interpretation would also run counter to the well- established law in this province which allows provincially regulated employers to seek to enjoin actions of a federally regulated picket line.

21 The Business Council notes, in fairness, that the Section 66 argument was not made to the original panel. However, it submits that nonetheless an absurd result should be avoided, and the same phrase should be interpreted the same way in the same legislation. It submits the Section 66 issue supports the interpretation of the Phrase as meaning only provincial and not federal picketing.

22 The Business Council also submits that the phrase "permitted under" exists elsewhere in the Code, although followed by a specific Code section number rather than "the Code" generally. It says an examination of the places where this phrase is used supports the conclusion that "permitted under" means allowed or authorized by the Code, as opposed to "not prohibited" by it. The Business Council gives several examples in its written submission and submits they show the phrase "permitted under" in the Code does not include, expressly or impliedly, common law rights or principles.

23 The Business Council submits that interpreting the Phrase as limited in scope to only picketing that is authorized or allowed by the express terms of the Code is also supported by the robust framework the Code sets out for picketing by provincially regulated employees. It submits that framework sets out rights and limitations for both sides of a labour dispute, as part of a balancing of interests. The right to refuse to work in the face of Code-permitted picketing is part of that framework, which is set out in Sections 65 and 67, the provisions which regulate when and where picketing is permissible under the Code.

24 The Business Council notes the definition of "person" in the Code was amended in 1987 to make clear that federally regulated employees, employers, and unions are not "persons" within the meaning of the Code. It submits the limitation that the Code only regulates the labour relations of provincially regulated employees, employers, and unions, including in the context of picketing, supports the interpretation of the Phrase as including only provincial and not federal picketing.

25 The Business Council notes that in *The Bay*, the Board reviewed the evolution of the jurisprudence, and changes to the Code, on the issue of whether the Board has any authority to regulate picketing that does not emanate from a provincial labour dispute. The Business Council notes that in *The Bay*, the Board accepted the ruling in *British Columbia Ferry Corporation v. Telecommunications Workers Union*, [1981] B.C.J. No. 1193 (B.C.C.A.) ("*BC Ferry*") that the Board did not have jurisdiction over picketing by federal unions, even where the picketing affected provincially regulated employers. The Board only has jurisdiction over picketing where it emanates from a provincially regulated dispute: *The Bay*; *Tyco International of Canada Ltd.*, BCLRB No. B272/94 ("*Tyco*").

26 The Business Council notes that in *Tyco* the Board again reviewed the jurisprudence and found it did not have jurisdiction over extra-provincial picketing affecting a provincially regulated employer because the origin of the dispute was not a provincial labour dispute. The panel added that the Board would similarly not have jurisdiction to regulate picketing emanating from a complaint by retired employees, pickets protecting community issues in which the employer was involved, or pickets protesting a labour policy of the government.

27 The Business Council submits that the Board's conclusion and comments in *Tyco* are important because they underscore that the Code does not contemplate regulation by the Board of picketing whose origin is a dispute out of

the Code's scope. The Business Council submits that, by logical extension, the Phrase ("picketing permitted under this Code") does not refer to federal picketing, extra-provincial picketing, or any other form of picketing that is not specifically allowed by the Code. It submits that to hold otherwise would be to give the Board an authority that is not otherwise found in the Code.

28 The Business Council submits that in *The Bay*, the Board concluded it made clear the Board could not declare a federally regulated employer to be an "ally" within the meaning of the picketing provisions of the Code. It states that, in *Southern Railway of British Columbia Ltd.*, BCLRB No. B49/2015 ("*Southern Railway*"), the Board relied on the ruling regarding the Board's lack of jurisdiction to regulate the labour relations of federal entities in *The Bay* to find it did not have jurisdiction to grant a federal employer's application for relief from provincial picketing. The Business Council submits that these authorities establish the Board does not have jurisdiction to regulate federal picketing, and it submits this conclusion supports what it says is the plain meaning of the Phrase (as including only provincial picketing and not federal picketing).

29 The Business Council submits Sections 2(f) and 2(g) of the Code also support interpreting the Phrase as excluding federal picketing. Those provisions require the Board to exercise its discretion and perform its duties in a manner that minimizes the effects of labour disputes on uninvolved parties and ensures that the public interest is protected during labour disputes. The Business Council says the original panel's interpretation of the Phrase significantly increases the exposure of provincial employers to mid-contract work stoppages due to their employees honouring federal picket lines. Not only commercial but also non-commercial services provided by provincial employers could be affected by provincial employees refusing to cross federal picket lines.

30 The Business Council acknowledges that, as stated in the Original Decision, the Code has long contained subsection (b) of the definition of "strike", which allows provincial employees the right to honour picket lines "permitted under this Code". It further acknowledges that this provision forms an important component of the overall balance in the Code, although it submits it is not as important as other rights protected by the Code. The Business Council submits, however, that even rights recognized by the Code may be impacted when labour disputes cross jurisdictional lines. The impact flows from both the limits of provincial jurisdiction under the Constitution and the design of the Code as a comprehensive regime governing provincial labour relations.

31 For example, a striking provincial union can seek an ally declaration under the Code against a provincial employer that is assisting the struck employer in resisting the strike, but not against a federal employer who is doing the same. Similarly, an uninvolved employer affected by a provincial picket line can seek common site relief from provincial picketing under the Code but not from federal picketing. Thus, the Business Council submits, both unions and employers can be affected by the constitutional limitation on the Board's jurisdiction. The Business Council submits that the Phrase should be interpreted consistently with this jurisdictional limitation.

32 The Business Council also takes issue with the finding in the Original Decision that the Legislature intended the Phrase to include any "lawful" picketing, regardless of whether it is provincial or federal. It submits the Board has jurisdiction to regulate the labour relations aspect of picketing (when and where picketing may occur under the Code) but cannot determine the lawfulness of picketing apart from Code considerations. It is the Courts, not the Board, which determines whether federal picketing is otherwise lawful.

33 With respect to the original panel's reliance on *Charter* values, the Business Council agrees with the Employer that the Federal Court of Appeal's decision in *Terminal Elevator* should have been followed. It says that decision found honouring a picket line was not *Charter*-protected expressive activity. The Business Council adds that *Charter* values have no role to play in statutory interpretation in circumstances where the meaning of the words at issue is found to be unambiguous. The Business Council submits the meaning of the Phrase is unambiguous, and in any event, even if *Charter* values were to be applied, it would not support a different interpretation.

3. <u>The Poly-Party Unions</u>

34 The Poly-Party Unions submit the Employer is asking the Board to reverse half a century of labour policy

underlying the Code, which is that the proper object of regulation is picketing, and not the response to picketing. The Poly-Party Unions submit that, pursuant to that policy, for nearly 50 years union members' rights to observe legal picket lines without fear of having their actions characterized as an illegal strike have been respected. They submit the Board should dismiss the application for reconsideration of the Original Decision and uphold the rights of union members to choose to honour a legal picket line.

35 The Poly-Party Unions note that reconsideration is not an opportunity for re- argument in the hope of a more favourable outcome, and the mere fact an applicant disagrees with an original panel's labour relations judgment is not a proper ground for reconsideration. Rather, the Employer must show the Original Decision is inconsistent with the law and policy of the Code. The Poly-Party Unions say the Employer has not met this burden, and in any event the Original Decision is consistent with the law and policy of the Code.

36 The Poly-Party Unions agree that the issue before the original panel was whether picketing by a union in a federally regulated bargaining relationship is "picketing that is permitted under this Code" within the meaning of Section 1(1) of the Code. They submit that, when the Phrase is considered in light of the context, scheme, and object of the Code, and legislative intent, it is clear the Code protects the right to respect picket lines, regardless of the jurisdictional origin of those picket lines. They submit this interpretation of the Phrase is also consistent with the *Charter*-protected values of free expression and association.

37 The Poly-party Unions submit the original panel properly applied the well- established modern approach to statutory interpretation set out in *Rizzo*, to find the relevant labour relations context of subsection (b) of the definition of "strike" is the importance to unions and their members of honouring a lawful picket line. In service of this expression of the fundamental principle of union solidarity, the legislature created a specific exemption from the definition of "strike".

38 As stated by the Board in *Pacific Press Limited*, BCLRB No. 140/85, *9 CLRBR (NS) 129* (Leave for reconsideration in BCLRB No. 171/86, *13 CLRBR (NS) 74*), the effect of subsection (b) of the definition of "strike" in the Code is that "even where a union does not obtain, through collective bargaining, the right to observe a picket line, the Legislature has determined that employees who refuse to work behind a picket line do not thus engage in conduct which will be regulated by the Board as an illegal strike" (p. 153).

39 The Poly-Party Unions submit the Guild's picketing was "picketing" as defined in the Code:

> "picket" or "picketing" means attending at or near a person's place of business, operation or employment for the purpose of persuading or attempting to persuade anyone not to
>
> (a) enter that place of business, operations or employment,
>
> (b) deal in or handle that person's product, or
>
> (c) do business with that person,
>
> and a similar act at such a place that has an equivalent purpose, but does not include lawful consumer picketing that does not unduly restrict access to or egress from that place of business, operations or employment or prevent employees from working at or from that place of employment; ...

40 The Poly-Party Unions note that VSY is a provincially regulated employer and therefore a "person" within the meaning of the Code and its definition of picketing. They say the Guild was attending at or near VSY's place of business and was attempting to persuade anyone not to enter that place. The Guild's picketing did, in fact, persuaded the Poly-Party Unions' members not to enter VSY's place of business. The Poly-Party Unions submit the fact that the location in question is also the place of business of a federally regulated entity, Seaspan, which is not a "person" under the Code, is of no moment.

41 The Poly-Party Unions submit that, once it is recognized the Guild's picketing is "picketing" within the meaning of the Code, the question becomes simply whether that picketing is "permitted under this Code". The Guild says

any lawful picketing that is not prohibited under the Code is permitted under it. The ordinary meaning of the term "picketing under this Code" is simply any lawful picketing that is not prohibited.

42 The Poly-Party Unions submit the Board has accepted that the Code "permits" what it does not prohibit. For example, in *Excell Agent Services Canada Co.*, BCLRB No. B213/2003 ("*Excell*") at paragraph 40, the Board accepted that if Section 7 of the Code prohibits attempting to persuade people to join a union during working hours, then such activity is permitted during non-working hours.

43 Similarly, the Poly-Party Unions say, in *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, *[1989] S.C.J. No. 107* ("*Paccar*"), the Court upheld a Board decision that employers could unilaterally alter the terms and conditions of employment following the termination of a collective agreement while noting that the Board "came to the conclusion that what is not prohibited by either the wording or the policy of the statute is permitted" (para. 34).

44 The Poly-Party Unions submit that, consistent with *Excell* and *Paccar*, the Code imposes some limits on picketing but permits what it does not prohibit. In particular, Section 67 of the Code provides: "Except as provided in this Code, a person must not picket in respect of a matter or dispute to which this Code applies", and therefore it specifically exempts picketing in respect of matters or disputes to which the Code does not apply, such as federal labour disputes. The Poly-Party Unions cite *BC Ferry* and the definition of "dispute" in Section 1 of the Code.

45 The Poly-Party Unions note that the test for whether the Code applies to picketing is the "origin of the dispute" test is set out in *Pacific Western Airlines Ltd. v. B.C. Federation of Labour*, 1986 CanLII 833 (BCCA) Where the picketing originates from a federally regulated labour dispute, the Code does not regulate the picketing. Similarly, Section 67 only restricts picketing by "persons" as defined in the Code, which does not include federally regulated entities such as the Guild. Accordingly, as the Code does not regulate or prohibit the Guild's picketing, the Code permits it.

46 The Poly-Party Unions submit the scheme of the Code supports their argument that the picketing captured by the Phrase includes federal picketing. They submit the Board has interpreted the scheme of the Code with respect to picketing to be that the proper object of regulation is picketing, not the response to it: *MacMillan, Bloedel Packaging Limited*, BCLRB No. 90/75, *[1976] 1 Can LRBR 100* ("*MacMillan Bloedel*"). There, a full Board led by then-Chair Weiler held that it was not a strike to honour a picket line, given how strike was defined in the Code. The Poly-Party Unions say that while the reasoning in *MacMillan Bloedel* relied in part on the subjective definition of strike which was in effect at that time, the Board also held there was "another, subtler" reason to find respecting a picket line did not amount to a strike (p. 104). That reason was because the regulation of picketing under the Code was focused on "the activity of picketing... rather than the anticipated reaction to the picket line, which is merely the symptom" (p. 105). The Poly-Party Unions note the Board added in *MacMillan Bloedel*:

> ... It would make a mockery of the delicate balance created by the Legislature in its picketing law to hold that once a picket line has surmounted all of these legal obstacles and, as soon as it is having some effect, the employer may come to the Board and ask us to order employees and union members to cross a legal picket line. (p. 105)

47 The Poly-Party Unions submit this latter rationale and legislative policy continued through the passage of the amended definition of strike in 1984 which removed the subjective element of the definition. They submit this is clear from the decision in *Delta Hotels Limited*, BCLRB No. 252/85, *10 CLRBR (NS) 101* ("*Delta Hotels*"). In that case, the Board declined to grant a provincial employer relief from picketing by a federally regulated union on the basis that, while the amended definition had removed the subjective element of the strike definition, the Legislature added the exception contained in subjection (b), which "reflects the policy originally expressed by the full Board in the *MacMillan Bloedel* case, namely that the proper way to try to end a work stoppage produced by picketing is to challenge the legality of the picketing itself, not to challenge the response to that picketing" (p. 104).

48 The Poly-Party Unions submit *Delta Hotels* confirms that the scheme of the Code, and the labour relations

policy of this province, is to require employers to challenge picketing, and not the response to it. They submit that whether the employer must challenge that picketing before the Board or the Court does not alter that policy.

49 With respect to Section 66 of the Code, the Poly-Party Unions submit that, as the Code cannot apply to federally regulated picketing, there is no possibility Section 66 could apply to such picketing, regardless of whether federal picketing might be included in "picketing permitted under this Code" in Section 1(1) of the Code.

50 The Poly-Party Unions further submit that Section 66 only eliminates certain torts arising out of lawful collective worker actions (strikes and picketing), and that the courts have confirmed that other torts remain available to employers in this province. Thus, the Poly-Party Unions submit that, even if Section 66 does apply to prevent federally regulated employers from seeking relief against federal picketing, it would leave those employers free to pursue a wide variety of other tort claims in court, where the authority to regulate federal picketing lies.

51 Finally with respect to Section 66, the Poly-Party Unions submit that the use of a phrase similar to the Phrase in Section 1(1) in the different context of Section 66 at most raises an ambiguity about the meaning of the Phrase, which must be resolved by recourse to the normal tools of statutory interpretation and *Charter* values.

52 In terms of the objects of the Code, the Poly-Party Unions rely on Section 2(a), submitting that one of the key objects of the Code is to recognize the rights and obligations of employees, employers, and trade unions. The Poly-Party Unions submit the picketing exception in subsection (b) of the Code definition of "strike" is plainly intended to protect the rights of employees and trade unions under the Code to respect lawful picket lines. The Poly-Party Unions also rely on Section 2(d), arguing that requiring union members to cross lawful picket lines is not consistent with the Code objective of promoting conditions favourable to the orderly, constructive, and expeditious settlement of disputes. Union members in British Columbia should be able to honour any lawful picket line and not be required to try to determine whether it is federally or provincially regulated.

53 With respect to the Employer's reliance on Section 2(f) of the Code, the Poly- Party Unions note that the duty under that provision is to "minimize" the effects of labour disputes on third parties, not to eliminate the effects. They note that in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 ("*Pepsi*"), the Supreme Court of Canada stated that the "protection of innocent third parties from the economic fallout of labour disputes, while a compelling consideration, is not absolute. Some economic harm to third parties is anticipated by our labour relations system as a necessary cost of resolving industrial conflict" (para. 45).

54 The Poly-Party Unions disagree that VSY is truly an "innocent third party" to the labour dispute between the Guild and Seaspan, submitting the labour relations for both VSY and Seaspan are fully centralized in one entity. However, they acknowledge that their position regarding the correct interpretation of the Phrase would apply regardless of whether the provincial employer affected by federal picketing was an involved or uninvolved third party to the federal labour dispute. The Poly-Party Unions say that, in either case, Section 2(f) does not require that the provincial employer be completely unaffected by its employees' right to honour a federal picket line.

55 With respect to the 1984 amendment to the definition of "strike" in the Code, which eliminated the subjective element and added the exemption in subsection (b), the Poly-Party Unions submit the intention was clearly to preserve the right to honour picket lines as an exception to the general prohibition on mid-contract work stoppages. This right was previously recognized in *MacMillan Bloedel* and its continuation under the new definition of strike was recognized in *Delta Hotels*, a case in which the picketing at issue was federal. The Poly-Party Unions submit the Employer does not explain why the Legislature would have intended to create an exception for unionized employees to honour provincial picket lines but not federal picket lines. They submit the Legislative intent was to provide for one consistent response to all labour picketing in the province.

56 The Poly-Party Unions submit the 1987 amendment to the definition of "persons" in the Code was intended to avoid provincial regulation of federal labour matters, not to prevent provincial unions from honouring legal picket lines because they happened to arise from a federal bargaining relationship. In *The Bay*, the Board interpreted the amendment as providing "a clear line around the Board's jurisdiction" (para. 43) which excluded "all federally

regulated undertakings" (para. 39). The Poly-Party Unions submit that nothing about the right to respect a picket line involves the Board crossing the line into regulating federal undertakings or their labour relations.

57 The Poly-Party Unions agree the Board has no jurisdiction to regulate federal undertakings and their labour relations but submit that nothing about the Original Decision would require the Board to do so. Only the court can regulate federal picketing, and the proper way to address federal picketing is to challenge the legality of the picketing itself, not the response to the picketing (*MacMillan Bloedel, Delta Hotels*). That approach preserves the delicate balance of interests involved in picketing, the Poly- Party Unions submit, and if the Board were to require that employees under the Code cross federal picket lines, that delicate balance would be lost.

58 The Poly-Party Unions submit that, to the extent the Board finds the modern approach to statutory interpretation results in an ambiguity as to whether the Phrase includes federal picketing, it can and should rely on *Charter* values to prefer an interpretation that upholds constitutionally protected rights. They submit that just as picketing is a constitutionally protected expressive activity (*Pepsi*), so is honouring a picket line. In that regard, they rely on the following passage, quoted in *United Food and Commercial Workers, Local 1518 v. Kmart Canada Ltd., [1999] 2 SCR 1083*, from the earlier judgment of Chief Justice Dickson in *British Columbia Government Employees' Union v. British Columbia (Attorney General), [1988] 2 S.C.R. 214* ("*BCGEU*"):

> Picketing sends a strong and automatic signal: do not cross the line lest you undermine our struggle; this time we ask you to help us by not doing business with our employer; next time, when you are on strike, we will respect your picket line and refuse to conduct business with your employer.
>
> (para. 40)

59 The Poly-Party Unions submit the majority decision in *Terminal Elevator* erred in suggesting that honouring a picket line is not expressive activity; they say Evans J.A., although in the minority, was correct to find it was *Charter*-protected expressive activity. The Poly-Party Unions submit that while no one is required to listen to picketers or to honour a picket line, union members have a constitutionally protected right to choose to listen and to engage in their own expression when they choose to honour a picket line. They submit that honouring a picket line is expressive activity that engages Section 2(b) of the *Charter*, such that union members have a right to receive the expression of picketers. An interpretation of the Code that preserves these rights should be preferred over one that does not.

60 With respect to remedy, the Poly-Party Unions submit the application for reconsideration should be dismissed. Alternatively, if the Board finds that honouring a federal picket line is an illegal strike under the Code, the Poly-Party Unions submit the Employer should nonetheless be denied any remedy, or in the further alternative they submit the only appropriate order is a declaration that the refusal to cross the picket line is a strike for purposes of the Code. The Poly-Party Unions submit that there is no reason to believe any person will continue to strike if that declaration is made.

61 The Poly-Party Unions also note that one of their constituent unions, Canadian Office of Professional Employees' Union, Local 378 ("MoveUP"), has a provision in their collective agreement with the Employer which allows it to respect picket lines. The Poly- Party Unions submit that either MoveUP is therefore entitled to respect the picket line or alternatively the application must be dismissed as against MoveUP.

4. BC Fed

62 The BC Fed submits picketing is not a right created by statute but rather is lawful by virtue of the common law and exists independent of any statutory regime. In many jurisdictions like British Columbia, picketing is restricted and regulated by statute. However, the Code does not restrict or prohibit picketing by federal unions, including where it occurs at a provincial employer's place of operations. The BC Fed submits that therefore the Code permits such picketing, because the common law continues to govern. At common law, picketing is permitted and lawful unless it involves a tort or a crime: *Pepsi*, para. 62. The BC Fed submits the Code permits lawful (non-tortious and non-criminal) picketing through the absence of regulation because the right to picket exists independent of labour relations legislation.

63 The BC Fed further submits that federally the Canada Labour Code leaves the regulation of picketing exclusively to the courts, which apply the common law: *Moffat Communications Ltd. v. Hughes*, *[1975] 55 D.L.R. (3d) 701*, p. 710. In contrast, the Code regulates picketing by provincially certified trade unions, limiting the common law rights of such unions to engage in secondary picketing and codifying the rights of their members to refuse to cross picket lines. The BC Fed submits the language in the Code which codifies the right to refuse to cross picket lines (subsection (b) of the definition of strike) does not distinguish between federal and provincial picketing lines. While the Code does not provide the Board with authority to regulate federal picketing, the BC Fed submits the right of employees under the Code to refuse to cross a picket line without being found to engage in an illegal strike can be triggered by a federal picket line. The Court of Appeal has stated the BC Legislature could have, but did not, restrict federal picketing at provincial employers under the Code: *BC Ferry*, para. 15. Such picketing is therefore permitted under the Code.

64 The BC Fed submits that under the original version of the Code, the Board believed it had concurrent jurisdiction with the courts to regulate federal picketing at provincial employer worksites: *The Bay*, para. 68. The Board also believed it had the power to declare a federally regulated undertaking to be an ally of a provincially regulated employer. However, the Board subsequently recognized it did not have such jurisdiction under the Code, particularly after the definition of "person" was narrowed to exclude federal undertakings: *The Bay*, paras. 44-46. The BC Fed submits that therefore, as the Board's jurisdiction over federal labour undertakings has been narrowed, the Code's prohibition on picketing has also been narrowed. The BC Fed submits the revisions to the Code show a legislative intent that the Code regulate picketing by provincial unions, but permit picketing at provincial worksites by "non- persons", such as picketing regulated at common law.

65 The BC Fed thus submits that "picketing permitted under the Code" includes both picketing by provincial unions, which is regulated and may be permitted when certain conditions are met under the Code, and picking by non-persons (those who do not fall within the definition of "person" under the Code") such as federal trade unions. The BC Fed submits the definition of "picketing" in the Code is not restricted to actions of "persons" but encompasses actions by anyone at the place of a person's business operations. It says a person or a non-person can engage in activity which falls within the definition of picketing under the Code, as long as that activity occurs at the place of operations of a "person" under the Code.

66 The BC Fed further submits that the Code expressly recognizes the rights of unions and their members in Section 2(a), and that innumerable judicial, arbitral, and labour relations board decisions have recognized the importance of honouring picket lines to unions: see, for example, *BCGEU*, paras. 27-28. With respect to Section 2(f) of the Code, the BC Fed submits the common law regulating picketing allows for harm to third parties incidental to lawful (non-tortious and non-criminal) picketing of a struck employer: *Pepsi*, para. 45.

67 With respect to Section 66 of the Code, the BC Fed submits that even if this provision does limit the jurisdiction of the Supreme Court so that it cannot enjoin picketing involving economic torts, trespass, and nuisance, that restriction reflects the common law. The BC Fed submits that, with the evolution of the common law, older economic torts do not constitute grounds to find the tort of inducing breach of contract at common law: *Prince Rupert Grain Ltd. v. Grain Workers' Union, Local 333*, *2002 BCCA 641* ("*Prince Rupert Grain*"), paras. 4-5 and 46. The BC Fed submits that Section 66 still leaves recourse to the courts for unlawful picketing that involves violence, threats, or harassment. It submits that, while the Legislature may restrict an employer's ability to access court, that is a separate issue from the recognition of federal picket lines under subsection (b) of the definition of strike.

68 The BC Fed concludes by submitting that workers have the fundamental freedom to express themselves and act with their conscience and their commitment to union solidarity, and to refuse to cross picket lines. It submits such conduct cannot be considered a "strike" and the Original Decision reasonably found that a lawful picket line at a provincial employer was not intended to warrant less recognition because it was federal in origin. It submits there is no justification for recognizing provincial but not federal picket lines under the Code for the purpose of the picketing exception in the definition of strike. It further submits it is inconsistent with the *Charter* to interpret the Code as allowing workers to refuse to cross provincial picket lines but compel them to cross federal picket lines.

The BC Fed submits it serves no statutory purpose and does not make labour relations sense to protect only those respecting provincial picket lines from illegal strike applications.

5. ILWU

69 The ILWU notes the *Charter* guarantees freedom of conscience (Section 2(a)), freedom of expression (Section 2(b)), and freedom of association (Section 2(d)), and it submits that all three freedoms are engaged in the present case.

70 Regarding freedom of expression, the ILWU notes it is settled law that a picket line is expressive activity protected by Section 2(b): *Pepsi*. It submits a finding that freedom of expression does not include the freedom to be persuaded and respond to a picket line - by refusing or not refusing to cross it - would dramatically undermine the purpose of freedom of expression, which is to ensure that we can persuade each other. ILWU submits that listening to and altering behaviour in response to picketing is expressive activity protected by Section 2(b). The ILWU notes that a picket line is no longer assumed to be coercive: *Prince Rupert Grain*, para. 48, and submits the Board has accepted that refusing to cross a picket line is expression: *Canadian Forest Products Ltd.*, BCLRB No. B312/2006, para. 280.

71 Regarding freedom of conscience, the ILWU submits refusing to cross a picket line is an act of solidarity with striking workers, and thus it is not only expressive activity but also an act of conscience. It submits freedom of conscience protects the freedom to act or not act in accordance with one's conscience, and to not be forced to act otherwise. ILWU submits that the decision of unionized workers to refuse to cross a picket line risks discipline and loss of wages, and is indicative of a commitment to the greater principle of union solidarity. This has long been recognized in law: *BCGEU*, paras. 28-29.

72 Regarding freedom of association, the ILWU submits a decision that would limit the effect of a picket line by forcing workers across it impacts the right of meaningful collective bargaining. It further submits the act of refusing to cross a picket line is an associative act - one that is taken in association with striking workers. There is also recognition of these principles in international law. The ILWU submits that an interpretation of the Code which limits the effect of the Guild picket line by forcing members of the Poly-Party Unions to cross the picket line is contrary to freedom of association because it would dramatically dampen the power of the picket line, which it submits is a key part of freedom of association.

73 The ILWU submits that in *Pepsi*, the Supreme Court of Canada found the limit on constitutionally-protected picketing at common law is where there is undue harm to third parties by tortious or criminal actions. Otherwise, harm to third parties is an expected, and accepted, result of the constitutional right to picket. *Pepsi* also makes clear that *Charter* rights and freedoms are to be preferred over economic rights, which are not *Charter* protected. It submits that these principles must be considered when weighing the policy purposes of the Code set out in Section 2, and in particular when considering how to balance Section 2(a) rights against Section 2(f). ILWU submits the constitutional rights of employees and trade unions must be preferred.

74 The ILWU submits that where legislation is ambiguous, decision makers interpreting it must apply a *Charter* values presumption. Ambiguity results when words of a provision are "reasonably capable of more than one meaning" and one must consider the entire context of a provision before one can determine if it is reasonably capable of multiple interpretations: *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, para. 29 ("*Bell ExpressVu*"). Determining whether ambiguity exists requires the decision maker to first "undertake the contextual and purposive approach set out in Dreidger" and thereafter determine if the words are ambiguous: *Bell ExpressVu*, para. 30.

75 The ILWU submits there is real ambiguity in the Code with respect to whether subsection (b) of the definition of strike applies to federally regulated picketing. When the strike definition was amended in 1984, the Legislature took away the subjective element and thus the right of workers to engage in political strikes, but gave them the right to refuse to cross picket lines. The ILWU submits the legislative intent was not to give workers the right to respect only

provincially regulated picket lines but any labour picket lines. The ILWU submits that while picketing by "persons" is regulated under the Code, any other picketing - by persons or non-persons, and in respect of matters or disputes to which the Code does not apply - is permitted by the Code. ILWU submits there is ambiguity in the interpretation of the interplay between the strike exemption, the picketing definition, the term "person", and Section 67 of the Code. It submits this ambiguity must be resolved in favour of the *Charter* freedoms at stake.

76 Accordingly, ILWU submits, in considering how the Code applies in a case where workers are refusing to cross a legal picket line, the Board must consider which interpretation will limit the impact on freedom of expression, freedom of conscience and freedom of association as much as possible in light of the statutory objectives: *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 ("*TWU*"), paras. 79-81. ILWU submits that the statutory objective of the picketing exception to the definition of strike in the Code is to give workers the right to respect picket lines. It submits the Original Decision correctly finds that purpose is not limited to provincially regulated picket lines.

77 In addition, ILWU submits the Board cannot make orders that violate the *Charter*. It submits that making an order requiring employees to cross a picket line is clearly contrary to the fundamental *Charter* freedoms of expression, association, and conscience, and as the Board can exercise its discretion not to make such an order, it should not make an order requiring employees to cross a picket line. The Original Decision should accordingly be upheld as it correctly interpreted the Code in a manner that respects both the intention of the picketing exception and the *Charter* freedom to refuse to cross a picket line.

V. ANALYSIS AND DECISION

78 An application under Section 141 of the Code must demonstrate a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93). An applicant must raise a serious question as to the correctness or fairness of the original decision. For the reasons that follow, we conclude that the Employer has raised a serious question as to the correctness of the Original Decision and leave for reconsideration is granted, accordingly.

79 In the present case, there is agreement that the Original Decision correctly identifies the issue in dispute to be whether the concerted refusal of the Poly-Party Unions and their members to cross the Guild's picket line and go to work constitutes an illegal strike under the Code or falls within the subsection (b) exception to the definition of strike in the Code. More particularly, the issue is whether the Guild's federally regulated picketing constitutes "picketing that is permitted under this Code" (i.e., the Phrase) in that provision, which reads:

> "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services, but does not include
>
> * * *
>
> (b) a cessation, refusal, omission or act of an employee that occurs as a direct result of and for no other reasons than picketing that is permitted under this Code, ...
>
> (emphasis added)

80 The parties present two competing interpretations of what is meant by the Phrase. The Employer and the Business Council say the Phrase refers to picketing which the Code expressly permits. The Poly-Party Unions, supported by the BC Fed and ILWU, say the Phrase refers to picketing which the Code does not expressly prohibit.

81 For the reasons which follow, we find the Employer's interpretation must prevail.

82 Before turning to our reasons, however, we note that both interpretations of the Phrase offered by the parties give rise to significant labour relations policy concerns.

83 Firstly, to adopt the interpretation of the Phrase advocated by the Employer and the Business Council may upset the longstanding and widely held understanding in the labour relations community in British Columbia that honouring a picket line does not, in and of itself, constitute a strike - an understanding that emanates from *MacMillan Bloedel* which was an early policy decision of the full Board, chaired by then Chair Weiler dealing with picketing arising from a dispute under the Code.

84 The Board in that case reasoned that the refusal to cross a picket line did not meet the subjective element of the strike definition (which was then in effect), which required that the concerted activity be "for the purpose of compelling their employer to agree to terms or conditions of employment, or of compelling another employer to agree to terms or conditions of employment of his employees". The Board went on, however, to address the policy reasons why respecting a picket line should not be considered a strike:

> As the Panel noted in its decision, there is another, subtle reason for this legal conclusion. We are not asked to find that the members of Local 5 went on strike in the abstract: instead we are asked to conclude that the actions of the box plant employees are subject to the scheme established by the Labour Code for regulating strikes. If honouring a picket line is, in principle, a strike, then it is always illegal unless it takes place within the narrow bounds during which the Code permits a strike: when the collective agreement has expired, the union has bargained, a strike vote has been taken, and strike notice has been given. In other words, it is only employees who have followed the type of procedure undertaken by Local 8 members at Harmac who will be legally entitled to strike. In turn, once such employees have actually gone on strike, they are permitted- under Section 85 of the Code, to establish picket lines at the places of business of their employer. The intriguing result of the employer's argument in this appeal is that, if it is a strike to refuse to go to work behind a picket line, the only employees legally entitled to honour the picket are those who have already gone on strike and put the pickets up in the first place. As the panel's analysis showed, every other category of employee will be violating the no-strike provisions of the Code. This includes not only the members of Local 5 here, who have not gone to work at the box plant which is subject to a collective agreement; it also includes delivery drivers who refuse to cross a picket line at the site of the strike; it includes employees who are not subject to any collective agreement (if they have not put themselves in a strike position); finally, it includes those employees whose collective agreements explicitly permit them to honour a picket line (because the parties are not permitted to contract out of the statutory prohibition on strikes contained in Section 79 of the Code).
>
> These legal conclusions, which flow inexorably from the premise of this Employer's appeal, are incongruous to say the least, not just in terms of the expectations of the B.C. industrial relations community but also in the face of other explicit provisions of the Code itself. Section 85 allows a union to picket not only at the site of the strike but also at secondary locations of the struck employer and of any "ally" it has in the strike. This means that the union is entitled to persuade employees at any one of these secondary locations to refuse to go to work behind the picket line. Now we are told that the Legislature, in another part of the Code, has made it illegal for these employees to be persuaded. The law first makes trade-union picketing legal if it is directed at certain targets, the struck employer or its ally. But as soon as this picketing is having some success, the employer who is its target can go to the Board and demand an end to this "illegal" activity by its own employees of not crossing that picket line.
>
> We are not prepared to impute to the B.C. Legislature such a schizophrenic set of labour law policies...
>
> (*MacMillan Bloedel*, p. 104, emphasis added)

85 Weiler returned to this theme some years later in *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980), saying as follows:

> One tack that the law might take is to hold that if employees honour a picket line, if they refuse to cross it in order to go to work, they are thereby guilty of an illegal strike. That has never been the view of British or American law, but there are labour boards and courts which have so interpreted Canadian legislation. Undoubtedly such a wholesale legal ban can blunt the effectiveness of union picketing, whatever the reason for it. Yet I have always found that interpretation more than passing strange. On the one hand the law holds out to unions the right to picket at certain times and places, that is, the right to persuade

> employees not to report to for work. On the other hand, that same law is read as telling these workers that if they are persuaded not to go to work, if they choose to adhere to that fundamental tenet of the trade union ethic, they put themselves beyond the legal pale of the wider community. In British Columbia at least, we are satisfied that this legal policy would be perceived (rightly I believe) as totally unfair and likely to discredit any institution which tried seriously to enforce it. Our approach was strictly to delimit the legitimate use of the picket line - not to mount a frontal assault on those who are loathe to cross the line - a symptom of the problem.
>
> (pp. 79-80)

86 There can be no dispute that, in the context of a dispute about provincial picketing, the Weiler Board in *MacMillan Bloedel* recognized that honouring picket lines is fundamental to the ability of a trade union to exercise its rights under the Code. From a policy perspective, we see no principled difference between honouring a provincially regulated picket line and honouring a federally regulated one. In this regard, we share the former Chair's concern that requiring employees to cross a picket line - including a federally regulated one - raises similar policy concerns to the ones he expressed.

87 On the other hand, to adopt the Poly-Party Unions' interpretation of the Phrase - that "picketing that is permitted under the Code" means picketing that is not expressly prohibited by the Code - would pose its own labour relations policy concerns.

88 As the Employer and the Business Council point out, there are many instances of conduct that may have the effect of causing employees in British Columbia to down tools, but which fall outside of the Board's ability to regulate. Consequently, notwithstanding the Code's general ban on mid-contract work stoppages, adopting the interpretation of the Phrase advocated by the Poly-Party Unions would potentially allow mid-contract work stoppages which the Board has no power to restrain or to control. It may mean, for example, that a withdrawal of labour would not be an unlawful strike if done in response to "picketing" in support of political protests, consumer boycotts, or labour disputes that emanate from other jurisdictions.

89 The facts in *Tyco* illustrate the labour relations concerns that would potentially flow from the Poly-Party Unions' interpretation. *Tyco* involved picketing in British Columbia by a trade union certified in the United States to the parent company of a BC Employer. Unionized BC employees refused to cross those picket lines and therefore did not report for work. The question in that case was whether the Board could order that the pickets be removed, not whether provincially regulated employees could honour the picket line without engaging in an illegal strike for Code purposes. The Board found the picketing was in relation to a dispute not governed by the Code - the Code neither expressly permitted nor prohibited the picketing in question which emanated from a labour dispute in the United States. The Board found that it was powerless to grant relief to the BC employer from the picket line, but observed:

> This is an awkward result for the Board and the community. The work stoppage suffered by employers in the position of the Complainant is within the jurisdiction of the Board, but the activity causing it is out of the Board's reach. It is usually unhelpful to consider the former but not the latter. To do so is to address the effect while ignoring the cause. The Board prefers to deal with the cause: [*Delta Hotels*]; [*Macmillan Bloedel*]
>
> ... Picketing may spring from disputes over issues which are closely related to, but are not in strict terms labour relations issues under the Code. What of pickets emanating from a complaint by retired employees? Or pickets protesting community issues in which the employer is involved? What about pickets protesting a labour policy of the government? All of these could have massive labour relations consequences for provincial employers. Given the necessity to consider the origin of the dispute, it is not clear the Board would have any jurisdiction to deal with such picketing.
>
> (*Tyco*, p. 7)

90 If the Board were to adopt the Poly-Party Unions' definition of the Phrase and treat all picketing not expressly prohibited by the Code as being permitted by it, the Board would find itself in precisely the "awkward" position described in *Tyco*. There is no dispute that the Board has jurisdiction to regulate work stoppages by provincially

regulated employees. However, the Board would be powerless to regulate a work stoppage by provincially regulated employees where the work stoppage results from the employees' choosing to honour a non-Code related picket line, whether it be a federal picket line, a political protest, or any other non-Code related matter. We agree with the Employer and the Business Council that such a result is entirely inconsistent with the Board's duties under Section 2(e) and (f) of the Code.

91 We further note that, by adopting the Poly-Party Unions' definition of the Phrase, we would be granting provincially regulated employees a right vis-a-vis a federal picket line that federally regulated employees do not themselves enjoy. There is no dispute that the Canada Labour Code does not contain an equivalent to the subsection (b) exception to the strike definition. If the Poly-Party Unions' definition prevails, the result would be that provincially regulated employees are protected against an illegal strike declaration for honouring a federal picket line, while federally regulated employees who honour the same picket line are not.

92 For the reasons articulated by the parties to this dispute, there are labour relations policy consequences that cannot be easily reconciled, regardless of which interpretation we find the Legislature intended by the Phrase. Ultimately, however, the Board's task in these proceedings is interpretive, not legislative. That is to say, it is not for the Board to decide what the law *should be*. That is the role of the Legislature. Our task is to interpret what the law *is*. In doing so, our job is to ascertain which of the two policy considerations - the importance to the labour movement of the right to honour a picket line or the importance of minimizing labour disputes on unrelated third parties - the Legislature intended to favour by defining "strike" the way it did.

93 To that end, there is no dispute, and in any event we find, the Original Decision correctly identifies that the proper approach to this issue of statutory interpretation is set out in *Rizzo* at paragraph 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

94 At its core, we must decide what the Legislature meant when it exempted a work stoppage which results from "picketing that is permitted under this Code" (i.e., the Phrase) from the definition of "strike". To do so, we must determine what the Legislature intended in 1984 when the definition of "strike" was amended to (substantially) its present form.

95 Guided by *Rizzo*, we have looked for evidence of legislative intent in three broad areas: 1) legislative history and labour relations context at the time of the amendments; 2) the plain wording of the statute itself; and 3) the scheme and objects of the Code. Consistent with the guidance provided in *Rizzo*, we have considered these factors holistically, not as a checklist. Having considered both of the proposed interpretations of the Phrase in light of these factors, we find the Employer's is the only possible interpretation; specifically, only the Employer's interpretation is consistent with the scheme and objects of the Code as a whole.

96 As a starting point, we turn first to the legislative history and the labour relations context surrounding the 1984 Code amendments, beginning with the Board's 1975 decision in *MacMillan Bloedel*. At the time *MacMillan Bloedel* was decided, the Code defined a "strike" as follows:

> 'strike' includes
>
> (i) a cessation of work, or
>
> (ii) a refusal to work, or
>
> (iii) a refusal to continue to work, or
>
> (iv) an act or omission that is intended to, or does, restrict or limit production or services,
>
> by employees in combination, or in concert, or in accordance with a common understanding, for the purpose of compelling their employer to agree to terms or conditions of employment, or of compelling another employer to agree to terms or conditions of employment of his employees, and 'to strike' has a similar meaning.

(emphasis added)

97 Under this definition, conduct falling within the definition of "strike" must have satisfied both an objective element and a subjective element. Even where the conduct itself met the objective elements of a strike, it would also have to be undertaken for the specific purpose set out in the definition.

98 In *MacMillan Bloedel*, the Board found that honouring a picket line could not be a strike for two reasons. First, it did not satisfy the subjective part of the "strike" definition. It held that, while the picketers themselves were acting in concert to compel their employer to resolve the bargaining impasse, it could not ascribe the same motive to those individual employees who simply encounter the picket line and "automatically and instinctively" refuse to cross it "just because it is there" (p. 103). Second, as noted above, the Board found it would be inconsistent with the Code as a whole to find that the refusal to cross a picket line amounts to a strike.

99 Not long after *MacMillan Bloedel*, the Board again considered the definition of "strike", in *British Columbia Hydro and Power Authority*, BCLRB No. 71/76 [1976] 2 Canadian LRBR 410 ("*BC Hydro*"). At issue in that case was a National "Day of Protest" announced by the Canadian Labour Congress against a federal anti-inflation program. In support, employees of BC Hydro refused to work and set up pickets at various locations. The Board considered whether, in doing so, the definition of "strike" in the Code was met. Again, the Board determined that what occurred was not a strike because the subjective element of the definition of "strike" was not met; the motivation was political rather than to compel an employer to agree to terms or conditions of employment.

100 The Board observed, however, that in Ontario, where there was no subjective element to the definition of strike, protests on October 14, 1976, in support of the National Day of Protest were found to be unlawful strikes.

101 The Board noted the awkwardness of its decision - particularly in light of the Code's general prohibition against mid-contract work stoppages - and observed that if political strikes were to become routine, the Legislature might be forced to intervene:

> ... That major political work stoppage [October 14] was a unique event in recent Canadian history. No one knows whether it will be repeated in the foreseeable future. At this stage, surely the wisest course is not to distort the general law of strikes under the Code to deal with what may turn out to be a once-and-for-all event. If, on the other hand, "political strikes" were to become habit-forming, then unquestionably Canadian legislatures, including the B.C. Legislature, would find it necessary to deal with the problems presented by this kind of trade-union action (and the constitutional questions would then have to be answered). ...
>
> (*BC Hydro*, p. 418)

102 Political protests in the mold of the 1976 National Day of Protest were not, however, a once-and-for-all event. Notably, in 1983 a number of British Columbia trade unions engaged in Operation Solidarity - a protest of the Social Credit Government's austerity programs and legislation the trade unions saw as anti-union. In *Metro Transit Operating Company*, BCLRB No. 220/83, *Health Labour Relations Association*, BCLRB No. 221/83, and *Metro Transit Operating Company*, BCLRB No. 245/83 the Board was again asked to decide whether a political protest could be an illegal strike, this time in the context of Operation Solidarity. Again, it concluded the withdrawal of services in that context did not constitute a strike because it failed to meet the subjective element of the definition of strike. Once again, the object of the campaign was political, not to compel an employer to agree to terms or conditions of employment.

103 The following year the Social Credit Government introduced Bill 28, the *Labour Code Amendment Act*, 1984, S.B.C. 1984, c. 24 which sought to, among other things, amend the definition of strike by removing the subjective component of that definition, but adding the caveat that a strike "does not include...a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted by or under this Act". In other words, it was the 1984 amendment to the strike definition that introduced the Phrase in issue in the present case.

104 The Poly-Party Unions rely on Hansard to argue the legislative purpose of the 1984 amendment to the strike definition was to bring an end to the use of strikes other than for labour relations purposes, while expressly preserving the right to honour a picket line. We agree that it is clear from the evidence in Hansard, and from the surrounding context, that the impetus for the removal of the subjective element of the definition of strike was to avoid political strikes like those in support of Operation Solidarity (which occurred the previous year) and the National Day of Protest (from, 1976). For example, the Premier, speaking in support of Bill 28 noted with regard to the change of the definition of strike:

> I don't know , Mr. Speaker, how anyone - unless they have a very narrow view that only those they choose to think they represent are right and they should be represented - could oppose this legislation or argue against it. To me it is unarguable on any basis for the opposition to oppose what the Minister of Labour has proposed. It is positive. It will help. There are those who don't want it to help. There are those to whom dissent or having the right to political strikes are more important than seeing the province work. I was quite surprised to see the change in the definition of strike criticized - that political strikes will not be considered as part of the economy in the workplace. That's the same definition they have in other legislation across this country. To somehow suggest that we are out of step with the rest of the country is wrong; what we are doing is in step. I think the public will decide. Had they seen the type of disruptions in other parts of this country, the way political strikes were allowed to take place as part of the solution, or do they see the fact that that hasn't taken place as justification for us getting in step with the rest of the country?
>
> (British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 33rd Parl, 2nd Sess, (May 10, 1984) Afternoon Sitting, page 4678, emphasis added)

105 We are not persuaded, however, that the amendment was expressly intended to remove from the definition of strike all picketing in respect of any labour dispute whatsoever. We have considered Hansard, the Legislative history, and the political and labour relations context in 1984 but are unable, from those sources alone, to identify, with any degree of confidence, the legislative purpose behind exempting "a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted by or under this Act" from the definition of strike.

106 One possibility is that the Legislature sought to preserve, what Weiler described in *MacMillan Bloedel* as the "the expectations of the B.C. industrial relations community" that union members be entitled to honour a picket line without fear that by doing so they will have engaged in an unlawful strike; in other words, to preserve what the Original Decision calls a recognition of "the fundamental importance that unions and their members attach to honouring a lawful picket line" (Original Decision, para. 50).

107 Another possibility, however, is that the Legislature took to heart the rationale articulated in *MacMillan Bloedel* and elsewhere and sought to allow employees to honour a picket line only in those circumstances where the Code provides the Board the capacity to regulate the picketing, and the picketing was expressly lawful pursuant to the Code.

108 We are unable to conclude, on the basis of Hansard, Legislative history, or the labour relations context in 1984, that the Legislature turned its mind to whether the Phrase should include an exemption in the case of federal picketing. Therefore, we are left to determine the meaning of the Phrase by reference to the words chosen by the Legislature, in their grammatical and ordinary sense, when read harmoniously with the scheme and objects of the Code: *Rizzo*, p. 21.

109 To that end, we might have been inclined to find the Phrase to be ambiguous were it not for the requirement that it be read harmoniously with the Code as a whole. However, taking into account the entirety of the Code, including Section 66, we are persuaded that the Phrase is unambiguous and that the Employer's interpretation must succeed.

110 We firstly accept that "permitted" can, in common usage, refer to that which is not prohibited. As the Poly-Party

Unions note, reasonable authors, including the Board (in *Excell*) and the Supreme Court of Canada (in *Paccar*) have used "permitted" in this context.

111 However, "permitted" may also mean something which has been expressly allowed. As the Business Council observes:

> To "permit" is defined by Merriam-Webster as:
>
> to consent to expressly or formally: permit access to records
>
> to give leave: AUTHORIZE
>
> to make possible : the design permits easy access
>
> Source: https:// www.merriam-webster.com/dictionary/permit
>
> Similarly, to "permit" is defined by the Cambridge dictionary as to "allow something".
>
> Source: https:// dictionary.cambridge.org/dictionary/english/permit

112 We accept, therefore, that in the grammatical and ordinary sense of the language used by the Legislature, both the Employer's and the Poly-Party Unions' interpretations of the Phrase are possible.

113 We further note that both the Poly-Party Unions' and the Employer's interpretations are possible on a purposive interpretation of the Phrase, albeit in different ways. The Poly-Party Unions' interpretation promotes the fundamental importance to the labour movement of honouring picket lines. The Employer's interpretation of the Phrase promotes the Board's duty to minimize the effect of labour disputes on unrelated parties by limiting the exemption to only that picketing which the Board has the constitutional authority to regulate. It is also consistent with the Board's duties under Sections 2(e) and 2(f) of the Code.

114 Had the *Rizzo* analysis allowed us to end our inquiry there, we may well have concluded the Phrase was ambiguous. However, *Rizzo* requires us to also consider the Phrase, as part of the definition of "strike" chosen by the Legislature, in a manner that is harmonious with the scheme and objects of the Code. For the reasons that follow, we find that the Employer's interpretation can be read harmoniously with the other picketing provisions of the Code, while the Poly-Party Unions' cannot.

115 Picketing is addressed in Part 5 of the Code and, specifically, in Sections 65, 66, and 67. Section 67 sets out a general prohibition on picketing and says, "except as provided in this Code", a person must not picket in respect of a matter or dispute to which this Code applies.

116 The Code provides a limited exception to the Section 67 prohibition in Section 65(3), which says:

> A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near a site or place where a member of the trade union performs work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation and the site or place is a site or place of the lawful strike or lockout.

117 In other words, Section 65(3) limits the right of employees to picket unless the trade union has taken the steps necessary under Section 60 to engage in a lawful strike or the employer has imposed a lawful lockout under Section 61. There can be no dispute that Section 65(3) only contemplates picketing in respect of a dispute to which Sections 60 and 61 apply: that is, picketing that the Code expressly allows.

118 Section 65(4) provides the Board discretion to allow picketing at certain places other than a site or place "permitted by subsection (3)":

> The board may, on application and after making the inquiries it requires, permit picketing
>
> (a) at or near another site or place that the employer causing a lockout or whose employees are lawfully on strike is using to perform work, supply goods or furnish services for the employer's own

benefit that, except for the lockout or strike, would be performed, supplied or furnished at the site or place where picketing is permitted by subsection (3), or

(b) at or near the place where an ally performs work, supplies goods or furnishes services for the benefit of a struck employer, or for the benefit of an employer who has locked out,

but the board must not permit common site picketing unless it also makes an order under subsection (6) defining the site or place and restricting the picketing in the manner referred to in that subsection.

119 We are satisfied that Part 5 of the Code sets out a comprehensive scheme regarding strikes, lockouts, and picketing, including the fact that picketing is generally prohibited (Section 67) unless the legal prerequisites set out in Section 65 are met or unless the Board expressly grants authority to picket under Section 65(4) or 65(7). We find the Employer's interpretation of the picketing exception - that "permitted" means expressly allowed - fits more harmoniously with these sections.

120 The Employer and the Business Council also point out that their interpretation is the only one consistent with the language of Section 66 of the Code. We note that, while this may be the Employer's most persuasive argument in support of its interpretation, it is one which the original panel did not have the benefit of hearing. Nonetheless, it is one that the parties have fully canvassed on reconsideration and merits consideration.

121 On reconsideration, the Employer and the Business Council note that the phrase "permitted under this Code", in fact, appears twice in the Code and in both instances refers, at least in part, to picketing. In addition to appearing in the Section 1 definition of strike, the "Phrase" also appears in Section 66:

No action or proceeding may be brought for

(a) petty trespass to land to which a member of the public ordinarily has access,

(b) interference with contractual relations, or

(c) interference with the trade, business or employment of another person resulting in a reduction in trade or business, impairment of business opportunity or other economic loss

arising out of strikes, lockouts or picketing permitted under this Code or attempts to persuade employees to join a trade union made at or near but outside entrances and exits to an employer's workplace.

(emphasis added)

122 There is one grammatical difference between the Phrase ("picketing that is permitted under this Code") and Section 66 language ("picketing permitted under this Code"). We find the presence or absence of "that is" makes no substantive difference from an interpretive perspective and refer to both as the "Phrase" for the purpose of our analysis.

123 The parties do not dispute, and we accept, that the purpose and effect of Section 66 is to remove common law rights which employers and others adversely affected by picketing have to seek redress in court against those responsible for conduct which might otherwise constitute the torts captured by that section: *Value Industries Ltd. v. Pacific Press Ltd.*, *[1981] B.C.J. No. 1772*.

124 If the Phrase meant "picketing that is not prohibited by the Code" as the Poly- Party Unions say it must, then the prohibition would apply in the context of any picketing that is beyond the Code's scope. In that way, Section 66 would arguably prohibit a federally regulated employer from seeking a remedy in Court for torts committed by federally regulated employees on a federal picket line. We agree with the Employer and the Business Council that this would amount to a constitutional overreach and, therefore, cannot have been the Legislature's intention. The BC Fed says the prohibition in Section 66 of the Code reflects the common law of picketing in any event, and therefore it is irrelevant whether it does or does not enjoin federal employers from bringing an action in response to federal picketing. We do not agree. The Poly-Party Unions' interpretation would amount to the Legislature attempting to regulate the relations between federally regulated employers and their employees and is therefore constitutionally improper.

125 Even if we accept the Poly-Party Unions' argument that Section 66 cannot apply to federal picketing (because of the constitutional division of powers), if the phrase "permitted under the Code" means the same in Section 1 as it does in Section 66, that would still require us to conclude (on the Poly-Party Unions' interpretation) that the Legislature *tried to* remove the specified torts from the jurisdiction of the Courts in respect of federal entities even though the Legislature is without jurisdiction to do so. We find that to be an incongruous interpretation of the Code and unlikely to reflect Legislative intent.

126 Rather, we accept that Section 66 is intended to apply to conduct regulated by the Code and which properly falls within the Code's constitutional reach. That is to say, the Code does not, in Section 66, purport to remove common law tort rights from federal entities affected by strikes, lockouts and picketing or those entities that are otherwise extraneous to the Board's jurisdiction. Within the class of strikes, lockouts, and picketing regulated by the Code, however, there are strikes, lockouts and picketing that the Code allows, and there are strikes, lockouts and picketing that the Code does not allow. We are satisfied that, reading Section 66 in accordance with the principles articulated in *Rizzo*, when that section speaks of picketing that is "permitted under the Code", it seeks to distinguish between picketing that the Code allows, and picketing that the Code does not allow - removing certain torts from conduct arising out of picketing which the Code expressly allows.

127 As we have said, Part 5 sets out the comprehensive scheme by which the Code allows picketing and in what circumstances. That is, the picketing regulated by Part 5 is picketing the Code expressly allows. We have also found that the Phrase, as it is used in Section 66, can only mean picketing which the Code expressly allows (as the Employer and the Business Council argue). The Employer's interpretation of the Phrase in the strike definition is consistent with the scheme established in Part 5 and with what we have found the Phrase can only mean in the context of Section 66, specifically. We are mindful of the principle of interpretation which says that, when a statute uses the same phrase in different provisions that phrase should be presumed to have the same meaning in both provisions: *R. v. Zeolkowski*, *[1989] 1 S.C.R. 1378*, para. 19. In the circumstances, we are not persuaded there is a basis on which to depart from this interpretive principle in order to find the Phrase is ambiguous and can mean something different than that, when it is used in to define what is or is not a "strike".

128 Consequently, we find the interpretation of the Phrase advanced by the Employer and the Business Council to be in harmony with our interpretation of Part 5 of the Code and, specifically, Section 66. It results in the phrase "permitted under the Code" as it appears in the Section 1 strike definition and in Section 66 having the same meaning - in both instances, it would refer to picketing that is expressly permitted by the Code or under some authority conferred by the Code. It is also consistent with the remaining scheme of the Code that regulates strikes and picketing.

129 In sum, considering the Phrase in its entire context and in its grammatical and ordinary sense harmoniously with the scheme and objects of the Code, and the intention of the Legislature, we accept that the Legislature intended to create an exception to the definition of strike only to the extent that the impugned conduct occurred as the direct result of and for no other reason than picketing that is expressly permitted by the Code or under some authority conferred by the Code. As a result, we are not persuaded that there is any ambiguity in the Phrase.

130 Because we have found, on the basis of our *Rizzo* analysis, that there is no ambiguity in the Phrase, there is no basis on which to consider *Charter* values. In *Bell ExpressVu*, the Supreme Court of Canada explained both how to determine whether statutory language is ambiguous, and when consideration of *Charter* values is appropriate (that is, only in circumstances of genuine ambiguity). With respect to what constitutes ambiguity in statutory language, the Court in *Bell ExpressVu* explained:

> What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, supra, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, *[1999] 1 S.C.R. 743*, at para. 14, is apposite: "It is only when genuine ambiguity arises between

> two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> (para. 29)

131 Thus, for statutory language to be ambiguous, it must be reasonably capable of more than one meaning, when considered in its entire context. There must be two (or more) plausible readings, each equally in accordance with the intentions of the statute. If there is no such ambiguity, then the Court in *Bell ExpressVu* explained it is not appropriate to apply a *Charter* values analysis to interpret the language:

> Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" (Sullivan, supra, at p. 325), it must be stressed that, to the extent this Court has recognized a "Charter values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.
>
> (para. 62, emphasis added)

132 For the reasons provided above, we find that when considered in its entire context, the Phrase is not capable of two equally plausible readings. Rather, our contextual analysis of the Phrase results in a single plausible interpretation, the one advocated by the Employer. As a result, we find there is no basis on which to engage in a *Charter* values analysis.

133 The Employer's application for reconsideration is allowed and the Original Decision is cancelled.

134 With the exception of MoveUP and its members, we find that the concerted refusal of the Poly-Party Unions' other constituent unions and their members to cross the Guild's picket line and go to work constituted an illegal strike, and we so declare.

135 We understand that, since our hearing into this matter, the Guild has removed its picket lines and that the conduct complained of no longer continues. We also note that the Employer's and the Business Council's argument about Section 66, which we find the most persuasive, was raised for the first time in the application for leave and reconsideration. In light of the above, we find no other orders or remedies would be appropriate.

136 In the case of MoveUP, the question of whether or not its members engaged in an illegal strike by honouring the Guild's picket line remains undecided, given that they are relying on a collective agreement provision in addition to the Code. The original panel did not address this issue, given the outcome was reached on other grounds. This aspect of the application is remitted to the original panel who will address it, if the parties, on or before January 9, 2023, request that it do so.

VI. CONCLUSION

137 For the reasons given, the application for reconsideration is granted and the Original Decision is cancelled.

LABOUR RELATIONS BOARD

JENNIFER GLOUGIE
CHAIR

BRETT MATTHEWS
ASSOCIATE CHAIR

J. NAJEEB HASSAN
REGISTRAR AND VICE-CHAIR

End of Document